

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 May 2024

Public Authority: Charity Commission for England and Wales
Address: PO Box 211
Bootle
L20 7YX

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence between the Charity Commission and the Foreign and Commonwealth Development Office concerning an inquiry about the Potanin Foundation and the decision-making process concerning the designation of the charity's founder under the Russia sanctions regime. The Charity Commission withheld the requested information under section 32(2) (court records) as it was held only by virtue of it being part of an inquiry. The Charity Commission also advised it was also applying section 40 of FOIA (personal information) to the request.
2. The Commissioner's decision is that the Charity Commission has applied section 32(2) correctly to withhold the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 23 November 2022, the complainant wrote to the Charity Commission and requested information in the following terms:

"[...] we would be grateful if you would share the Commission's representations to the FCDO and any other exchanges that might have taken place either before May or more recently, to today's date, with the FCDO or other parties to the designation decision as it came to be

made in June, so that we have a clearer understanding of the decision-making process (and in particular how it might bear upon the Commission's present approach)."

5. On 15 February 2023 the complainant clarified:

"We believe information provided to the Charity Commission may have had a bearing on the subsequent Charity Commission decision making, including the opening of the statutory inquiry into the Potanin Foundation, the appointment of an interim manager and the removal decision affecting the Potanin Foundation's Founder and member, Mr Potanin. To form a view on this, with the intention of advising our client, we need to see the correspondence in full. It is possible that subsequent further representations will be warranted following review of the correspondence."

6. The Charity Commission responded on 24 March 2023. It confirmed that it held information related to the request but advised that it was applying sections 32(2) and section 40 of FOIA to withhold it.

7. Following an internal review the Charity Commission wrote to the complainant on 13 December 2023. It stated that it was maintaining its reliance on sections 32(2) and section 40 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 22 January 2024 to complain about the way their request for information had been handled.

9. The Commissioner considers that the scope of his investigation is to determine if the Charity Commission has correctly withheld the information requested on the basis of either section 32(2) of FOIA or section 40(2), or both.

Reasons for decision

Section 32 – court records

10. Section 32(2) states that information held by a public authority is exempt information if it is held only by virtue of being contained in:

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of arbitration, or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

11. The Commissioner has issued guidance on section 32¹. Section 32(4) explicitly restricts the definition of the term 'inquiry' to those inquiries which are governed by statute. The Charity Commission has explained that the information that falls within scope of the request relate to an ongoing statutory inquiry opened by the Charity Commission on 29 June 2022. It explained that the statutory inquiry falls within section 32(4) of the FOIA as it was set up under the provisions of an enactment, specifically section 46 of the Charities Act 2011. As such the Commissioner is satisfied that the inquiry in this case meets the relevant definition as it is governed by statute.
12. The guidance on section 32(2) states that for the exemption to be engaged the information must be:
 - Contained in (or obtained from) a type of document specified by the exemption; and
 - Held 'only by virtue ...' of being contained in that document.
13. There are two main tests in considering whether information falls within this exemption. First, is the requested information contained within a relevant document? Second, is this information held by the relevant public authority only by virtue of being held in such a document?
14. In the Commissioner's view, the phrase 'only by virtue of' implies that if the public authority also holds the information elsewhere it may not rely upon the exemption.
15. In relation to the first point, the Charity Commission has explained that the information requested relates to emails exchanged between the Foreign, Commonwealth and Development Office (FCDO) and the Charity Commission before the announcement of the designation decision by FCDO on 29 June 2022, and the commencement of the Charity Commission's statutory inquiry on 29 June 2022. The Charity Commission has confirmed that these emails were passed to the team conducting the inquiry. The Commissioner therefore accepts that the information is in documents placed in the custody of a person conducting an inquiry, for the purposes of that inquiry.

¹ [Court, inquiry or arbitration records \(section 32\) v1.1 - FOIA guidance \(ico.org.uk\)](#)

16. Turning to the second point, the Commissioner's guidance is clear that this will be determined by the route by which the public authority obtained the information. In this case, the Charity Commission has explained that while the correspondence in scope of the request pre-dates the inquiry, it was placed in the custody of a person conducting the inquiry, for the purposes of the inquiry only. Whilst information pre-dating an inquiry would generally exclude this information from being 'held only by virtue of being contained in a document' passed to an inquiry, it can be considered 'held only by virtue of' if the information is no longer being kept for the purposes for which it was originally obtained and is now being held solely for the purposes of the inquiry.
17. The Charity Commission argues this is the situation in this case and that the information is only being held for the purposes of the inquiry and not for any other purpose.
18. The Commissioner accepts that, at the time the information request relevant to this decision notice was made, the information had already been passed to the inquiry. The information is now only held by virtue of having been passed to the inquiry and the inquiry now requires the Charity Commission to retain it. As such the Commissioner accepts the Charity Commission has correctly applied section 32(2).
19. Sections 32 2) is a class-based exemption. This means that any information falling within the category described is not subject to a prejudice test and is automatically exempt from disclosure. Section 32(2) is also absolute an exemptions and is therefore not subject to any public interest considerations.
20. As the Commissioner is satisfied that section 32(2) applies to all of the requested information, he has not gone on to consider section 40 of FOIA.

Procedural matters

21. The Commissioner finds that the Charity Commission breached section 10(1) of FOIA by failing to request clarification of the request within 20 working days.
22. The Commissioner acknowledges that the Charity Commission was entitled to request clarification of the request to enable it to provide its response. However, he reminds the Charity Commission that clarification should be sought as soon as possible once it receives the request.

Other matters

23. The Commissioner notes that the Charity Commission failed to carry out an internal review within 40 working days. The Section 45 Code of Practice advises all public authorities to carry out internal reviews in a timely manner and within 20 working days. A total of 40 working days is permitted in particularly complex cases only.
24. The Charity Commission is reminded of the requirements of the Code and of the importance of carrying out internal reviews in a timely manner and in accordance with the timeframes specified in the Code. The Commissioner has recorded this as part of his routine monitoring of public authorities.

Right of appeal

25. 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

26. 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.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Keeley Christine
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Water Lane
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