

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 16 September 2024

**Public Authority:** Charity Commission

**Address:** PO Box 211

Bootle  
L20 7YX

#### **Decision (including any steps ordered)**

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1. The complainant has requested the Charity Commission (CC) to disclose a list of charities that have a dispensation where the names of all of their trustees are withheld from the public Register of Charities. CC refused the request citing sections 38 and 40 of FOIA.
2. The Commissioner's decision is that section 40 of FOIA applies to the requested information for Charitable Companies. However, for Charitable Incorporated Organisations (CIOs), Charitable Trusts and Unincorporated Charitable Associations, both sections 38 and 40 of FOIA are not engaged.
3. The Commissioner requires CC to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information for all CIOs, Charitable Trusts and Unincorporated Charitable Associations to the complainant.
4. CC must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 27 November 2023, the complainant wrote to CC and requested information in the following terms:

“Please can you disclose a list of charities that have a dispensation where the names of all of their trustees are withheld from the public register of charities.”
6. CC responded on 21 December 2023. It refused to disclose the requested information citing sections 38 and 40 of FOIA.
7. The complainant requested an internal review on 21 December 2023.
8. CC completed an internal review and notified the complainant of its findings on 20 February 2024. It upheld its application of the exemptions cited.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 20 February 2024 to complain about the way their request for information had been handled. They dispute the application of the exemptions cited. They stated that the information is already in the public domain; just not in a user friendly or systematic way. They also do not consider the requested information to be personal data, as the point to allowing a dispensation is to protect the identity of the trustees.
10. The Commissioner considers that the scope of his investigation is to determine whether or not CC is entitled to rely on the exemptions cited. He will first consider section 40 of FOIA. He will only go on to consider section 38 of FOIA if he finds that section 40 does not apply to some or all of the requested information.

## **Background**

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11. CC provided the following background in order to set out the relevant context to the request and its decision. It explains the information it makes available and why and how it approaches applications for dispensation.
12. Under section 30 of the Charities Act 2011 (CA2011), all charities are required to be registered with the CC unless an exemption under section 30(2) of the CA2011 applies.

13. CC is required under section 29 of the CA2011 to maintain a Register of Charities. It has broad discretion under section 29(2)(b) of the CA2011 to determine what information forms part of the Register (known as particulars of the Register). Trustees' names are a particular of the Register. Under section 38 of CA2011, CC must allow the particulars of the Register to be open to public inspection unless it determines otherwise (section 38(3) of CA2011). Trustees' names are available as part of the Register made available to the public.
14. Trustees' names are also required to be included by charity trustees in the Trustees' Annual Report (TAR) prepared annually for each charity. Under section 162(1) of CA2011, a charity's TAR must include the trustees' activities within the charity and other information related to the charity, its trustees and officers. The detailed legal requirements for the content of the TAR are set out in The Charities (Accounts and Reports) Regulations 2008 (the 2008 Regulations).
15. Charities with an income over £25,000 (and all Charitable Incorporated Organisations (CIOs) regardless of income level) must transmit their TAR to the Commission (s.163 of the Act). CC must make this available for public inspection (s.170 of CA2011). CC does this by making the last five years of a charity's TAR and accounts available on its website.
16. Under paragraph 40(4) of the 2008 Regulations, where the CC is satisfied that disclosure of the name a trustee in the TAR could lead to that person being placed in any personal danger, CC can dispense with the requirement to disclose their names in the TAR. This is known as a trustee dispensation. Where CC grants a dispensation under paragraph 40(4), it also makes a determination that a trustee's name should not be made publicly available as a particular of the Register under section 38(3) of CA2011.
17. When deciding whether to grant a dispensation, CC considers whether it is CC's disclosure of a trustee's name which could lead to the risk of danger. As part of this assessment it will examine any publicly available information about who the trustees of a charity are. If CC finds that a charity or trustee has already disclosed this information in the public domain (and this is not an error), it is likely to refuse the dispensation application because it would be difficult to demonstrate that it is the disclosure by CC which could lead to the risk of personal danger.
18. Whether a charity has a dispensation in place can be found from the Register on CC's website. For a charity with a dispensation, the 'trustees' section of the Register entry will show 'xxxx'.
19. There are different types of legal form of charities. For CIOs, Charitable Trusts and Unincorporated Charitable Associations, the names of the

trustees is only held by CC and this informs part of the Register of Charities unless a dispensation applies.

20. For Charitable Companies, the charity trustees are the directors of a company. Under the Companies Act 2006, Charitable Companies are required to record the names of their directors/trustees on the Companies House Register. Any dispensation granted by CC applies only to the information disclosed by CC on the Register of Charities and in a charity's TAR. It will not apply to information disclosed on Companies House Register.
21. Company directors, LLP members or people with significant control (PSCs) who are at serious risk of violence or intimidation because of the company or activities can apply to the Companies House under section 243(4) of the Companies Act 2006 not to disclose their residential address to a credit reference agency. More information on how Companies House makes a decision whether or not to disclose addresses, can be found here:

[Apply to protect your details on the Companies House register - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

22. The factors considered by Companies House and CC are different. When reviewing dispensation requests, CC examines publicly available information. In cases where dispensation has been granted, the CC has considered all relevant factors and has determined that while trustees' names may be listed on the Companies House Register, it is CC's disclosure of the trustee's name on the Register of Charities that would risk exposing them to personal danger. This is an assessment CC takes seriously due to its statutory objective to enhance the accountability of charities to donors, beneficiaries and the general public and its statutory function to maintain a Register of Charities and make the register public.
23. CC's deem information in the public domain if the link between the trustee and the charity is easily, readily and realistically accessible to the public and if finding the information does not require unrealistic persistence or efforts nor any specialised knowledge. It considers this aligns with the Commissioner's guidance, which states:

"Information is in the public domain if it is easily, readily and realistically accessible to the public. One example of this is information which can be easily found through a simple internet search."

## Reasons for decision

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### Section 40 – personal data

24. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
25. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
26. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
27. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### Is the information personal data?

28. Section 3(2) of the DPA18 defines personal data as:

"any information relating to an identified or identifiable living individual".
29. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
30. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

31. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
32. With regards to CIOs, Charitable Trusts and Unincorporated Charitable Associations, CC confirmed itself that it only holds the names of trustees. This information can therefore only come from CC or the charity or trustee. Therefore disclosing the requested information for these specific charities cannot lead directly or indirectly to the identification of a specific trustee or trustees who have been granted a dispensation.
33. CC said it was concerned about disclosing this information because it recognised that the majority of trustees are volunteers who sometimes make honest mistakes, which can unintentionally lead to protected information being disclosed. It commented that it has dealt with cases in the past where charities have accidentally disclosed the names of trustees with a dispensation in their annual accounts. Once alerted to the mistake, immediate steps are taken to rectify the error. CC advised that it was also concerned that it is difficult to delete the digital history, so a trustee may have been linked with a charity publicly but then their circumstances changed meaning that they applied for a dispensation.
34. The Commissioner notes CC's concerns here but he considers such occurrences are rare and happen due to human error, separately from the disclosure of the requested information. The requested information will not assist anyone motivated enough in identifying the names of trustees. It cannot be linked in anyway to such errors or past information – as there would be no way of knowing from that list if this had occurred to a particular charity or charities. A motivated intruder would have to fall upon that information as a result of their efforts.
35. Human error should also not prevent information that would otherwise be suitable for disclosure from being released. It should also not prevent the disclosure of the requested information for the remainder of charities in this category where it is known (or CC has not been made aware of) no such errors have occurred. Taking such errors, which again will be very rare, out of consideration, the requested information cannot be used directly or indirectly to identify the names of the trustees of charities granted a full dispensation in these categories. It therefore cannot be said that the requested information is personal data and so section 40(2) does not apply.
36. Turning now to Charitable Companies, a list of charities which have been granted a dispensation for all trustees names, would enable someone to identify those individuals via Companies House. A member of the public can use that list to enter the name of each charity into Companies

House and identify the name of the directors (therefore trustees). CC has said that the name of the director is still available; it is only the address that would be withheld if Companies House felt that action was necessary.

37. The requested information would make the names of trustees easily accessible to someone interested in identifying them from the list. The Commissioner is therefore satisfied that, for Charitable Companies, the requested information is personal data, as it can be used directly via Companies House to identify individual directors of the charity/the charity trustees by name. For these charities, the requested information falls within the definition of 'personal data' in section 3(2) of the DPA.
38. The remainder of the Commissioner's analysis on section 40(2) of FOIA is therefore only applicable to Charitable Companies. For other categories of charities, he has decided that the requested information is not personal data and so section 40(2) cannot apply. Further analysis on this specific information will take place later on in this notice when the Commissioner has to address section 38 of FOIA, which CC has also applied.
39. For Charitable Companies, the fact that information constitutes the personal data of an identifiable living individual or number of individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
40. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

41. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

42. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
43. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

## Lawful processing: Article 6(1)(f) of the UK GDPR

44. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>2</sup>.

45. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
46. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>2</sup> Article 6(1) goes on to state that:-

*“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

*“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.*



## **Legitimate interests**

47. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
48. No specific arguments have been made by CC or the complainant concerning any legitimate interests in disclosure.
49. The Commissioner can however see there is a legitimate interest in general openness and transparency and the ability of the public to hold the trustees of charities to account. Disclosure would help those interested in a particular charity with a relevant dispensation to understand more closely who is responsible for managing that charity and the donations and funds it receives.

## **Is disclosure necessary?**

50. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
51. Again no specific arguments have been made on this point by either CC or the complainant. Although CC has said that it still remains capable of managing trusts with such dispensations, as it will know who the relevant trustees are (just not the general public). Any concerns or issues can still be raised and dealt with via the procedures and regulatory requirements that are in place.
52. The Commissioner accepts that the non-disclosure of this information does not prevent CC from meeting its statutory requirements. However, it does not meet the interests of the complainant here (otherwise they would not be pursuing such a complaint) and therefore he is happy to accept in this case that disclosure is necessary to meet the legitimate

interests in openness and transparency and any specific interests the complainant has.

### **Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

53. It is necessary to balance the legitimate interests in disclosure against the data subjects' (the trustees) interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
54. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individuals expressed concern to the disclosure; and
  - the reasonable expectations of the individuals.
55. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
56. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
57. CC explained that the requested information would allow very sensitive information to be identified, by cross referencing the list that would be disclosed, if it were to comply with the request, with the information available at Companies House. Having applied and been granted a dispensation from public disclosure (from the charity's TAR and the inclusion on the Register of Charities) the relevant trustees will have the expectation of confidentiality and privacy.
58. CC advised that dispensations are granted due to concerns over personal safety. If it were to disclose the requested information, which would then allow the trustees of these specific charities to be identified, it would cause them significant distress and upset and open them up to potential safety issues.

59. It noted the complainant's comments over the information already being in the public domain but stated that it strongly disagreed that it is. CC said that someone would need to download the entire register from its website and then go through all 170,000+ entries to identify if each charity had the relevant dispensation and create their own list. They would then have to go through each and every one and locate the names of the directors/trustees from the information disclosed at Companies House.

60. CC confirmed that for information to be considered in the public domain the public should have direct, rather than indirect, access to it. It feels this position is in alignment with the High Court case of Attorney-General v Greater Manchester Newspaper Ltd [2001] EWHC QB 451 and the First-tier Tribunal hearing (FTT) of Professor Geoffrey Alderman and Information Commissioner other [2022] UKFTT 00524 (Alderman). In the case of Alderman, CC referred to paragraph 19 of the FTT decision where it was stated:

"It is clear to us that, at the time that the Appellant made his request, the information was not easily, readily and realistically accessible to the public; to access it a member of the public would need to display unrealistic persistence (for example searching the Article of all the companies registered as Companies House) or have specialised knowledge (i.e. the name of the company to look at Companies House)."

61. The Commissioner agrees with CC's position here. Looking at his own guidance<sup>3</sup> it states that:

"Information is in the public domain if it is easily, readily and realistically accessible to the public. One example of this is information which can be easily found through a simple internet search."

"The information should also be available in practice and finding it should not require unrealistic persistence or efforts nor any specialised knowledge."

62. The requested information and the personal data it can lead to is not considered to be in the public domain. It is not currently possible for someone to easily, readily and realistically obtain a list of charities with a full dispensation and then cross reference each one with the information available at Companies House. Currently, someone would have to download the entire register and then go through all 170,000+

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<sup>3</sup> [Information in the public domain | ICO](#)

entries to first see if they have this dispensation and create a list. Then they would need to search for each on Companies House to identify the directors/trustees. The Commissioner considers this would take in practice unrealistic persistence and effort, or alternatively some specialised or insider knowledge.

63. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
64. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
65. The Commissioner's decision is therefore that section 40(2) does apply to the requested information for Charitable Companies and therefore it should not be disclosed.

### **Section 38 – personal safety**

66. To recap, the following reasoning covers the requested information for CIOs, Charitable Trusts and Unincorporated Charitable Associations.
67. Section 38 of FOIA states that information is exempt information if its disclosure would, or would be likely to-
  - (a) endanger the physical or mental health of any individual, or
  - (b) endanger the safety of any individual.
68. Being a qualified exemption, it is also subject to the public interest test.
69. For this particular request the Commissioner considers the key consideration is whether the requested information can lead to the identification of trustees with a dispensation and then potentially lead to a personal safety issue. If the requested information cannot be used in anyway to identify those trustees with a dispensation, it cannot be said that disclosure would or would be likely to endanger the personal safety of an individual.
70. CC has confirmed itself that it only holds the names of the trustees for these categories of charities. There is no means of identifying them from the requested information and/or other information that may otherwise be available. It therefore cannot be said that disclosure would or would be likely to lead to the trustees being identified and therefore those

trustees being potentially exposed to any consequences that would or would be likely to endanger their personal safety.

71. For these reasons, the Commissioner has concluded that section 38 of FOIA does not apply and the information should be disclosed.

## Right of appeal

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72. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

73. 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.
74. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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