

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 June 2019

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

Decision (including any steps ordered)

1. The complainant has requested communications relating to complaints made to the Charity Commission about a particular charity. The Charity Commission refused to disclose the requested information under section 31(1)(g) with subsection (2)(f) and (g) and 40(2) FOIA.
2. The Commissioner's decision is that the Charity Commission has correctly applied section 31(1)(g) with subsection 2(f) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 14 September 2018 the complainant made the following request for information under the FOIA for:

"copies of all the correspondence you have had from and with [named individual], or anyone else including [named protest group] since March this year".
5. On 18 September 2018 the Charity Commission responded. It refused to disclose the requested information under section 31(1)(g) with subsection (2)(f) and (g) FOIA.
6. The complainant requested an internal review on 24 September 2018. The Charity Commission sent the outcome of its internal review on 24

October 2018. It upheld its original position but also applied section 40(2) FOIA.

Background

7. The Charity Commission has been handling a regulatory case concerning the charity which is the subject of the request. The trustees made a decision to relocate the charity's premises. This decision prompted complaints and petitions to the Charity Commission from members and beneficiaries of the charity who opposed the relocation decision and alleged mismanagement of the charity. Upon investigating the complaint the Charity Commission concluded that it did not have reason to intervene in the decision made by the charity's trustees as they were acting in accordance with their governing document, however regulatory advice and guidance was issued to the trustees. It is within this context that this FOIA request was received and to which the correspondence it holds relates.

Scope of the case

8. The complainant contacted the Commissioner on 31 October 2019 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the Charity Commission was correct to withhold the information which was withheld under section 31(1)(g) with subsection 2(f) and (g) and section 40(2) FOIA.

Reasons for decision

10. The Charity Commission has argued that the withheld information is 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.
11. 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):

- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
 - (g) protecting the property of charities from loss or misapplication;
12. 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.
 13. 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.
 14. 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.
 15. The Commissioner has first considered whether the Charity Commission is formally tasked with protecting charities against one of the interests set out in regulation 31(2).
 16. The Charity Commission explained that it derives its investigatory powers from charity law; these are most substantially detailed within the Charities Act 2011. Section 46 of the Charities Act 2011 outlines the powers the Commission has to formally initiate inquiries into charities. Section 46(1) states that:

“The Commission may from time to time institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes.”
 17. Such inquiries will relate to the Charity Commissions statutory functions at Section 15(1) of the Act. These include identifying and investigating apparent misconduct or mismanagement in the administration of charities, and encouraging and facilitating better administration of charities.
 18. Charity trustees have a number of legal responsibilities in charity law which they are required to adhere to, such as acting within the conditions of a charity’s governing documents, filing accounts and annual returns correctly, and providing the Charity Commission with

information required for the maintenance of the charities register. There are also requirements with regard to the disposition of land.

19. The failure of charities to comply with their legal obligations may lead to regulatory action being undertaken, and ultimately, for serious cases of maladministration, an inquiry being opened under the terms of Section 46. The Charity Commission, as the regulator for the charities sector, therefore has a responsibility to identify misconduct and mismanagement, which it does in various ways; e.g. through serious incident reports from charities, whistleblowing, complaints from the public or beneficiaries, and inspections by the Charity Commission itself.
20. The information that is within scope constitutes reports of maladministration concerning the charity which is the subject of the request, received from members of the charity and beneficiaries. Petitions and testimonies were received from individuals detailing alleged accounts of mismanagement and requesting that the Charity Commission intervene to take a number of steps, including the dissolution of the charity's executive committee (constituting the charity's trustees) and banning the sale of the charity's then premises. The correspondence also includes the Charity Commission's response, which included some criticism of the charity's trustees and giving an overview of the regulatory advice which had been issued to them.
21. The ICO has, on a number of occasions, accepted that the Charity Commission is the public authority that has been established to:-
 - protect charities from misconduct and mismanagement and
 - protect the property of charities from loss or misapplication.

For example in case FS50535948 at paragraph 15 the Commissioner stated that, "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."

22. In this case the Commissioner has considered the application of section 31(2)(f) in the first instance and is satisfied that the Charity Commission has been formally tasked with protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration and that this functions was specifically designed to fulfil this purposes.

23. The Commissioner has therefore gone on to consider how disclosure would be likely to prejudice this function.
24. The Charity Commission explained that the disclosure of such correspondence in this case would be likely to prejudice the ability of the Charity Commission to continue to protect charities against misconduct or mismanagement in their administration. It said that it relies upon communities, charity beneficiaries and the general public as a whole to report instances of alleged maladministration so that it is able to hold charities to account. If it transpired that the Charity Commission was required to publicly disclose complaints and reports of misconduct it receive then this would inhibit individuals from reaching out to the Charity Commission in future for fear of their communications being made public. Dependent upon the particular circumstances of an individual, they may perceive that harm would arise to them if the details of their complaint became publicly known. It would also alter the nature of communications as complainants would be wary of how their communications would be interpreted if seen publicly. The overall effect would be to suppress the number and quality of reports received from the public, meaning the Commission would be at risk of being uninformed of serious incidents of misconduct within the charity sector.
25. It went on that it has limited resources and the reports and intelligence it receives from the public are invaluable in helping it to assess where it needs to direct resources and conduct further enquiries. They also contribute to its 'risk framework' tool which assists the Charity Commission in deciding when to engage with a charity.
26. With regard to the specific circumstances of this case, it is the Charity Commission's view that disclosure of this information into the public domain would have the effect of discouraging further reports from the charity's members and beneficiaries which may help in identifying any future misconduct. In the Charity Commission's response to the complainant it was stated that regulatory advice and guidance had been issued to the trustees, and that compliance with that advice would be monitored. If incidents of wrong-doing/non-compliance are identified by charity members, but not reported to the Charity Commission for fear of those reports being publicly disclosed, this would be likely to prejudice the ability of the Charity Commission to continue to protect the charity from future misconduct or mismanagement.
27. The Commissioner considers that the Charity Commission is formally tasked with protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration. Its

ability to fulfil this function effectively is dependent upon communities, charity beneficiaries and the general public as a whole to report instances of alleged maladministration so that it is able to hold charities to account. In this case the Charity Commission confirmed that at the time of the request it had made a decision not to intervene however it had also issued advice and guidance to the trustees which continues to be monitored. The Commissioner therefore accepts 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

28. As a public body the Charity Commission recognises the public role it has in regulating the charity sector. One of its statutory objectives is to "increase public trust and confidence in charities" and it is acutely aware of the need to be accountable for its performance in meeting this objective. More broadly, as a public authority, the Charity Commission has a duty to be open and transparent in how it conducts its activities and spends public money.
29. The complainant considers that it is in the public interest for the requested information to be disclosed as it is his belief that the Charity Commission acted upon false information in this case.

Arguments in favour of maintaining the exemption

30. The Charity Commission also has a duty however, to protect the integrity of the functions it serves to fulfil. In this instance, to identify and investigate apparent misconduct and mismanagement in charities. Whilst it recognises that there is a public interest argument in understanding how it goes about fulfilling its functions and investigating charity wrongdoing, that openness must not prejudice the ability of the Charity Commission to undertake its regulatory functions.
31. As detailed earlier, it is the Charity Commission's view that the disclosure of information subject to this request would negatively impact upon the ability of the Charity Commission to identify mismanagement within charities. This is because its ability to gather

information and evidence would be likely to be prejudiced by the public disclosure of complaints and reports it receives, such as the information subject to this request. Individuals would be inhibited from reporting concerns for fear of their complaint details being disclosed publicly. This would apply to the regulatory case in question where the charity is being monitored for compliance with regulatory advice having been given.

32. When complaints of charity misconduct develop to inquiry stage the Charity Commission proactively publishes reports into its findings. Information is also regularly disclosed publicly regarding its regulatory work where it is feasible to do so. The Charity Commission must however, be able to protect the work undertaken to investigate reports of misconduct in order to protect the integrity of the investigation process. The public would not expect the Charity Commission to disclose information which would negatively impact upon its ability to hold the charity sector to account.

Balance of the public interest

33. The Commissioner considers that there is a strong public interest in the Charity Commission operating openly and being accountable in its effectiveness in carrying out its statutory functions and in particular how it interacts with communities, charity beneficiaries and the general public when instances of alleged maladministration are reported. In addition the Commissioner understands that the complainant has private interests in the withheld information, however this cannot be confused with the wider public interest.
34. As referenced above, the Commissioner does consider that there is a strong public interest in not disclosing information which would be likely to impede the Charity Commission's ability to carry out its functions effectively. Therefore disclosing information which would be likely to frustrate the voluntary flow of information would not be in the public interest. This is particularly so in this case as the advice and guidance issued in response to the concerns raised continues to be monitored.
35. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. Section 31(1)(g) with subsection (2)(f) FOIA was correctly applied in this case to all of the withheld information. The Commissioner has not therefore gone on to consider the application of any of the other exemptions any further.

Right of appeal

36. 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@Justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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.....

Gemma Garvey
Senior Case Officer

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF