

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 27 January 2021

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

Decision (including any steps ordered)

1. The complainant has requested information on the types and numbers of criminal record checks undertaken by the Charity Commission as part of assessing waivers from disqualification from acting as a trustee or senior manager of a charity. The Charity Commission withheld this information on the basis of section 31(1)(g) of the FOIA.
2. The Commissioner's decision is that the Charity Commission has correctly engaged section 31(1)(g) by virtue of section 31(2)(f) and the public interest favours maintaining the exemption. She requires no steps to be taken.

Request and response

3. On 31 January 2020 the complainant made a request to the Charity Commission in the following terms:

"Further to data that the Charity Commission provided in February 2019, I would like to know the following information, broken down by each of the last two years (01/02/2018-31/01/2019, and 01/02/2019-31/01/2020).

- 1. The number of waiver applications received, split between whether they relate to trustee positions, senior management positions or both, the number approved, the number refused and the number outstanding*
 - 2. The same breakdown as (1), but specifically in relation to waiver applications that relate to people with unspent convictions for specific offences*
 - 3. The same breakdown as (1), but specifically in relation to waiver applications that relate to people on the sex offenders register*
 - 4. The average length of time it took to make a waiver decision upon receipt of waiver application*
 - 5. The number of refusals relating to unspent convictions appealed through a) internal review and/or b) the First Tier Tribunal (charity)*
 - 6. The number of refusals relating to people on the sex offenders register appealed through a) internal review and/or b) the First Tier Tribunal (charity)*
 - 7. The type and number of criminal record checks carried out on receipt of each waiver application (for example to confirm that an applicant is in fact disqualified under the rules)"*
4. The Charity Commission responded on 26 February 2020 confirming that some information was held but that some information was being withheld under section 31 of the FOIA. The Charity Commission provided information/answered questions for parts 1-6 of the request but refused to provide the information at part 7 of the request under section 31(1)(g) of the FOIA.
 5. The complainant requested an internal review on 2 March 2020 detailing the reasons he considered the balance of the public interest had been wrongly determined by the Charity Commission.
 6. The Charity Commissioner conducted an internal review and responded on 25 March 2020 upholding its decision.

Scope of the case

7. The complainant contacted the Commissioner on 14 April 2020 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if the Charity Commission has correctly withheld the information requested at part 7 on the basis of section 31(1)(g) of the FOIA.

Reasons for decision

Section 31 – law enforcement

9. Section 31(1)(g) of the FOIA states that information is exempt if its disclosure 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).
10. The purposes listed in section 31(2) which the Charity Commission has cited are:
 - a) ascertaining whether any person has failed to comply with the law;
 - 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 in their administration.
11. In order for a prejudice based exemption such as section 31 to be engaged, there must be at least a likelihood that disclosure would cause prejudice to the interest or interests that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice-based exemption:
 - The harm the public authority states would, or would be likely to, occur if the information was disclosed must be relevant to the applicable interests protected by the exemption;
 - The public authority must be able to demonstrate there is a causal relationship between the potential disclosure of the information and the prejudice which the exemption is designed to protect. This prejudice must be real, actual or of substance; and
 - The public authority should establish whether the level of likelihood of prejudice it is relying on is the lower threshold of 'would be likely to prejudice' or the higher threshold of 'would prejudice' and be able to demonstrate this.
12. The Commissioner has first considered whether the Charity Commission is formally tasked with functions for any of the purposes set out in section 31(2).
13. In its submission to the Commissioner, the Charity Commission has provided some information on its statutory objectives and functions that are set out in sections 14 and 15 of the Charities Act 2011.
14. These objectives relate to increasing public trust and confidence in charities and promoting compliance by charity trustees with their legal

obligations in exercising control and management of the administration of their charities. The Charity Commission's functions include encouraging and facilitating the better administration of charities and identifying and investigating apparent misconduct or mismanagement in the administration of charities, and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.

15. The information at part 7 that has been withheld is the type and number of criminal record checks carried out on receipt of each waiver application. This is in relation to waivers from disqualification. The Charity Commission has explained that the waivers from disqualification service is available to individuals who wish to hold a trustee or senior management position at a charity and who would otherwise be disqualified from holding such a position on account of their criminal convictions or previous conduct. Sections 178 and 181 of the Charities Act 2011 are the relevant sections that detail the legal justification for this process.
16. Section 178 details the reasons why individuals would be disqualified from holding a trustee or senior management position at a registered charity, including being in possession of certain convictions which would bar an individual from holding that position. Further to this, section 183 of the Charities Act 2011 states that it may also be an offence for an individual to hold a position whilst disqualified.
17. Section 181 details how the Charity Commission may, upon application, decide to waive trustee disqualification in particular instances. The Charity Commissioner therefore asserts it has lawful powers to disqualify individuals from serving as trustees or senior managers in a charity and also has the power to waive the disqualification in certain circumstances.
18. In this case, the Commissioner has considered the application of section 31(2)(f) in the first instance as this relates to the protection of charities against misconduct or mismanagement in their administration which would appear to be most relevant in this case. Having considered section 14 and 15 of the Charities Act 2011 and sections 178 and 181, she is satisfied this sets out that the Charity Commission is formally tasked with ensuring that anyone appointed to trustee or senior management positions is fit to hold such a position.
19. The exemption provided by section 31(1)(g) is a prejudice based exemption and can be engaged on the basis of one of two levels of probability; that prejudice to the Charity Commission's functions either 'would' occur or 'would be likely' to occur.

20. The Charity Commissioner has indicated it is relying on the lower threshold that prejudice 'would be likely' to occur. For this to be the case there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
21. The Charity Commission has explained that it is able to grant waivers from disqualification based on the evidence it receives and identifies and that this comes from a number of sources including the individual themselves, charities, records of the Charity Commission's previous regulatory activity and intelligence it comes into possession of.
22. The Charity Commission has provided the Commissioner with detailed explanations of its intelligence gathering process and the resources it has available but as this information is not widely known outside of the Charity Commission, it is not included in this decision notice.
23. In terms of the prejudice to its function; the Charity Commission states that individuals will often be disqualified from trusteeship on account of criminal offences they have committed, including offences which could undermine public trust and confidence in charities, or offences which would lead to safeguarding risks if an individual was to serve as a trustee. If such individuals were to serve in these posts whilst considered unsuitable to do so there would be a significant degree of prejudice that could be caused to the Commission's ability to effectively perform its statutory functions of protecting charities from misconduct and/or mismanagement. The Commission states this would also be in breach of the disqualification requirement in charity law and it is therefore important the Commission is able to rely on its intelligence where it is considered there is a risk to a charity.
24. More specifically, in relation to the actual information requested, the Charity Commission considers that disclosing the number and type of criminal record checks it undertakes would be likely to prejudice the efficiency and effectiveness of the Commission in achieving its statutory objectives and functions. The Charity Commission explained this is because there is a real and significant risk that to disclose this information would constitute a 'tipping off' of the Charity Commission's processes and procedures, and this would therefore enable knowledgeable individuals to evade detection through an informed understanding of the type of criminal records checks the Commission undertakes in assessing waiver applications.
25. The Charity Commission argues that disclosing the 'type' of criminal record checks it undertakes would allow individuals to identify patterns underpinning the type of checks it carries out. This knowledge, the

Charity Commission argues, would encourage individuals who may be unsuitable or ineligible for a waiver to make an application, concealing criteria which would render them ineligible to serve on the basis that the Charity Commission would be unlikely to identify the conduct or an unspent conviction which would otherwise bar them from the role.

26. With regard to the prejudicial effect of disclosure on the 'number' of criminal record checks undertaken by the Charity Commission; it argues that if the number of checks undertaken was known to be low this would encourage individuals to apply for waivers from disqualification, concealing details of their relevant convictions or conduct, in the belief that there was only a low possibility the Charity Commission would identify a conviction or conduct which would deem them unsuitable or ineligible.
27. The result of this would be that individuals unsuitable for waivers from disqualification would be able to exploit the Charity Commission processes, through informed understanding of its intelligence procedures, to become trustees or senior managers of charities. This would pose a risk for the charity and their beneficiaries, in worst case scenarios this may result in individuals convicted of serious offences and who are unsuitable to be in a position of power, placed within a charity that may have vulnerable beneficiaries.
28. The Charity Commissioner considers that this would be likely to prejudice its ability to identify and investigate misconduct within charities and, more broadly, to uphold public trust and confidence in the sector on account of the ability individuals would have to evade scrutiny of their waiver application based on knowledge of the Charity Commission's intelligence checks.
29. Whilst the Information Commissioner recognises the Charity Commission's arguments with regards to its objective of increasing public trust and confidence in the charities sector, she notes that this objective does not fulfil any of the regulatory purposes listed in subsections a), c) or f) of section 31(2) of the FOIA.
30. The Commissioner has had sight of the withheld information and, as already stated, has also been given descriptions of the intelligence processes and procedures at the Charity Commission. The Charity Commission has provided clear arguments as to why it considers disclosing the type and number of criminal record checks it undertakes for waiver disqualifications would be likely to prejudice its function of protecting charities from misconduct or mismanagement.
31. The Commissioner accepts that the Charities Act 2011 gives the Charity Commission clear functions and statutory objectives and section 181

does give the Charity Commission the ability to waive trustee disqualifications, thereby giving the Charity Commission the ability to both disqualify trustees and waive disqualification. This is intended to protect charities from appointing unsuitable or ineligible trustees and if the appropriate scheme and checks did not exist, charities could be open and liable to misconduct from trustees who are unsuitable or have concealed information from them that may be relevant.

32. In order to make determinations the Charity Commission relies on its intelligence gathering and this comes from several sources and is dependent on various checks the Charity Commission can undertake. The Charity Commission has made it clear to the Commissioner that the extent, frequency and type of check is not information it makes freely available and if this is the case the Commissioner accepts that providing any insight into this process will have the prejudicial impact that the Charity Commissioner has argued.
33. The Commissioner considers that if substantial detail on investigation processes or intelligence gathering is placed in the public domain then there is a possibility that motivated individuals may find a way to use this information to circumvent checks or to evade detection. Whilst this is not a certainty there is a real and actual risk of this and as such, she accepts that the prejudice argued is of substance and the section 31(1)(g) exemption by virtue of section 31(2)(f) is engaged.
34. Section 31 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosing the information

35. The complainant argues that knowing about the types of checks the Charity Commission does would increase compliance. He argues that withholding the information is more damaging to public trust and confidence and that providing information on the types of checks the Charity Commission undertakes would increase trustee compliance.
36. The Charity Commissioner recognises that as a public authority it has a duty to be transparent and accountable for the decisions it makes and for how it uses public money. It therefore acknowledges there is a public interest in understanding how the Charity Commission undertakes its decision-making activities.
37. The Charity Commission also states that as a charities regulator it is committed to upholding and enhancing public trust and confidence in

the charity sector. It accepts that disclosing the information would inform and educate the public as to actions it takes to this end and this, in turn, would enable a more informed public debate on subjects such as charity safeguarding and rules around trustee disqualification.

Public interest in maintaining the exemption

38. The Charity Commission argues there is a strong public interest in having a regulator that is able to perform functions of regulating the charity sector efficiently and effectively. The disclosure of the requested information would enable individuals acting with malicious intent to subvert the regulatory processes and requirements in charity law through an awareness of the intelligence check processes. This would make it more difficult for the Charity Commission to identify non-compliance and misconduct within charities and would serve to encourage further misconduct if it became widely known that processes could be bypassed.
39. The Charity Commission states that it has limited resources and its intelligence function is essential for providing evidential support and enhancing the quality of decision-making. It argues that if the effectiveness of this evidence is compromised it will be less able to rely on intelligence information for its decisions. A compromised intelligence stream would make it more difficult to target resources effectively towards high risk instances of misconduct by charities.

Balance of the public interest

40. The Commissioner has considered the public interest arguments for and against disclosure. She notes there is a public interest in the general openness, transparency and accountability of public authorities. She also accepts that providing the public with any information on the Charity Commission's decision-making would assist the public in evaluating the effectiveness of the regulator and determining if its processes are robust.
41. The Commissioner also adds some weight to the argument that disclosure of the information may, in some cases, assist in trustee compliance as those attempting to circumvent checks may become aware that this is not likely to succeed.
42. Conversely, the risk that some motivated individuals may use the information, if it were disclosed, to evade processes and checks cannot be ignored and must also carry some weight.

43. In accepting the exemption is engaged the Commissioner has already accepted there is a risk of prejudice to the functions of the Charity Commission through disclosure of the requested information. There is a significant public interest in ensuring the Charity Commission, with its statutory functions under the Charity Act 2011 to ensure that charities are regulated, can operate efficiently and effectively, something the Commissioner has determined would be negatively affected by disclosure. To outweigh this the Commissioner would need to be persuaded of compelling arguments for disclosure and she does not consider that there are such arguments in this case.
44. The Commissioner has therefore concluded that, in all the circumstances, the weight of the public interest lies with maintaining the exemption under section 31(1)(g) by virtue of section 31(2)(c).

Right of appeal

45. 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

46. 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.
47. 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

Jill Hulley
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