

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 October 2021

Public Authority: The Charity Commission
Address: PO Box 211
Bootle
L20 7YX

Decision (including any steps ordered)

1. The complainant requested correspondence from four named individuals held by the Charity Commission containing allegations. The Charity Commission refused to confirm or deny whether the requested information was held under section 31(3), 40(5B) and 41(2) FOIA.
2. The Commissioner's decision is that the Charity Commission has correctly applied section 31(3) FOIA to refuse to confirm or deny whether the requested information is held.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 15 October 2020 the complainant made a request for the following information:

"The full disclosure of all correspondence containing allegations about the undersigned from the following individuals, all former officials of the [named charity] covering the period of 1 May 2018 to date.

[four named individuals]"

5. On 12 November 2020 the Charity Commission responded, it refused to confirm or deny whether the requested information is held under section 40(5B), 31(3) and s41(2) FOIA.

6. On 13 November 2020, the complainant requested an internal review.
7. On 11 December 2020 the Charity Commission provided the internal review. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 14 December 2020 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the Charity Commission was correct to refuse to confirm or deny whether the requested information was held under section 31(3), 40(5B) or 41(2) FOIA.

Reasons for decision

10. Section 31(1) of the FOIA states that:

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

11. Section 31(2) of the FOIA states that purposes referred to in the above sub-section are:

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise 2,

(f) – the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration.

12. 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)

13. Therefore a public authority can refuse to confirm or deny holding relevant information if to do so would risk undermining the ability of a regulator to go about its work.
14. The exemption can be engaged on the basis that disclosing the information either “would” prejudice the regulatory function, or the lower threshold that disclosure only “would be likely” to prejudice that function. For the Commissioner to be convinced that prejudice “would” occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of “would be likely to” occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
15. The Commissioner’s approach to the prejudice test is based on that adopted by the Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* EA/2005/0026 and 0030. This involves the following steps:
 - Identifying the “applicable interests” within the relevant exemption.
 - Identifying the “nature of the prejudice”. This means:
 - o Showing that the prejudice claimed is “real, actual or of substance”;
 - o Showing that there is a “causal link” between the disclosure and the prejudice claimed.
 - Deciding on the “likelihood of the occurrence of prejudice”.

The Charity Commission’s position

16. The Charity Commission is of the opinion that confirming or denying whether the requested information is held would be likely to prejudice its functions as cited in section 15 of the Charities Act. If the Charity Commission were to either confirm or deny that it held information pertaining to the request, members of the public or trustees of charities would be less likely to provide information to the Charity Commission for fear of disclosure, or reprisal from that disclosure. This in turn would impact its ability to identify and investigate apparent misconduct or mismanagement in the administration of charities and could prevent it taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.
17. The Charity Commission said that requested information concerns whether allegations were made to it by four named individuals which is clearly within the its regulatory remit.

18. The Charity Commission has determined that release of the information would be likely to prejudice its ability to carry out the functions set out in s31(2) (c) and (f). This lower threshold requires it to demonstrate that there is "a real and significant risk" of the prejudice occurring.
19. The Charity Commission is aware of many instances where it is informed by complainants that they would not have come forward with their complaint if they had known that their identity would have been revealed. The Charity Commission has worked hard to ensure that complainants feel confident in its handling of serious allegations. As an example, it has undertaken work recently to support whistleblowing. The Charity Commission provided the Commissioner with a link to a recent blog written by the Chief Executive Officer concerning this work.
20. The Charity Commission's strategic objectives include 'Dealing with Wrongdoing and Harm'. In this it identifies as a priority area that "Anyone who has serious concerns about the way a charity is being run should feel able to report these to the Charity Commission, confident that their concerns will be heard." Respecting confidences plays a significant part in people feeling able to report concerns.
21. The Charity Commission relies on people making complaints to it. Although it does have methods to proactively identify regulatory issues, the vast majority of cases of regulatory interest begin with a complaint to the Charity Commission. If it became known that the identity of the complainant or a person providing evidence to a complainant was routinely disclosed this would be likely to be prejudicial to the Charity Commission's ability to regulate effectively because it is highly likely it would be aware of fewer concerns of regulatory interest.
22. To be an effective regulator, those who have an interest in charities have to have confidence that the Charity Commission can handle sensitive information carefully. It relies on the voluntary disclosure of information to be able to regulate effectively. Therefore confirming or denying whether allegations were made by any of the four named individuals could impact on this confidence in the Charity Commission's ability to handle information appropriately. This would be likely to be prejudicial to the ability of the Charity Commission to regulate effectively.

The Commissioner's View

23. The Commissioner accepts that the Charity Commission cannot confirm or deny that it holds information within the scope of the request without revealing whether it had or had not received correspondence containing allegations from the four named individuals. She also accepts that such a confirmation or denial would be likely to prejudice the Charity Commission's function to ascertain whether regulatory action would be required and its function to effectively protect charities against misconduct or mismanagement
24. The Commissioner recognises that the Charity Commission relies upon individuals notifying it of any concerns, this is clear from the recent work it has undertaken to support whistleblowing and from its strategic objectives. If complainant's identities were made publicly available the Commissioner accepts this would pose a real and significant risk that individuals would not be as willing to come forwards in the future with concerns if they thought they may be identified as having made a complaint to the Charity Commission.
25. The Commissioner is therefore satisfied that the chance of prejudice to the relevant functions occurring is more than hypothetical and the harm identified is actual and of substance. Given that there is a clear causal link between the Charity Commission issuing a confirmation or a denial as to whether or not information is held and the potential harm, the Commissioner is satisfied that the exemption is engaged.

Public interest test

Public interest in favour of disclosure

26. The Charity Commission recognised that public authorities have a wider duty to be transparent and accountable for the decisions they make.
27. It also accepted that disclosure of this information would help to educate and inform the public by detailing how it handles regulatory complaints and concerns, providing a fuller picture of the Charity Commission's statutory functions and duties.

Public interest in favour of maintaining the exemption

28. The Charity Commission argued that there is a strong public interest in not disclosing information which would be likely to impede its ability to carry out its functions effectively and disclosing the identity of a complainant would be likely to be detrimental to the Charity Commission's ability to regulate effectively.
29. Furthermore it does not consider that the identity of a complainant assists the public to understand its regulatory position and handling of a case.

Balance of the public interest

30. The Commissioner considers that there is a public interest in disclosure of information which assists public understanding as to how the Charity Commission carries out its regulatory functions.
31. In this case confirming or denying whether the requested information is held would disclose whether or not four individuals made allegations to the Charity Commission. This would demonstrate to the public whether or not the Charity Commission were notified of allegations by this route i.e. whether a complaint was made by specific individuals. The Commissioner considers that this would only assist public understanding of how the Charity Commission exercises its functions in a very limited way.
32. On the other hand, confirmation or denial in this case would be likely to damage trust and confidence in individuals bringing complaints or allegations to the Charity Commission if they were concerned they may be publicly identified. The Commissioner considers that there is a significant public interest in preserving this trust and confidence so that the Charity Commission is able to exercise its relevant functions as effectively as possible.
33. On balance, in this case, the Commissioner considers that the public interest in favour of confirmation or denial is outweighed by the public interest in maintaining the exemption.

34. As the Commissioner has determined that section 31(3) was correctly applied in this case she has not gone on to consider the application of section 40(5B) and 41(2) FOIA any further.

Other matters

35. In this case the request asks for correspondence from four individuals containing allegations about 'the undersigned'. As the complainant is 'the undersigned', if any information were held, it would highly likely contain the complainant's own personal data. Moreover, confirmation or denial would disclose into the public domain whether allegations had been made about 'the undersigned'. For this reason, although it has not been applied by the Charity Commission, it is likely it would not have been obliged to confirm or deny whether the requested information was held under section 40(5A) FOIA. Section 40(5A) states that, "The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)". Section 40(1) states that "Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject". This is an absolute exemption and so there would be no need to consider the balance of the public interest.

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: 0300 1234504

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.

Signed.....

Gemma Garvey

Senior Case Officer

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF