

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 August 2016

Public Authority: Charity Commission
Address: PO Box 211
Liverpool
L20 7YX

Decision (including any steps ordered)

1. The complainant has requested information regarding correspondence between the then chair of trustees of the charity known as Kids Company and any meetings between the Charity Commission and that individual together with the details of any complaints that the Charity Commission had received about the charity. The public authority refused the request under sections 32 (information held for the purposes of an inquiry), s31(law enforcement), 40(2) (personal data) and 41 (information provided in confidence).
2. The Information Commissioner's decision is that the Charity Commission is entitled to withhold the information under section 31(1)(g) via 31(2)(g) – prejudice to the Charity Commission's function in respect of protecting the property of charities.
3. The Information Commissioner does not require the public authority to take any further action in respect of this request

Request and response

4. On 10 August 2015 the complainant wrote to the Charity Commission and requested information in the following terms:

"Please note I am only interested in information which relates to the period January 1 2014 to the current day.

Please do redact the names and addresses of any members of the public from the responses.

Please do not include the names and addresses of any young people who were being helped by the charity.

1. During the aforementioned period has the Charity Commission exchanged correspondence and communications (including emails) with Alan Yentob chair of trustees at the charity known as Kids Company. Please note that I am only interested in correspondence and communications which relate to the Kids Company Charity and or Mr Yentob's role with the charity. These communications will include but will not be limited to matters relating to funding and or management and or transparency and or probity. If the answer is yes can you please provide copies of all correspondence and communications including emails. Please note that I am interested in receiving both sides of the correspondence and communications.
2. During the aforementioned period did Alan Yentob meet with any representative and or employee of the Charity Commission to discuss the affairs of Kids Company and or his role with the charity. If the answer is yes can you please provide a date, time and venue for each meeting. In the case of each meeting can you please provide a full list of those present. In the case of each can you please provide any related documentation.
3. Between 2009 and 2012 did the Charity Commission ever receive a written complaint about Kids Company. If the answer is yes can you please supply a copy of these complaints including emails. Please redact the names of any individuals who may be claimants. Please do not redact the names of any public bodies or organisations who may have complained. In the case of each complaint can you provide documentation relating to these complaints and the Charity Commission's response."
5. The Charity Commission responded on 10 September 2015. It confirmed it held information falling within points 1 and 2 of the request. However it went on to withhold that information citing section 32 – information held for the purposes of an inquiry, as the basis for doing so. In respect of point 3 the Charity Commission explained that it had contacted the charity following a ruling by the Advertising Standards Authority (ASA) regarding posters the charity had used to promote its work.
6. Following an internal review the Charity Commission wrote to the complainant on 18 December 2015. It upheld its original application of section 32 in respect of points 1 and 2. It also advised the complainant that other exemptions may apply to this information, namely section 31 (law enforcement), section 40(2) (third party personal data), and section 41 (confidential information).

7. In respect of point 3 the Charity Commission now explained that it did not hold any information. This was on the basis that upon becoming aware of the ASA ruling referred to in its original response, the Charity Commission proactively contacted the charity, as opposed to acting in response to a specific complaint.
8. During the course of the Information Commissioner's investigation the Charity Commission confirmed that it was now relying on the additional exemptions it had referred to at the internal review stage.

Scope of the case

9. The complainant contacted the Commissioner on 23 November 2015 to complain about the way his request for information had been handled. However it was only after the Charity Commission had completed its internal review that the complaint became eligible for investigation.
10. The Information Commissioner wrote to the complainant on 23 March 2016 advising him that she understood his complaint related solely to the Charity Commission's grounds for withholding the information requested in the first and second parts of the request. The complainant was given the opportunity to clarify whether he also wished to challenge the Charity Commission's response to the third part of his request, ie that it did not hold any information relating to complaints made between 2009 and 2012. As the complainant did not raise any concerns in respect of this part of his request, the Information Commissioner considers the matter to be decided is whether the Charity Commission is entitled to withhold the information requested at points 1 and 2 under any of the exemptions cited.
11. When responding to the Information Commissioner's enquiries the Charity Commission identified a number of documents captured by part 2 of the request, which concerned meetings. It explained that interpreting this element of the request had not been entirely straight forward as it sought documentation that 'related' to the specified meetings. Therefore over the course of the investigation the Charity Commission provided two bundles of documents. The first contained information which it had identified as definitely falling within the scope of the request as, in the Charity Commission's opinion, it related directly to the meetings. The second bundle contained information which the Charity Commission considered only fell within the scope of the request based on a broader interpretation of the term 'related'.
12. The second bundle contains emails and their attachments. The emails include those exchanged in advance of the meetings which collectively deal with arranging the meeting, establishing the scope of the issues to

be discussed and the provision of documents to inform those discussions. The bundle also includes emails exchanged following the meetings which refer to the meetings or seek clarification of the issues raised. Having viewed the withheld information, the Information Commissioner is satisfied that the Charity Commission has correctly identified this documentation as also falling within the scope of the request.

13. The Information Commissioner will start by looking at section 31. In particular the Charity Commission has withheld the information under section 31(1)(g) via sections 31(2)(f) and 31(2)(g) and 31(2)(h).
14. Section 31 is a qualified exemption. This means that it is subject to a public interest test. Even if the exemption is engaged, ie the prejudice claimed would or would be likely to occur, the information can only be withheld if the public interest in preventing that prejudice outweighs the public interest in disclosing the information.

Reasons for decision

15. Section 31(1)(g) of FOIA states that information is exempt if its disclosure would, or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes in subsection (2).
16. As far as is relevant, the purposes listed in section 31(2) include:
 - 31(2)(f) – the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other person) in their administration,
 - 31(2)(g) – the purpose of protecting the property of charities from loss or misapplication,
 - 31(2)(h) – the purpose of recovering the property of charities.
17. The Information Commissioner will initially focus on whether disclosing the information would, or would be likely to prejudice the Charity Commission's function to protect the property of charities from loss or misapplication as covered by section 31(2)(g). Having looked at section 15 of the Charities Act 2011 the Information Commissioner is satisfied that this is one of its functions.
18. The exemption provided by section 31(2)(g) can be engaged on the basis that the prejudice to the Charity Commission's functions either

'would' occur, or on the basis that the prejudice would only be 'likely' to occur. In this case the Charity Commission has argued that the prejudice it claims could be caused is only likely to occur. This lower test still requires there to be a real and significant risk of the harm arising if the information was released. Although it is easier to engage an exemption on the lower test, the fact that there is less risk of the prejudice occurring is taken into account when considering the public interest test.

19. In terms of how the prejudice is likely to be caused the Charity Commission has explained that at the time it dealt with the request it was conducting a statutory inquiry into the management of Kids Company. The Charity Commission has the power to open such inquiries under section 46 of the Charities Act 2011. As the inquiry is still ongoing the Charity Commission does not wish to disclose its details. Nevertheless the Information Commission understands that, in broad terms, the purpose of the inquiry was to consider allegations concerning the governance and financial mismanagement of the charity and one of the issues that concerned the Charity Commission was the protection of the property of Kids Company as well as that of other charities. Therefore despite the charity closing on 5 August 2015 the inquiry continued.
20. The Information Commissioner notes that the inquiry actually began on 20 August 2015, ie after the request was received. However as explained in her guidance¹, it is the Information Commissioner's view that when considering the possibility of prejudice, a public authority can take account of the circumstances as they existed up until the statutory time for complying with the request (normally twenty working days). As a result the Charity Commission is able to take account of the effect the disclosure would have on the inquiry which commenced only eight working days after the request was received. Furthermore, the Information Commissioner is satisfied that at the time the request was actually received the Charity Commission would have already determined that a formal inquiry was required to address the concerns which were being raised, or at the very least have recognised that such an inquiry was very likely. The Information Commissioner finds that the impact disclosing the information would have on the inquiry is a relevant factor when considering the application of the exemptions.
21. The information captured by the request relates to a number of, what the Charity Commission has described as, regulatory cases, all of which predate the opening of the inquiry. The last case was closed just before the inquiry commenced and the Charity Commission has explained that this case led to, and was formalised by, the opening of the inquiry. The

¹ The prejudice test

material from the other regulatory cases was also deemed relevant to the inquiry and was passed to it. Having viewed the withheld information the Information Commissioner is satisfied that the subjects addressed in all the regulatory cases have a bearing on the current inquiry. This, together with the fact that all the cases arose within a relatively short period leading up to the commencement of the inquiry, means that the charity would not necessarily distinguish between how the Charity Commission handled information about those cases and how it handled information the charity provided directly to the inquiry itself.

22. As part of the inquiry the Charity Commission was actively seeking information from the trustees of the charity at the time it dealt with the request. The Charity Commission has powers to compel the provision of information, but it argues that the information provided under compulsion is likely to be of a different, less satisfactory quality than information that has been volunteered.
23. The Charity Commission considers that in order to obtain high quality information from the charity's staff and trustees, which addresses the issues raised by the inquiry in an open and frank manner, those individuals need safe space. The Information Commissioner understands this to mean that the staff and trustees need to feel confident that anything they disclose to the Charity Commission will remain private at least until the conclusion of the inquiry and the Charity Commission has had the opportunity to produce fully considered findings.
24. The Information Commissioner recognises that the charity in question was a very high profile one and, later, a very controversial one. The difficulties the charity encountered attracted a great deal of media attention. This very much raises the sensitivity of the ongoing inquiry. The Information Commissioner is therefore satisfied that the disclosure of any information relating to regulatory activity undertaken prior to the inquiry would be the subject of intense press scrutiny and speculation. This would have an impact on the charity's staff and trustees. It would seriously undermine their confidence that the Charity Commission would keep their communications private. It is likely that this would make them more circumspect when responding to issues raised by the inquiry. This in turn would be likely to hamper the objectives of the inquiry.
25. The Information Commissioner recognises that the request captures a range of information. Some of it directly addresses matters of concern to both the charity and the Charity Commission. Included in the information is however some which is less revealing, for example that which focusses on the arrangements for the meetings. The Information Commissioner has therefore considered whether this less sensitive information really engages the exemption. Normally the Information Commissioner would be sceptical that the disclosure of such information

could have any chilling effect on an individual's willingness to cooperate fully with a public authority. However given the fact that the ongoing inquiry can be seen to be a continuation of, at least some of, the regulatory casework and given the controversy surrounding the charity, she is prepared to accept that any disclosure would be likely to dampen the willingness of individuals to engage with the inquiry in a free and frank manner.

26. The Information Commissioner finds that the exemption provided by section 31(1)(g) via 31(2)(g) is engaged in respect of all the information.

Public interest test

27. Section 31(1)(g) is subject to the public interest test as set out in section 2 of the FOIA. This means that although the exemption is engaged the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
28. There will always be a public interest in disclosing information which allows scrutiny of how public authorities such as the Charity Commission operate and how well they serve the public in carrying out their statutory functions.
29. In addition the controversy which meant it was more likely that disclosing the requested information in this case would have a chilling effect and so engage the exemption also provides a powerful public interest argument in favour of disclosing the information. Allegations of mismanagement were widely reported; the charity received large amounts of money from the government and had the support of senior politicians. The request targets communications between the charity's chair of trustees and the Charity Commission and the Information Commissioner recognises that the chair's role was itself very controversial.
30. There is therefore genuine public concern over not only how the charity spent donations from the public, but also over why large amounts of government money were given to the charity. There is a public interest in disclosing information which may help answer these questions.
31. It should be remembered however that at the time of the request the allegations of mismanagement had not been fully investigated or substantiated. It is also important to note that the Charity Commission's inquiry is, at least in part concerned with protecting the property of the charity and with learning lessons from the charity's collapse in order to help prevent similar problems arising with other charities in the future.

The Charity Commission argues that there is a public interest in preserving the safe space which it needs to conduct its inquiries and to encourage those involved to engage in such processes in as open a manner as possible. If individuals were less cooperative the Charity Commission would be unable to gather the information it required and its conclusions would not be as full and complete as possible.

32. The effect on the engagement of those involved in such inquiries would be most acutely felt by those involved in the current inquiry into Kids Company. However the impact is not limited to the current inquiry. It may also make those involved in future inquiries, or who have to deal with the Charity Commission on other regulatory issues, less forthcoming in their communications.
33. The request focusses on the chair of trustees. Whilst the Information Commissioner recognises the chair's involvement with the charity was controversial, having viewed the information, she accepts that it does not contain anything exceptional or noteworthy about the chair of trustees from the perspective of the public interest. It is not what the information reveals about the chair's role that makes the information sensitive, it is the fact that much of the information directly addresses issues of concern to both the charity and the Charity Commission in a very detailed and open manner.
34. The Information Commissioner has mentioned previously that some of the communications captured by the request are less sensitive than others, for example emails focussing on arrangements for meetings. Although these engaged the exemption, the Information Commissioner recognises that the harm caused by their disclosure would not be as significant as that caused by the other information. This may be so, but the public interest in favour of disclosing these documents is also reduced because of their content.
35. The Information Commissioner reminds herself that the information captured by the request deals with a limited number of issues. As such it only provides a partial picture of how the charity was managed. As discussed, it sheds no light on the role of the chair of trustees. The Information Commissioner has to balance the limited value in disclosing this information against the potential harm that would be caused to an ongoing inquiry which on conclusion is likely to address the public's concerns over how the charity was managed far more fully than the requested information would. In addition the disclosure could impact on the quality of the information gathered during future inquiries and regulatory work.

36. The Information Commissioner has also had regard for the fact that the exemption was engaged on the basis that the prejudice is only likely to arise.
37. Having considered all these factors the Information Commissioner finds that the public interest in favour of maintaining the exemption outweighs the in favour of disclosure. The Charity Commission is entitled to rely on section 31(1)(g) via 31(209g) to withhold the information. The Charity Commission is not required to take any further action in this matter.

Right of appeal

38. 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

39. 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.
40. 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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