

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 February 2017

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested correspondence relating to the liquidation of Kids Company. The Cabinet Office refused to provide what it held within the scope of the request citing section 43 (commercial interests) and section 41 (confidential information). At internal review, it introduced also reliance on section 31 (law enforcement).
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 31(1)(g) as its basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 1 March 2016 the complainant requested information of the following description:

***"Keeping Kids Company Co No 03442083 in liquidation
5390/2515 (Company)"***

I am writing to make an open government request for all the information to which I am entitled under the Freedom of Information Act 2000.

Definitions:

Correspondence means and includes: Email, text, Instagram, whats app and on any and all media whatsoever

Cabinet Office means and includes: Prime Minister's Office, other relevant Ministerial Departments, Charity Commission, Crown Prosecution Service

Please send me:

1. A copy of the grant which Government made in July 2015 to the Company(Grant).
2. Correspondence between Insolvency Service, Company, and Cabinet Office concerning repayment and denial of repayment of the Grant and the award of the Grant.
3. Correspondence between Cabinet Office Company [sic] and Insolvency Service concerning attempt to obtain repayment of the Grant.
4. Correspondence by Cabinet Office with staff of the Company including Camila Batmanghelidjh, the Trustees whether collectively or individually and advisers on their behalves.

I would like the above information to be provided to me as ***paper copy and electronic copy.***

If this request is too wide or unclear, I would be grateful if you could contact me as I understand that under the Act, you are required to advise and assist requesters. If any of this information is already in the public domain, please can you direct me to it, with page references and URLs if necessary.

If the release of any of this information is prohibited on the grounds of breach of confidence, I ask that you supply me with copies of the confidentiality agreement and remind you that information should not be treated as confidential if such an agreement has not been signed."

5. On 22 March 2016, the Cabinet Office responded. It said that it did not hold information held by other Ministerial Departments or the Charity Commission or the Crown Prosecution Service. It refused to provide what it did hold within the scope of the request. It cited the following exemptions as its basis for doing so:
 - Section 43(2) (commercial interests exemption)
 - Section 41(1) (information held in confidence)
6. The complainant requested an internal review on 22 April 2016. The Cabinet Office sent them the outcome of its internal review on 6

September 2016. It upheld its original position and added that it could rely on section 31(1)(g) ((31(2)(g) refers), in respect to some of the information that it held in respect of the request.

Scope of the case

7. The complainant contacted the Commissioner on 6 August 2016 to complain about the way their request for information had been handled. The complainant had been in correspondence with the Commissioner about a protracted delay on the Cabinet Office's part in conducting an internal review. The Cabinet Office noted that the complainant had not used the address it had given to the complainant for requesting an internal review which may have contributed in part to the delay.
8. The Commissioner has considered whether the Cabinet Office is entitled to rely on the exemptions it has cited as its basis for refusing to provide the requested information.

Reasons for decision

9. In response to the Commissioner's enquiries, the Cabinet Office explained that it was relying on section 31(2)(a), (b) and (d) in respect of all the information rather than 31(2)(g) as previously cited. In other words, it is relying on section 31(1)(g) by virtue of 31(2)(a), (b) and (d). It explained that, in addition, it was relying on section 41(1) and/or section 43(2) for some of the information as well.
10. The Cabinet Office provided the following background information to assist the Commissioner with her investigation:

"The charity Keeping Kids Company (widely referred to as "Kids Company") was founded in 1996. It provided support to young people, mainly through its projects in London and Bristol. Most children and young people using its services referred themselves directly to Kids Company, which had a policy not to turn away any child seeking help. The charity was funded through private donations and, for much of its history, received grants from central government. In June 2015 there was a Cabinet Office ministerial direction to award a grant of £3 million to Kids Company. The charity had already received a grant payment of £4.3 million for 2015-16. In August 2015 Kids Company closed and filed for insolvency."
11. It added that:

“On 5 August 2015 the charity ceased operations and announced it would begin the process of placing itself into compulsory liquidation. On 20 August 2015, a winding-up order against Kids Company was made at the High Court, on the petition of Kids Company presented on 12 August 2015. On the making of the winding-up order, the Official Receiver was appointed, and one of the Official Receivers [name provided] – was assigned as the liquidator of the charity. On 12 August the Charity Commission announced it was commencing a statutory inquiry into Kids Company, but that the Official Receiver’s investigation would take precedence.”¹

12. The Commissioner accepts this background detail as correct.
13. There have been a number of investigations/inquiries in relation to the funding and subsequent closure of Kids Company by the National Audit Office, the Public Accounts Committee and the Public Administration and Constitutional Affairs Committee. All of these bodies have published their findings.
14. There are however ongoing investigations by the Official Receiver (OR) and the Charity Commission (CC). The CC’s investigation will address concerns about the administration, governance and financial management of Kids Company, and identify wider lessons for other charities and trustees. The OR has a statutory duty to identify the cause of failure and report on the conduct of the charity’s directors.

Section 31(1)(g)

15. The Commissioner first considered whether the Cabinet Office was entitled to rely on the exemption at section 31(1)(g).

16. The exemption states:

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

17. The public authority considers that the relevant purposes are those specified in sections 31(2)(a), (b) and (d) which respectively state:

¹ This is supported by a public statement of the Charity Commission
<https://www.gov.uk/government/news/new-charity-investigation-kids-company>

"..the purpose of ascertaining whether any person has failed to comply with the law.."

"..the purpose of ascertaining whether any person is responsible for any conduct which is improper.."

"..the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on.."

18. The Cabinet Office reiterated that it held no CC information as explained in its refusal notice of 22 March 2016. However it did hold information relating to the OR. It drew attention to an earlier FOIA case² from November 2016 which was about access to broadly similar information. It also drew attention to OR's concerns expressed in writing regarding requests for access to material it was considering as part of an on-going investigation.
19. The Cabinet Office acknowledged that it was relying on the lower threshold of likely prejudice in section 31. It is seeking to argue that prejudice would be likely to occur rather than seeking to argue that prejudice would occur. It asserted that the OR's activities clearly fell within the scope of section 31(2)(a), (b) and (d) in the circumstances of this case and that prejudice to OR's activities would be likely to occur. In particular, there were genuine concerns that disclosure of the requested information would be likely to inhibit the responses provided by third parties during the OR's investigation.
20. In order for prejudice based exemptions such as those contained within sections 31(1)(g) and 31(2)(a), (b) and (d) to be engaged, the Commissioner considers that three criteria must be met.
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is

² https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625399/fs_50606089.pdf

designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, the Commissioner considers that this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
21. The Commissioner has read the withheld information and has considered the submissions of both parties. She has also considered the previous decision notice that is referred to in Note 2 although she is not bound by it.
 22. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Cabinet Office clearly relates to the interests which the exemptions cited above are designed to protect.
 23. The Commissioner is satisfied that the prejudice alleged by the public authority is real and of substance, and there is a causal relationship between the disclosure of the withheld information and the prejudice which the exemptions are designed to protect. The information in question falls clearly within the scope of the request. It is correspondence between relevant parties on the subject of the awarding of a grant and the attempt to recover the grant. The Commissioner is entirely satisfied that this is information which the OR needs for their investigation.
 24. However, the Commissioner must establish whether disclosure would be likely to result in the prejudice alleged (ie the third criterion).
 25. Having inspected the withheld information, the Commissioner is satisfied that the public authority was correct to conclude that its disclosure would be likely to prejudice the OR's on-going investigations (pursuant to the compulsory liquidation of Kids Company) because it might inhibit the provision of full and frank information to the OR. While the charity's officers could be compelled to cooperate with the OR by requiring them to provide information to assist with the investigations, the officers could be inclined to withhold information or be less candid with investigators if sensitive information pertinent to the investigations is released to the public before they have been given the opportunity to defend themselves against possible accusations. This would affect the OR's

ability to conduct their on-going investigations of the charity effectively as well as their ability to resolve the matter using all of the options available to them.

26. Therefore, in the circumstances, especially in view of the high profile nature of the case, the Commissioner considers that disclosing the withheld information would indeed pose a real and significant risk of prejudice to the on-going investigations by the OR. She consequently finds that the public authority was entitled to engage the exemptions at sections 31(1)(g) by virtue of 31(2)(a), (b) and (d).
27. The complainant is sceptical as to whether the Cabinet Office can claim this exemption when it is the OR which is conducting the relevant investigation. The Commissioner would draw attention to the wording of section 31(1)(g) which states that information is exempt under section 31 if disclosure would be likely to prejudice “the exercise by any public authority [the Commissioner’s emphasis] of its functions for any of the purposes specified in subsection [31](2). The Commissioner is satisfied that the OR is a public authority which is entitled to conduct an investigation within the scope of section 31(2)(a), (b) and (d).³ She is also satisfied that the Cabinet Office holds information relevant to that investigation and that it is co-operating with the OR in this matter. This is evidenced by the copy correspondence that the Cabinet Office has provided to the Commissioner on the subject of disclosing the requested information.

Public interest test

28. The exemptions in question are, however, subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore also considered whether in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosing the withheld information

29. The Cabinet Office acknowledged that there is a general public interest in openness in government, and recognised that this increases trust in and engagement with the government. It also acknowledged that there are a considerable number of people, such as donors and employees,

³ <https://www.gov.uk/government/news/kids-company-information-for-employees-and-creditors>

who have an interest in the events at Kids Company which led up to it being placed into compulsory liquidation.

30. The complainant has drawn attention to the negative consequences of the closure of Kids Company. While the impact on communities and individuals who used the services of Kids Company has received media attention, the impact on former employees is also an important factor. The complainant argued that there is a strong public interest in having a high regard for this factor when considering disclosure. The complainant set out a number of points regarding the risk to reputation and the difficulties of gaining a new job that some employees have faced. Continued uncertainty and what the complainant sees as a lack of transparency about the closure of Kids Company only adds to these difficulties.

Public interest arguments in favour of maintaining the exemption

31. The public authority has argued that there is a strong public interest in the ability of the OR to conduct their investigations into the circumstances surrounding the compulsory liquidation of Kids Company. It argued that it would not be in the public interest for these very significant investigations to be impeded by or otherwise affected by premature disclosure of the withheld information particularly because in its view, there is already a significant amount of information in the public domain regarding the matter.
32. It argued that disclosure in the circumstances of this case would prejudice the OR's investigative functions more generally as responses in relation to similar investigations could be tentative or less full and frank and that would not be in the public interest.

Balance of the public interest arguments

33. Given the events leading up to the liquidation of Kids Company, the Commissioner considers that there is a strong public interest in disclosing the withheld information in light of the amount of public money awarded to the charity just before it filed for insolvency. It is also in the public interest to understand fully the extent to which due diligence was exercised before £3 million additional grant was awarded to the charity given the fact that it filed for insolvency two months after the additional grant was released. The Commissioner also gives weight to the difficulties that may be faced by former employees of Kids Company where there is any uncertainty about the closure of that charity.
34. The Commissioner notes that there have already been a number of investigations and inquiries which have shed some light on this matter.

Nevertheless, the Commissioner considers that disclosure of the withheld information would enhance public understanding on the very important question of whether public funds were used correctly. It would also bring further clarity to any misunderstandings that have arisen and which have had a negative consequence for former employees of the charity.

35. The public interest in releasing the withheld information however has to be balanced against the significant public interest in withholding the information, in the Commissioner's view. She considers that in the circumstances, there is a stronger public interest in maintaining the exemption given the real and significant risk it would pose to the on-going investigations by the OR. It is certainly not in the public interest to impede the ability of the OR to carry out effective investigations in order to address the very important concerns about the administration, governance and financial management of Kids Company, and identify wider lessons for other charities.
36. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemptions is significant and outweighs the public interest in disclosing the withheld information. She has reached this view with particular regard to the fact that the investigation was ongoing at the time of the request. Where the investigation is concluded and there are no other live investigations on this subject, the Commissioner may reach a different view depending on the prevailing circumstances.
37. In view of her decision that the public authority was entitled to rely on the exemptions pursuant to section 31(1)(g), the Commissioner has not considered the applicability of the remaining exemptions in dispute.

Right of appeal

38. 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

39. 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.
40. 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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