

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 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 relating to an allegation about a specific charity. The Charity Commission for England and Wales (the Charity Commission) refused to confirm or deny whether the requested information was held, citing section 31(3) (law enforcement) and section 41(2) (information provided in confidence) of FOIA. It later withdrew its reliance on section 41(2), citing section 40(5A) (personal information) instead to neither confirm or deny whether this information is held.
2. The Commissioner's decision is that the Charity Commission was correct to rely on section 31(3) of FOIA to neither confirm nor deny whether it held the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 3 April 2024 the complainant wrote to the Charity Commission and requested information:

"In respect of the serious allegation referred to in the attached from [redacted name of charity and identifying details], triggering a requirement to notify the Commission of a Serious Incident per

expressed at <https://www.gov.uk/guidance/how-to-report-a-serious-incident-in-your-charity>, please supply such notification served on the Commission in line with this requirement...”

5. The complainant repeated the request to the Charity Commission on 16 and 23 April 2024.
6. The Charity Commission responded on 26 April 2024 neither confirming nor denying whether it held the requested information, citing sections 31(3) – law enforcement and 41(1) – information provided in confidence. The Commissioner made the assumption that the Commission intended to cite section 41(2) of FOIA.
7. On 27 April 2024 the complainant requested an internal review. In their internal review request the complainant repeated that they required -

“the notification of SI [serious incident]; or indeed confirm that such notification was NOT served, in accordance with the over-riding statutory requirement on the Commission to act in the public interest”.
8. The Charity Commission provided its internal review on 28 May 2024 and maintained its position.

Scope of the case

9. The complainant originally contacted the Commissioner on 24 June 2024 to complain about the lack of an internal review.
10. During the Commissioner’s investigation the Charity Commission withdrew its reliance on section 41(2), instead citing section 40(5) – neither confirming nor denying whether it holds personal information.
11. The Commissioner considers that the scope of his investigation is to decide whether the Charity Commission was correct to neither confirm nor deny whether it held any relevant information.
12. The Commissioner will consider the Charity Commission’s application of section 31(3) first. Depending on his findings, he may go on to consider section 40(5).

Reasons for decision

Neither confirm nor deny ('NCND')

13. When it receives a request for information under FOIA, a public authority must do two things. It must first confirm whether or not it holds the requested information; this is commonly known as 'the duty to either confirm or deny'. If the public authority confirms it holds the requested information, it must disclose it unless an exemption under FOIA applies. However, there are exemptions from the duty to either confirm or deny. In these instances the public authority must issue a neither confirm nor deny response ('NCND'), leaving it ambiguous as to whether the requested information is held.
14. NCND responses are used in circumstances when even confirming or denying if information is held would, in itself, give away exempt information.
15. The decision to use a NCND response will not be affected by whether a public authority actually does, or doesn't, hold the requested information.
16. The main focus for the Commissioner when considering NCND is theoretical; he needs to consider the consequences of confirming or denying whether the information is held. A public authority will need to use NCND responses 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 inference as to whether information is or isn't held.

Section 31(3) – law enforcement

17. 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).
18. In this case the Charity 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 its regulatory functions set out in sections 31(2) of FOIA.
19. Although the Charity Commission has not specifically confirmed which sub-section it was relying on to cite section 31(3) it does refer to recent instances where the Commissioner has accepted its position and it listed the relevant purposes that pertain to section 31(1)(g) which states that:

"Information...is exempt information if its disclosure under this Act would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."

20. The Charity Commission has confirmed that the relevant purposes in section 31(2) include:
- (a) the purpose of ascertaining whether any person has failed to comply with the law;
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper;
 - (c) ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise; and
 - (f) protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration.
21. The Charity Commission has set out the regulatory functions and objectives that are relevant to the purposes of this exemption and which, it contends, would be likely to be prejudiced from confirming or denying whether the requested information is held:
- "s.14.1 Charities Act (CA) 2011 – the public confidence objective;
s.14.3 CA 2011 – the compliance objective;
s. 14.5 CA 2011 – the accountability objective;
s. 15(1)2 CA 2011 – Encouraging and facilitating the better administration of charities;
s. 15(1)3 CA 2011 – Identifying and investigating apparent misconduct or mismanagement;
s. 15(1)5 CA 2011 – Obtaining, evaluating, and disseminating information in connection with the performance of any of the Commission's functions or meeting any of its objectives; and
s. 15(2) CA 2011 – Give such advice or guidance with respect to the administration of charities as it considers appropriate."
22. The Charity Commission has provided the Commissioner with some further background argument that cannot be included here.
23. The Charity Commission has explained that it is "the independent regulator of charities, with the aim of ensuring that charities are accountable, well run and meet their legal obligations". The nature of its role is that it "could be entrusted with sensitive information".
24. In support of its argument that confirmation or denial would be likely to prejudice its law enforcement functions it points to a recent decision by the Commissioner - [IC-278930-T4T7](#) "regarding the disclosure of RSI" where the Commissioner was 'satisfied that the prejudice being claimed is "real, actual or of substance", and that there is a causal link between disclosure of the withheld information and the prejudice claimed'.

25. An RSI is a serious incident report. The Charity Commission argued that the ICO had accepted its position and “that the RSI process falls within the Commission’s regulatory remit and functions set out in section 31(2) of FOIA”. The Commissioner notes that this decision related to information held and the citing of section 31(1)(g). The Charity Commission points to where the Commissioner ‘has accepted in past cases...that disclosure of sensitive information is likely to “erode public trust in the Commission’s ability to handle information confidentially”’. It argues that,

“in this case, confirming whether or not the Commission received an RSI from the charity about the complaint and allegation against the charity would reveal the charity’s assessment of risks and its internal management of those risks”.

26. In [IC-278930-T4T7](#) the Charity Commission -

“confirmed that it fulfils its objectives and functions by ensuring that trustees comply with their legal duties and that the reported incidence is appropriately managed. Through RSI reporting it becomes aware of the risks that charity is facing, and it advised how it would be difficult to obtain this information as efficiently by other means”.

By interacting with the charity and gathering the relevant information, the Charity Commission fulfils its legal obligations and ensures that a reported incident is appropriately managed.

27. The Charity Commission explained to the Commissioner that it regulates over 170,000 charities and that “even a small percentage changing their behaviour is likely to harm its functions”. It underpinned its view by pointing to IC-278930-T4T7 where “the Commissioner had acknowledged and accepted this point”. The Charity Commission asserts that there is a causal relationship between confirming or denying whether the requested information is held and the prejudice claimed. The likelihood of risk is high “given the reduction in the number of RSIs received by CC, as noted in its 2022-23 annual report”. The report referenced a decrease for the third year in a row providing the example of 3451 in 2021-22 to 2,969 new serious incident reports in 2022-23. The Charity Commission claims the prejudice to be at the lower level.

28. The Commissioner has considered his handling of previous, similar requests¹ in this investigation and he accepts that the exemption at section 31(3) is engaged at the lower level of prejudice.
29. Since he has decided the exemption is engaged, the Commissioner will go on to consider the balance of the public interest test.

Public interest test

30. The complainant argues that it is in the public interest for this information to be disclosed:

“Let’s all keep in mind the milestone dates in this case, the scale of the suspected offenses at law we are talking about in the midst a public enquiry on systemic governance failure, plus dates of the associated case and statute laws pertinent to this case...”
31. The complainant considers that “this is a case of suspected procurement fraud” and expressed the view that the charity in question -

“must to be seen (sic) to be acting in accordance with their own Code of Conduct and the standing orders imposed on ALL charities by the Commission, which includes serving of notifications of Serious Incident when trigger events occur such as the recognition of a serious allegation having been made as is the case here”.
32. The Charity Commission accepts 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”. The Charity Commission has “a wider duty to be transparent and accountable”.
33. Confirming whether or not the Charity Commission received an RSI would inform the public whether or not charity trustees have complied with the requirement to report serious incidents to the Charity Commission. However, it notes that it “would only inform the public to a limited extent because the reporting is only required where a serious incident has occurred”. It explains that when serious events occur trustees sometimes don’t class them as serious, don’t comply with their obligations and don’t report them. Sometimes RSI reports are received but they don’t meet the definition of a serious incident. The Charity

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2024/4029672/ic-280497-z8z2.pdf> and [IC-319885-K0C2](#)

Commission states that "Adverse inferences can be taken whether a charity reports an RSI or it doesn't".

34. On the other hand it is not in the public interest "If charities recognised that the Commission routinely disclosed whether or not it reported serious incidents, involving often sensitive information and risks to the charity". It argues that this would be likely to "undermine the relationship of trust between the Commission and the charities sector as a whole". In IC-278930-T4T7 the Commissioner accepted that "disclosure would be likely to alter the behaviour of those trustees and third parties" resulting "in more reluctance to approach CC and supply the detailed and sensitive information CC needs to perform its functions efficiently". This is not in the public interest and there is a greater public interest in "maintaining the free flow of information and contact" in order that the Charity Commission can operate effectively. There has been a decline in RSIs and any further decline is not in the public interest and could prejudice its efficiency and ability to fulfil its regulatory function.

Balance of the public interest

35. Because the charity is named in the request, confirming the information is held would confirm that a serious incident report about the charity had been made. Denying the information is held would confirm that no such serious incident report about the charity has been made. Bearing in mind that NCND responses need to be provided consistently to avoid inferences being made, the Commissioner agrees that complying with the duty to confirm or deny, in this instance, has the potential to disclose to the world at large information that isn't in the public domain.
36. The Commissioner has reached his decision on whether the balance of the public interest lies in confirming or denying whether it holds the requested information. He has considered both the complainant's and the Charity Commission's views. Transparency and accountability are clearly in the public interest but he has set against this the Charity Commission's regulatory functions and the arguments it has used to neither confirm nor deny whether it holds this information and the prejudice that is likely to follow from doing so. Additionally the Commissioner has noted previously that the Charity Commission issues a press release whenever it opens a statutory inquiry into a charity². However, it doesn't make the details of any allegations public. The Commissioner accepts that any reduction in the reporting of RSIs would

² [Charity Commission alerts, decisions, reports and statements - GOV.UK](#)

lessen the effectiveness of those functions and is not in the public interest. He has decided that the Charity Commission was correct to issue an NCND response in this instance.

37. Since the Commissioner has determined that the Charity Commission was correct to neither confirm nor deny whether the information was held in line with section 31(3), he has not gone on to consider its application of section 40(5).

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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.

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