

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 August 2017

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

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to a complaint he made to the Charity Commission about a particular charity.
2. The Commissioner's decision is that the Charity Commission has correctly applied section 31(1)(g) with subsection 2(f) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

#### Background

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4. The complainant was a member of a charity for a number of years and had held a number of administrative positions. In 2015 the complainant resigned from the charity. He subsequently made a number of complaints to the Charity Commission including complaints concerning safeguarding, accounts failings and a failure to lodge the Charity's governing document with the Charity Commission (Regulatory Issues).
5. The complainant considered that the Charity Commission had not acted properly in relation to his complaints and he complained to the PHSO. Prior to this the Charity Commission had responded to the complaints and advised that it had no role in the issues raised apart from seeking an explanation from the charity in relation to regulatory issues.

## Request and response

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6. On 23 December 2016, the complainant wrote to the Charity Commission and requested information in the following terms:
  1. *Why the Commission told the Parliamentary Ombudsman that it would be writing to me with an explanation of all its decisions and now say that it cannot do this; and*
  2. *How the charity said they were going to 'manage the reputational risks'.*
7. On 25 January 2017 the Charity Commission responded. It explained that it did not advise PHSO in the terms the complainant set out, but that it would write to him with its conclusions and outcome.
8. With regard to the second part of the request the Charity Commission refused to provide the requested information citing section 31(1)(g) of the FOIA as its basis for doing so.
9. Following an internal review the Charity Commission wrote to the complainant on 24 February 2017 upholding its original position.

## Scope of the case

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10. The complainant contacted the Commissioner on 24 February 2017 to complain about the way his request for information had been handled.
11. The Commissioner notes that the complainant also made a Subject Access Request under the Data Protection Act for the same information. A complaint in respect of this has been dealt with under the DPA and does not form part of this decision notice.
12. On 6 June 2017 the complainant wrote to the Commissioner again stating he was concerned that she did not seem to be addressing his concerns about the Charity Commission's refusal to provide him with reasons why they did not follow their own published guidance.
13. It is not within the Commissioner's remit to comment on a public authority's adherence to its guidance other than that associated with the legislation it oversees.
14. During the course of the Commissioner's investigation the Charity Commission wrote to the complainant again on 13 July 2017 and disclosed some further information. However, it further stated that section 40(2) (third party personal data) and section 41 (information

provided in confidence) also applied to the remaining withheld information.

15. Following this disclosure the complainant wrote to the Commissioner again. He stated *"they do not scratch the surface of the information I requested from them"*. The complainant further stated that one of the questions he originally asked was how the Charity Commission verified any information it received from the charity in response to his complaints. He did not consider that the additional disclosed information made any attempt to verify information the e-mails referred to. This then raised further concerns that the Charity Commission may have been 'negligent' concerning the various other issues he reported to them.
16. The Commissioner is not in a position to challenge the veracity of the information provided to her in response to her investigation. The Commissioner's powers allow her to request copies of all the withheld information and she expects that a public authority will provide this to her. It is not within her remit to then go onto verify the quality or accuracy of the information provided.
17. With regard the specific issue raised by the complainant, the Commissioner is satisfied that she has been provided with all the withheld information within the scope of the request.

**Part 1** - *Why the Charity Commission told the Parliamentary Ombudsman that it would be writing to me with an explanation of all its decisions and now say that it cannot do this;*

18. The Charity Commission maintain that it responded to this part of the request on 25 January 2017. The response stated:

*"Regarding the first bullet point above, we explained that we did not advise the PHSO in the terms you set out but rather that we would be writing to you with our conclusions and you could write in about the outcome of the issues."*

19. In its internal review response the Charity Commission further stated:

*"Regarding the first bullet point, we advised the PHSO that we would write to you with our conclusions but we did not say that we would provide an explanation of all our decisions. We wrote to you on 21 December 2016 that we were satisfied with the response from the charity and concluded that there was no regulatory role for the Commission. We also advised the PHSO that you could write in to us about the outcome of issues raised. Whilst we did not specifically state this, such a request for further information from you would be*

*considered under the provisions of the Freedom of Information Act 2000."*

20. In correspondence to the Commissioner the complainant stated:

*Part 1 of my complaint actually encompasses the Charity Commission's many and often repeated refusals throughout to provide the information on which they based their decisions not to investigate any of the reports I made to them about the charity concerned and where they instead relied on demonstrably untrue assertions that each of those reports fell outside their regulatory remit. I am sure this is a breach of the FOI Act.*

21. In his email of 6 June 2017 the complainant acknowledged that the Commissioner was unable to help with the Charity Commission's promise to write to him when their enquiries were complete.

22. The Commissioner therefore considers that, in effect, part 2 of the request is the matter to determine and the scope of this case is to determine if the Charity Commission has correctly applied the exemptions it has cited to the withheld information.

## **Reasons for decision**

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### **Section 31 – law enforcement (part 2 of the request)**

23. Section 31 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 the FOIA.

24. The purposes the Charity Commission has argued would be likely to be prejudice if the information was disclosed are the following within section 31(2):

*(a) the purpose of ascertaining whether any person has failed to comply with the law,*

*(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,*

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

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

*(g) the purpose of protecting the property of charities from loss or misapplication,*

*(h) the purpose of recovering the property of charities,*

25. 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.
26. 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.
27. The Charity Commission has stated that they believe 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.
28. The Commissioner has considered the application of section 31(2)(f) FOIA in the first instance. The Commissioner has therefore looked at whether the Charity Commission is formally tasked with protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration.
29. 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 protecting charities from misconduct and mismanagement.
30. The Charity Commission explained that in this case information was requested in accordance with its regulatory role, from the charity trustees concerning historic safeguarding matters which affected two individuals. A response from the trustees was provided within a reasonable time frame and provided sufficient information for the Charity Commission to consider whether it should further engage with the charity. A decision was made on two occasions that further engagement was not necessary.
31. The Commissioner has, on a number of occasions, accepted that the Charity Commission is the public authority that has been established to:-
  - protect charities from misconduct and mismanagement and
  - protect the property of charities from loss or misapplication.
32. For example in case FS50535948 at para 15 the Commissioner stated that, "The effect of the Act is that the Commissioner is satisfied that the first two stages of the aforementioned test are satisfied; namely that the

Charity Commission has been entrusted with a function to fulfil the purposes specified at sections 31(2)(c) and (f) and that the function has been specifically designed to fulfil those purposes."

33. In this case the Commissioner is satisfied that the Charity Commissioner has been formally tasked with protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration and this function was specifically designed to fulfil this purpose.

*The withheld information*

34. The Commissioner has reviewed the withheld information and notes it consists of a number of emails between the Charity Commission and the charity being complained about. The correspondence relates to the concerns raised by the complainant and the charity's responses.
35. The Commissioner has next gone on to consider how disclosure of the information would be likely to prejudice the Charity Commission's function.
36. The Charity Commission considered that if this information was disclosed trustees would be less likely to provide full disclosure to it if they became aware that the Charity Commission will routinely release such information, or parts of it, provided to the world under FOIA.
37. A further consideration of disclosure at the present time is that if it becomes known that the Charity Commission regularly releases all correspondence concerning a particular case either while the case is ongoing or shortly after it has closed, this is likely to impact detrimentally on the willingness of charities and members of the public to voluntarily supply information to the Charity Commission. This would significantly inhibit its ability to gather information. In order to consider whether the Charity Commission needs to use its powers and protect charities from misconduct or mismanagement and protect charity property it needs to have open and candid dialogue with charity trustees and others.
38. Although the Charity Commission does have formal information gathering powers in section 52 of the Charities Act 2011, asking for information by issuing an order is far more administratively bureaucratic than making a simple request in an email or over the telephone. If the Charity Commission could only obtain information from charities following the use of a formal order it would receive far less information and be able to deal with far fewer cases thus prejudicing its ability to function effectively. In addition some of its most effective work with charities takes place when there is an open free flowing discussion. Such



communication cannot take place if the Charity Commission can only obtain information by using its powers.

39. The Commissioner has previously accepted arguments regarding the voluntary supply of information on a number of occasions. For example in FS50184898 at para 94 the Commissioner stated "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 those 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."
40. The Commissioner considers that the Charity Commission is formally tasked with protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration. Its ability to fulfil this function effectively is dependent upon a charity's willingness to voluntarily supply and openly share information to assist with a Charity Commission investigation. The Commissioner therefore 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.
41. As section 31 is a qualified exemption, the next step is for the Commissioner to consider whether in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Public interest test (part 2 of the request)**

#### **Arguments in favour of disclosing the information**

42. The Charity Commission acknowledged there is public interest in operating, so far as possible within the applicable law, as a transparent and accountable regulator and this factor weighs in favour of disclosure.
43. The Charity Commission accepts and acknowledges 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 and this is recognised in the Charity Commission's statutory objectives to increase public trust and confidence in charities.

#### **Arguments in favour of maintaining the exemption**

44. There is a strong public interest in an effective regulator, able to effectively and efficiently regulate the sector and promote the effective use of charitable resources. Disclosure would be likely to have a

negative impact on the Charity Commission's ability to regulate charities.

45. The wider public interest is not served by disclosure of confidential information. To do so would interfere with the Commission's ability to carry out its statutory functions and properly regulate charities and those considerations weigh against releasing the information in question.
46. Similarly in case reference FS50488815 at para 37 the Commissioner stated, "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 Commissioner would not be in the public interest.

### **Balance of the public interest**

47. 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 and in particular how it interacts with the charities it regulates. In addition the Commissioner understands that the complainant has private interests in the withheld information, however this cannot be confused with the wider public interest.
48. As referenced above, the Commissioner does 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 would not be in the public interest.
49. 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.

### **Other matters**

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50. The Charity Commission's response to the Commissioner was not of the standard expected. It merged together its arguments with regard to the application of section 31 and 41 of the FOIA.



51. In addition it did not clearly set out what public interest arguments were considered for each exemption but instead these were all bundled together. For future reference the Charity Commission should ensure it clearly sets out each exemption and supporting arguments, along with the relevant public interest factors considered.
52. The complainant has raised a number of issues with the Commissioner which are outside her remit. However, the Commissioner seeks to reassure the complainant that she has not seen any evidence of impropriety with regard to these issues. She also seeks to reassure the complainant that the Charity Commission has dealt with his complaints in a fair and impartial manner.

*The use of 'do not reply' email address*

53. The complainant is unhappy that the Charity Commission staff appear to have a routine practice of using a 'do not reply' email address, meaning people have to 'start from scratch' on its website when they want to contact someone.
54. The Commissioner has reviewed the correspondence on file and notes that all communications appear to have generic email addresses rather than individual email addresses. The Commissioner does not have the authority to tell a public authority how it should arrange its contacts and communications with members of the public. However she would expect a public authority to have in place appropriate and proportionate channels of communication to allow someone to contact it.

## Right of appeal

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55. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

56. 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.
57. 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** .....

**Pamela Clements**  
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