

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 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 information on the number of complaints received about a named charity, and details of any serious incidents reported by that charity between 2013 and 2023. The Charity Commission ('the Commission') provided a response to the first part of the request, but it relied on section 31(3) of FOIA (law enforcement) to neither confirm nor deny whether it held the information for the second part.
2. The Commissioner's decision is that the Commission was entitled to rely on section 31(3) of FOIA to neither confirm nor deny whether it held the requested information in the second part of the request. The Commissioner also finds that the Commission breached section 10(1) and 17(1) of FOIA by failing to communicate information or issue a section 31 refusal notice within 20 working days.
3. The Commissioner does not require further steps.

Request and response

4. On 24 July 2023, the complainant wrote to the Commission and requested information in the following terms:

"This is an FOI request. Please can you tell me:

- 1) How many complaints you have received regarding [NAME REDACTED] between 2013 and 2023.

- 2) How many serious incidents has [NAME REDACTED] reported to the Charity Commission between 2013 and 2023.”
5. The Commission responded on 20 September 2023. It stated that it had received one complaint about the charity in the specified time period. For the second part of the request, the Commission advised the complainant that it could neither confirm nor deny whether it held the requested information by virtue of section 31(3) of FOIA.
 6. Following an internal review, the Commission wrote to the complainant on 29 May 2024. It upheld its position.

Scope of the case

7. The complainant contacted the Commissioner on 24 April 2024 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to establish whether the Commission is entitled to rely on section 31(3) of FOIA to refuse to confirm or deny whether it holds the information requested in the second part of the request.

Reasons for decision

Neither confirm nor deny (NCND)

9. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as “the duty to confirm or deny”. However, there are exemptions to this duty, whereby a public authority may NCND whether it holds the requested information.
10. The decision to use a NCND response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
11. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.

12. The Commission has taken the position to NCND holding the information requested in the second part of the request, citing section 31(3) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the Commission is entitled to NCND holding any information of the type requested by the complainant.

Section 31 - law enforcement

13. Section 31(3) of the FOIA states that: The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)
14. In this case the Commission has relied on the NCND exclusion on the basis that confirming or denying whether it holds the information within the scope of the request would be likely to prejudice the Commission's regulatory functions set out in sections 31(2) of FOIA.
15. In its submissions to the Commissioner, the Commission said its statutory objectives and functions are set out in section 14 and 15 of the Charities Act 2011. It considers that confirming or denying whether the information is held, would be likely to prejudice those objectives.
16. The Commission has explained that the reporting of serious incidents ('RSI') is an important regulatory tool that enables the Commission to be aware of reported issues and to identify risks at an early stage. It said that serious incidents should be reported promptly and in any event before the submission of a charity's Annual Return to the Commission. RSI enables the Commission to ensure that the charity trustees are meeting their legal duties in responding to serious incidents. The Commission added that RSI does, however, cause charities concern because the serious incidents should be reported before the charity has made its full investigation, and the facts are not yet fully known.
17. The Commission pointed to a recent decision¹ by the Commissioner where he accepted the importance of RSI as a regulatory tool for the Commission and referenced paragraph 36 of that decision: "He notes that the RSI process allows charities or third parties to raise any concerns or issues with CC on a confidential basis and enables CC to become aware of the most serious risks for individual charities and assess risks for the sector more generally".

¹ [ic-278930-t4t7.pdf \(ico.org.uk\)](#)

18. The Commission has explained that it is not publicly known whether the charity in question has reported serious incidents to the Commission. It therefore considers that confirming or denying whether it has received notification of serious incidents within the specified period would be likely to undermine the effectiveness of RSI as a regulatory tool. It stated that this is because it could undermine charities' confidence in reporting matters to the Commission promptly or possibly at all as adverse inference can be taken from both reporting and not reporting.
19. The Commission explained that this would mean that it would not become aware of as many serious incidents, or, if it did become aware, it would be at a later stage which would be likely to undermine its ability to provide regulatory advice, and perhaps stronger regulatory action.
20. The Commission added that confirming whether or not it had received RSI from a charity could reveal sensitive information about that charity's operation, especially if information is pieced together with other available information. This is because many serious incidents involve sensitive information that, if the existence or not of the RSI is disclosed, could affect the reputation of the charity or the individual involved.
21. Regarding the causal relationship between confirming whether or not the requested information is held and the claimed prejudice, the Commission maintains its position that, given the number of charities it regulates (over 165,000), even a small percentage changing their behaviour could likely harm its regulatory functions.
22. In its submissions, the Commission has confirmed that it considers either confirming or denying it holds the requested information 'would be likely' to prejudice the above purposes.
23. In their request for an internal review, the complainant has argued that they made a similar request concerning a different charity and the Commission did disclose the number of reported serious incidents. The Commission addressed this in its submission to the Commissioner and explained that, in that instance, the charity had itself voluntarily published that it had reported serious incidents to the Commission as part of its annual report. As the requested information was already in the public domain, the Commission provided a response to the request. That situation does not apply to the complainant's request about the charity in this case where there is no such information in the public domain.

24. In its submission the Commission has referred to a number of recent decisions² the Commissioner has made regarding the reporting of serious incidents to the Commission. In these cases, the Commissioner agreed that disclosing information, or confirming or denying whether information is held, about RSI would likely prejudice the efficacy of RSI as a regulatory tool. He agreed it could damage charities' trust in the Commission and the free flow of information when dealing with sensitive matters. In turn, charities may be deterred from reporting incidents at an early stage.
25. The Commissioner considers the same arguments to apply in this case and he is therefore satisfied that the Commission is entitled to rely on section 31(3) for the second part of the request. The RSI process allows charities to raise any issues or concerns with the Commission on a confidential basis. Confirming or denying whether recorded information is held relating to a certain issue or charity would be likely to hinder the free flow of often sensitive information, discourage those that would normally use it from doing so, thereby hindering the Commission's ability to identify issues falling within its regulatory remit efficiently and effectively.

Public interest test

Factors in favour of disclosure

26. The Commission has acknowledged that there is public interest in understanding how it regulates charities to ensure that correct processes are followed, and that proper and accurate due diligence is made by the charity. It stated that public authorities such as the Charity Commission have a wider duty to be transparent and accountable.

Factors in favour of maintaining the exemption

27. The Commission considers that if charities thought that it routinely disclosed whether or not it received reports of serious incidents, involving often sensitive information and risks to the charity, this would likely undermine the relationship of trust between the Commission and the charities sector as a whole.
28. It argued that confirming whether or not the requested information is held would be likely to undermine the named charity's confidence in reporting matters to the Commission as necessary. In turn this would

² [ic-290240-b7n6.pdf \(ico.org.uk\)](#), [ic-159027-j2n5.pdf \(ico.org.uk\)](#)

undermine the Commission's ability to regulate effectively and carry out its regulatory functions.

29. The Commission considers that it is in the public interest to protect the RSI process because it serves as a vital regulatory tool for maintaining integrity, accountability, and public trust in the charity sector, enabling the Commission to effectively fulfil its regulatory functions.

Balance of the public interest

30. The Commissioner recognises that there is public interest in knowing that charities are reporting any serious incidents that arise, and being reassured that the Commission is proactively and effectively responding to any reported incidents.
31. However, there is also a significant public interest in ensuring that the Charity Commission, with its statutory functions under the Charities Act 2011, can operate efficiently and effectively, something which the Commissioner considers would be negatively affected by confirming or denying whether the requested information is held.
32. The Commissioner has therefore concluded that, in the circumstances of this case, the balance of the public interest lies with maintaining the exemption under section 31(3) of FOIA.

Procedural matters

33. The Commissioner finds that the Commission breached section 10(1) and 17(1) of FOIA by failing to communicate information or issue a section 31 refusal notice within 20 working days.

Other matters

34. The Commissioner notes that the 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.
35. The 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

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: 0203 936 8963

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.

Keeley Christine
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