

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 July 2013

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

Decision (including any steps ordered)

1. The complainant has requested correspondence between the Charity Commission and Pearl of Africa Child Care Ltd (PoACC) between 15 December 2011 and 10 February 2012. The Charity Commission provided the complainant with some of the information he requested. It withheld the remaining information under section 31(1)(g) with subsection (2) (a), (b), (c), (f), (g) and (h) and section 41(1) of the Freedom of Information Act 2000 (FOIA). During the course of the Commissioner's investigation, the Charity Commission also said that section 40(2) FOIA was applicable to some of the withheld information.
2. The Commissioner's decision is that the Charity Commission has correctly applied section 31(1)(g) with subsection 2(f) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 3 December 2012, the complainant wrote to the Charity Commission and requested information in the following terms:

"Thank you for your response to my FOI request concerning Pearl of Africa Child Care Ltd (no: 1122809). I understand that you are unable to meet my request due to the volume of information involved. I am therefore now modifying my FOI request as follows.

Please can you supply the following information:

All correspondence (emails and letters including any attachments) between the Charity Commission and the above named charity between 15th December 2011 and 10th February 2012."

5. When the Charity Commission responded to this request it disclosed some of the requested information to the complainant. It said that some of the information requested was however exempt under sections 21, 31 and 41 FOIA.
6. The Charity Commission provided an internal review on 16 January 2013 in which it maintained its original position in relation to section 31 and 41(1) FOIA. It confirmed the subsection of section 31 FOIA which was applicable in this case was section 31(1)(g) with (2)(a)-(c). It disclosed the information which was originally withheld under section 21 FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 7 March 2013 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, the Charity Commissioner confirmed that section 31(1)(g) with subsection 2(f), (g) and (h) were also applicable.
8. The Commissioner has considered whether the Charity Commission was correct to withhold the information under section 31(1)(g) with subsection 2(a)-(c) and (f)-(g) and section 41(1) FOIA.

Reasons for decision

9. 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 the functions set out in 31(2) of FOIA.
10. 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):
 - (a) Ascertaining whether any person has failed to comply with the law;

- (b) Ascertaining whether any person is responsible for any conduct which is improper;
 - (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.
11. 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.
 12. 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.
 13. 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.
 14. 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.
 15. 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?
 16. 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.

17. The Charity Commission has explained that part its role as regulator is to ensure that the trustees are discharging their legal duties and responsibilities as trustees, including responding appropriately to, and effectively managing, any serious incidents that arise in their charity. Reporting serious incidents to the Charity Commission demonstrates that a charity has identified a risk and is taking appropriate action to deal with it. The information requested in this case constitutes part of the material obtained and created by PoACC in the form of a serious incident report (SIR) in order to provide information to the Charity Commission in its role as regulator of charities.
18. Therefore whilst the role of the Charity Commission is varied, it is clear that it includes investigating potential mismanagement at a charity.
17. 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. The Charity Commission has explained that in this case, the issues of concern arose in late 2011/ early 2012. It acknowledged that it could be suggested that the release of information about past events would not be as likely to prejudice the Charity Commission's functions as some time has passed since the matters referred to in the SIR took place. However it explained that receipt of the SIR in this case was relatively recent and matters relating to the issues contained within it may still be the subject of ongoing inquiries although not necessarily inquiries by the Charity Commission. Furthermore it argued that the fact that the information was provided in a SIR remains relevant notwithstanding any time that has elapsed. It said that the Charity Commission must be able to satisfy charities that it can be relied upon to withhold information, including confidential information, from routine disclosure to the world. It said that disclosure of this confidential information remains relevant to the exercise of its functions.
18. In this case, from the information which was disclosed to the complainant, it appears that this particular SIR was concluded by the Charity Commission back in February 2012. Whilst the Commissioner considers that prejudice of this kind is more likely to occur if an investigation is still ongoing, in this case at the time the request was made the investigation had been completed relatively recently (approximately 9 months previously). The Charity Commission has suggested that the issue may potentially continue to be under

investigation by other bodies, however the Commissioner does not consider that this would be relevant to establish the criteria set out at section 31(2)(f) FOIA. Whilst the Commissioner considers that the fact that the investigation was not ongoing at the time of the request may weaken the likelihood of the prejudice occurring to some extent, he has gone on to consider the nature of the information and in particular the disruption to the flow of this type of information between the Charity Commission and the charities it regulates, if it were to be disclosed.

19. 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 its 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.
20. The Charity Commission argued that if it became known that it disclosed information provided to it as part of a SIR this would be very likely to cause charities (and other organisations or individuals) to restrict the material that they provide to the Charity Commission. It 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 charities to make reports of serious incidents, so that it can identify regulatory issues within charities. It said that it would be difficult for the Charity Commission to become aware of all relevant regulatory issues in charities if trustees and other parties were not prepared to disclose information, including confidential information, voluntarily.
21. 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 to voluntarily report to it serious incidents which may have occurred. It explained that charities acting properly may have cause to disclose a series of SIR's. This mechanism is a way of alerting the Charity Commission to matters that may be of regulatory concern but which do not require action on the part of the Charity Commission, or on the part of the charity. Alternatively it said that a SIR may result in no action on the part of the Charity Commission because it can be ascertained from the SIR that appropriate steps are being taken, or the appropriate authorities have been informed and are proceeding with their own inquiries. Finally it acknowledged that a SIR might indicate misconduct that requires the Charity Commission's immediate intervention and use of its powers and it confirmed that such action would be recorded in the Charity Commission's published reports and

its policy to notify, via its website, when a Section 46 Inquiry has been opened.

20. 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.
29. 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 on a voluntary basis. 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 the Charity Commissioner would be hampered in carrying out its functions if it had to issue an order every time it required information from a charity.
30. 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
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"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."
31. 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

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

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

32. 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.
33. It also acknowledged that it has an important public role as regulator in demonstrating to the public that charities and their assets are being properly managed and protected. It confirmed therefore that there is a public interest in public money being properly protected.
34. It acknowledged that the complainant had argued that there was a strong public interest in disclosure of the requested information in this case as the charity concerned had had to make previous SIRs to the Charity Commission. However as explained above, the Charity Commission has stated that there may be a number of reasons why a SIR is made and it does not necessitate that there has been any misconduct.
35. 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

34. The Charity Commission has argued it is less likely to be able to effectively ensure that public money is properly protected if its initial assessment work is compromised by curtailment of voluntary disclosure. It said that this would not be in the public interest.
35. It said that disclosure of the withheld information relating to the SIR would be likely to prejudice its ability to gather information and evidence which would have a negative impact upon its ability to carry out its statutory functions.

Balance of the public interest

36. 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 assuring 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.

37. The Commissioner does also consider that there is a strong public interest in not 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 voluntary flow of information between charities and the Charity Commission would not be in the public interest.
38. 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

39. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

40. 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.
41. 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

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