

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 October 2014

Public Authority: The Charity Commission
Address: PO Box 1227
Liverpool
L69 3UG

Decision (including any steps ordered)

1. The complainant has requested details of all meetings and communications of a named individual. The Charity Commission refused to disclose the requested information under Section 31(1)(g) and 31(2)(c), (f), (g) and (h) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the Charity Commission has correctly applied section 31(1)(g) with subsection (2)(f) FOIA in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. In March 2014 the complainant requested information of the following description:

"Please provide details of all meetings with organisations or individuals external to the Commission in which Gwythian Prins has participated while a Board member of the Commission.

Please provide details of all forms of communication Gwythian Prins has sent, received or engaged in with organisations or individuals external to the Commission while a Board member of the Commission."

5. On 8 May 2014 the Charity Commission responded. It explained that some information was not held, it provided the complainant with some

information but refused to provide some of the requested information under section 31(1)(g) and 31(2)(c), (f)-(h) FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 21 May 2014 to complain about the way his request for information had been handled.
7. The Commissioner has considered whether the Charity Commission was correct to apply section 31(1)(g) with subsection (2)(c), (f), (g) or (h) FOIA in this case.

Reasons for decision

8. 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 of its functions set out in 31(2) of FOIA.
9. 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):
 - (c) Ascertaining whether circumstances would justify regulatory action;
 - (f) 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; and
 - (h) Recovering the property of charities.
10. 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. 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.
11. The Charity Commission has stated that it believes 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.

12. The Commissioner recognises that the Charity Commission's arguments focus on the prejudice to its regulatory functions that could arise due to the disruption that disclosure could have on the flow of information it receives as part of its role. Taking into account the nature of the Charity Commission's involvement with the charity in this case, the Commissioner considers that section 31(2)(f) is the most relevant part of the subsections quoted and has therefore focused on this provision in the first instance.
13. The Commissioner has sought to test the validity of these arguments by considering the following questions; Is the Charity Commission formally tasked with protecting a charity against misconduct or mismanagement? What stage had the investigation reached when the request was submitted? Does the Charity Commission have powers to compel engagement in the regulatory process and, if so, do these mean the chances of prejudice occurring are effectively removed?
14. The Charity Commission's role as the regulator of charities is set out at section 14 of the Charities Act 2011, which describes five statutory objectives. In addition, section 15 of the Charities Act expresses the Charity Commission's general statutory functions. These include encouraging the better administration of charities and investigating apparent misconduct and mismanagement in the administration of charities with the option that remedial or protective action is taken in this respect.
15. The Charity Commission has explained that the withheld information relates to an open case in which regulatory action was and is actively being considered, in order to protect the charity and sector against misconduct/maladministration and to protect charity assets. It provided the Commissioner with information as to the issue being considered by the Charity Commission in this case and where this process is currently up to. It said that disclosure of the information requested would both prejudice ongoing open and frank discussions with the charity and would be likely to prejudice any regulatory action being considered. It argued that this would clearly affect the Charity Commission's ability to regulate effectively.
16. Whilst the role of the Charity Commission is varied, it is clear that it includes investigating potential mismanagement at a charity. Generally speaking, the Commissioner accepts that if an investigation was ongoing at the time of a request, the greater the likelihood that disclosure would detrimentally affect a regulator's ability to gather information from those organisations that it regulates.

17. The Commissioner has considered whether the Charity Commission has any powers to compel relevant parties, such as the trustees of charities, to provide the information they require. If so, this could potentially offset any disruption to the flow of information received by the Charity Commission pursuant to investigation. This is because the Charity Commission could in principle oblige a party to produce the relevant information where this was not provided on a voluntary basis.
18. The Commissioner has previously accepted that if it became known that the Charity Commission disclosed information provided to it as part of this regulatory process this would be very likely to cause charities (and other organisations or individuals) to restrict the material that they provide to the Charity Commission. The Charity Commission said that this would materially prejudice its ability to carry out its functions effectively as, in addition to the obtaining of information by the exercise of its statutory powers, it relies on having an open and candid dialogue with charities without the information provided to the Charity Commission being publicised.
19. Whilst the Commissioner is aware the Charity Commissioner does have statutory powers to compel charity trustees to provide it with information, notwithstanding this it does rely upon charities sharing information open and candidly. The Commissioner has previously recognised and allowed the argument which says that despite the powers the Charity Commission has to compel a charity to provide it with information, disclosure of the information requested in this case could have a prejudicial effect, in that it could slow down the Charity Commission's regulatory process and may lead to less timely regulatory action.
20. The Commissioner understands that the Charity Commission will be dependent on its communications with the trustees of a charity being full and frank in nature so that it can effectively provide advice and investigate and check any abuses of charity law. The act of disclosure could therefore make trustees more reluctant to provide their candid submissions. This reluctance would not necessarily prevent the Charity Commission from eventually receiving all the information it needed because of the powers afforded by the Charities Act 2011. Yet, the Commissioner agrees that it would be likely to make the process more cumbersome.

21. This point was reinforced by the Commissioner in his decision on FS50184898¹, which also involved the Charity Commission. Regarding the application of section 31(2)(f) to (g), the Commissioner stated that:

"94. In reaching this conclusion the Commissioner recognises that the Charity Commission's argument is more sophisticated than suggesting that the disclosure of information in response to this request will result in trustees refusing to communicate with the Charity Commission at all. Rather it is the nature of these communications that will change and thus both the Charity Commission's formal and informal methods will be affected, as well as its ability to gather/receive wider intelligence."

22. Given the nature of the withheld information, the Commissioner 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

23. The Charity Commission has recognised that there is a public interest in it operating transparently and in being held to account in its public task of regulating charities.
24. It argued that the information it had disclosed to the complainant went some way to meet the public interest arguments in this case.

Arguments in favour of maintaining the exemption

25. The Charity Commissioner considers that there is a strong public interest in not disclosing information which would be likely to impede the flow of information and the quality of the dialogue between the Charity Commission and the charities it regulates.

¹ [http://www.ico.gov.uk/~media/documents/decisionnotices/2009/FS_50184898.ashx](http://www.ico.gov.uk/~/media/documents/decisionnotices/2009/FS_50184898.ashx)

Balance of the public interest

26. 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. Furthermore he considers that there is a public interest in ensuring that public money is being effectively protected by the bodies that are tasked to ensure this. The Commissioner has viewed the information that has been disclosed to the complainant in response to this request and accepts that this does go some way to meeting the public interest arguments in favour of disclosure.
27. The Commissioner does also consider that there is a strong public interest in 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 flow of information between charities and the Charity Commission would not be in the public interest.
28. 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 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

29. 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@hmcts.gsi.gov.uk

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

30. 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.
31. 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

Pamela Clements
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