

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 September 2008

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

Summary

The complainant requested information the Charity Commission held in relation to its inquiry into the Mariam Appeal. This request was refused on the basis that the information was exempt from disclosure by virtue of the exemptions contained at sections 27, 31, 32, 40, 41 and 42 of the Act. The Commissioner has concluded that all of the requested information is exempt by virtue of the sections 32(2)(a) and 32(2)(b). However, in handling this request the Commissioner has also concluded that the public authority failed to provide a refusal notice compliant with sections 17(1)(b), 17(1)(c) and 17(3) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 8 June 2007 the complainant submitted the following request to the public authority:

'Please would you let me know in writing if you hold information of the following description:

Information concerning:

The inquiry into the Mariam Appeal which took place between December 2005 and April 2007, its results on June 8 2007

If any part of the information requested is covered by one or more of the absolute exemptions in the Act please treat this request as a request for that part of the information which is not covered by the absolute exemption.

If you need further details in order to identify the information requested or a fee is payable please let me know as soon as possible'.

3. The Charity Commission responded to this request on 4 July 2007 and confirmed that it held the information requested but it considered the information to be exempt. The refusal notice explained that a number of exemptions applied, namely: section 27 (international relations); section 31 (law enforcement); section 32 (court records); section 40 (personal data); section 41 (information provided in confidence) and section 42 (legal professional privilege).

4. On 4 July 2007 the complainant asked the Charity Commission to conduct an internal review into its decision to refuse to disclose any information in response to his request.

5. The Charity Commission wrote to the complainant on 11 July 2007 and explained that:

'The Commission's review procedures are designed for the applicant to provide either some further information, or a reasoned argument, in support of their request for review. Your letter of 4 July, though, contains neither of these.

Please let me know, therefore, on what grounds you feel that the decision was incorrect, and I will arrange for a review to be carried out by a Commission officer who has had no previous involvement in the matter'.

6. The complainant contacted the Charity Commission again on 16 July 2007 and provided a detailed explanation as to why he believed the exemptions had been mis-applied, focusing on the public interest arguments supporting disclosure of this information.

7. The Charity Commission contacted the complainant on 3 August 2007 and explained that an internal review had been conducted and the original decision to withhold the information requested had been upheld.

The Investigation

Scope of the case

8. On 1 November 2007 the complainant contacted the Commissioner to complain about the Charity Commission's decision to withhold the information he requested.

Chronology

9. On 30 June 2008 the Commissioner contacted the Charity Commission and asked to be provided with a copy of the information falling within the scope of this request along with a detailed explanation as to why it considered the various exemptions listed in paragraph 3 apply.
10. The Charity Commission responded to this letter on 14 July 2008 and highlighted two issues. Firstly, the Charity Commission explained that there was a significant volume of information falling within the scope of the complainant's request, approximately 20 lever arch files, and therefore it was not practical to provide the Commissioner with copies of all of this information. Rather the public authority suggested that it would seem more practical for a representative of the Commissioner's office to visit the public authority's office in order to view the relevant information in situ. Secondly, the public authority suggested that it may be possible for the Commissioner to reach an opinion as to whether the requested information was exempt or not without having sight of the information. This was because the public authority considered **all** of the information falling within the scope of the request to be exempt from disclosure on the basis of section 32(2) of the Act and it considered it to be a question of the law whether it was correct to rely on this exemption and such a question could arguably be answered without having to view the information itself.
11. The Commissioner contacted the public authority on 24 July 2007 and suggested that it may be possible for him to reach a decision as to the applicability of section 32 without sight of the requested information but in order for him to do so the Commissioner asked the public authority to clarify a number of details with regard to its reliance on the section 32 exemption.
12. The public authority provided this clarification on 31 July 2007.

Analysis

Exemption

13. The parts of section 32 of the Act relevant to this request state that:

'32(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) *any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,*
- (b) *any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or*
- (c) *any document created by-*
 - (i) *a court, or*
 - (ii) *a member of the administrative staff of a court,*

for the purposes of proceedings in a particular cause or matter.

(2) Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or*
- (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.*

(4) In this section-

- (a) "court" includes any tribunal or body exercising the judicial power of the State,*
- (b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,*
- (c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and*
- (d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies.'*

The public authority's position

14. The public authority has argued that all of the information falling within the scope of the request is exempt by virtue of the sections 32(2)(a) or 32(2)(b).
15. The public authority has explained that the inquiry it conducted into the Mariam Appeal was conducted on the basis of its powers contained in the Charities Act 1993 and it believes that this inquiry falls within the scope of the definition of an 'inquiry' as defined at section 32(4)(c) of the Act.
16. With regard to the requirement of section 32(2) that information is exempt if it is held 'only by virtue of being contained in' a document relating to the inquiry, the public authority has explained that it is satisfied that all of the information that it holds which is the subject of this request is only held by virtue of being contained in documents acquired or created for the purposes of this particular inquiry.
17. The public authority's position is that all of the information falling within the scope of this request is exempt from disclosure on the basis of section 32 and therefore there is no need for the Commissioner to consider whether the information is also exempt on the basis of the other exemptions listed in paragraph 3.

The Commissioner's position

Is the Mariam Appeal inquiry one which falls within section 32(4)(c)?

18. The Commissioner agrees with the public authority that its inquiry set up to investigate the Mariam Appeal was one that was set up by a provision contained

in an enactment, namely section 8 of the Charities Act 1993 and this falls within the definition of section 32(4)(c). Section 8(1) of this piece of legislation states that:

*'The Commissioners may from time to time institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes, but no such inquiry shall extend to any exempt charity.'*¹

19. The Commissioner notes that the Mariam Appeal was not in fact a registered charity during the period in which the inquiry took place (the Appeal's failure to register as a charity was one of the reasons the inquiry was launched). Nevertheless, as the inquiry concluded that the Mariam Appeal should have registered with the public authority the Commissioner believes that it is reasonable to conclude that this particular inquiry was one that was being conducted in line with the powers conferred on the public authority by section 8(1) of the Charities Act 1993.

Does the information fall within section 32(2)?

20. The Commissioner is satisfied that the information held by the public authority in relation to the inquiry was either provided to it by a third party and therefore falls within the scope section 32(2)(a), or was created by it for the purposes of the inquiry and therefore falls within the scope of section 32(2)(b). In the Commissioner's opinion the information held by the public authority in relation to the inquiry could not fall outside the scope of either of these two sub-sections.

Is the information 'only held by virtue of being contained in' the inquiry documents?

21. The Commissioner is satisfied that the information falling within the scope of this request is only held by virtue of being contained in the inquiry documents. That is to say, the information is not held by the public authority for any of other purpose. The Commissioner's reason for reaching this conclusion is that prior to the commencement of the inquiry, the public authority did not have any previous contact with the Mariam Appeal and therefore did not receive any documents or create documents about it. This was because although the inquiry concluded that the Mariam Appeal should have registered with the public authority in order to comply with the Charities Act, as noted above, it had not. Consequently, as the Mariam Appeal had not registered with the public authority prior to the commencement of the inquiry, the public authority it did not receive or create any data about the organisation.
22. A theoretical example illustrates why the Commissioner considers this to be a logical conclusion to reach: if the public authority had conducted an inquiry using its section 8 powers under the Charity Act 1993 into a particular charity, for

¹ Charities Act 1993 http://www.opsi.gov.uk/Acts/acts1993/ukpga_19930010_en_1

arguments sake called Charity X, it is likely that information contained within the inquiry files would also be held elsewhere by the public authority. This is because Charity X would have provided various documents to the Charity Commission as part of its registration process – under the terms of the Charities Act 1993 all charities have to register with the Charity Commission – as well as providing the Charity Commission with documents in order to comply with other requirements of charity law, e.g. all charities whose annual income is over £10,000 have to send a copy of their Trustees annual report to the public authority. Moreover, the Charity Commission will have inevitably created various documents and pieces of information in regulating Charity X before the specific inquiry began.

23. However, with regard to the Mariam Appeal, as the Commissioner noted above, one of the issues that the public authority investigated was the Appeal's failure to previously register with it as a charity. Therefore, if the public authority did not have any substantial interaction with the Mariam Appeal prior to the commencement of the section 8 inquiry itself any information held on the inquiry files will not also be held elsewhere by the Charity Commission, in contrast to the position with the illustration above of an inquiry into the theoretical charity, Charity X.
24. The Commissioner is therefore satisfied that all of the information falling within the scope of the request is exempt on the basis of sections 32(2)(a) and 32(2)(b). As section 32 is an absolute exemption, there is no need for the Commissioner to consider the public interest test set out at section 2 of the Act.
25. Furthermore, on the basis of this conclusion the Commissioner does not consider it necessary to reach a decision as to the applicability or otherwise of the other exemptions that the public authority also relied upon to withhold the requested information.

Procedural matters

26. In its refusal notice the public authority simply informed the complainant that it was relying on a number of sections of the Act to refuse to disclose the information he had requested, i.e. 27, 31, 32, 40, 41 and 42. In order to comply with the requirements of section 17(1)(b) the public authority should have in fact specified in its refusal notice the relevant sub-sections of the various exemptions it was seeking to rely on, e.g. section 27(1). By failing to cite these specific sub-sections in its refusal notice the Commissioner believes that the public authority breached 17(1)(b) of the Act. Furthermore, although the public authority explained why it considered the exemption within section 31 to apply, its refusal notice did not explain why it considered the remaining exemptions to be applicable. By failing to provide this explanation the public authority breached section 17(1)(c). Finally by failing to explain why it considered the public interest test favoured withholding the information under these further exemptions, the public authority also breached section 17(3).

The Decision

27. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The public authority was correct to withhold the information requested on the basis that it was exempt from disclosure by virtue of section 32(2)(a) and 32(2)(b).

28. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority breached sections 17(1)(b), 17(1)(c) and 17(3) for the reasons outlined in paragraph 26.

Steps Required

29. The Commissioner requires no steps to be taken.

Other matters

30. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
31. The Commissioner notes the Charity Commission did not initially instigate its internal review procedure following receipt of the complainant's letter of 4 July 2007 (see paragraph 5). Rather it informed the complainant that in order for an internal review to be conducted, he must provide an explanation detailing 'on what grounds you feel that the decision was incorrect'. The complainant subsequently did so and in due course was provided with the outcome of the internal review.
32. The Commissioner notes that the Charity Commission's suggestion that it would only conduct an internal review if the complainant provided grounds for *why* such a review was justified does not comply with the desirable practice for complaints procedures set out in the Section 45 Code of Practice.² Paragraph 38 of the Code of Practice states:
- 'Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint....These communications should be handled in accordance with the authority's complaints procedure, even if, in the case of a request for information under the general rights of access, the applicant does not expressly state his or her desire for the authority to review its decision or its handling of the application.'
33. The Commissioner would expect that the Charity Commission's handling of requests for internal reviews complies with the guidance outlined in the Code in the future.
34. Finally, the Commissioner notes that in the particular circumstances of this case he has not considered it necessary to view the information that has been withheld. However, the Commissioner wishes to emphasis to all public authorities that in dealing with complaints he has received under section 50 of the Act the Commissioner will usually require sight of the information withheld by public authority.

² Section 45 Code of Practice <http://www.foi.gov.uk/reference/impref/codepafunc.htm>

Right of Appeal

35. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 9th day of September 2008

Signed

**Gerrard Tracey
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 32(1) provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by-
 - (i) a court, or
 - (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter.”

Section 32(2) provides that –

“Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or
- (b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.”

Section 32(3) provides 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 this section.”

Section 32(4) provides that –

“In this section-

- (a) "court" includes any tribunal or body exercising the judicial power of the State,
- (b) "proceedings in a particular cause or matter" includes any inquest or post-mortem examination,
- (c) "inquiry" means any inquiry or hearing held under any provision contained in, or made under, an enactment, and
- (d) except in relation to Scotland, "arbitration" means any arbitration to which Part I of the Arbitration Act 1996 applies.