# Freedom of Information Act 2000 (FOIA)

# Decision notice

**Date:** 17 October 2017

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

## Decision (including any steps ordered)

1. The complainant has requested information relating to the distribution of funds following the dissolution of a charity. The Charity Commission has relied on the exemption at section 41 of the FOIA to withhold the information. The Information Commissioner's ("the Commissioner's") decision is that the Charity Commission has correctly applied the exemption and she does not require any steps to be taken.

## Request and response

2. On 7 February 2017, the complainant wrote to the Charity Commission and requested information in the following terms:

> *"I write on behalf of the town council to request some urgent information into* [redacted name].
>
> *Upon this organisation dissolving, the money, which as of the March 2014 accounts on Companies House website was £262,299, was transferred to an organisation of similar aims.*
> *Please can you confirm if the total amount transferred and what organisation it was transferred to?*
>
> *The reason I ask this question is, the organisation which was involved with dissolving this company,* [redacted name]*, has also applied to be dissolved.*

*This company will be dissolved as of 27th February 2017, unless we have grounds for objection.*

*It is our belief that the funds from the* [redacted name] *were passed to this organisation and the funds are shown in their accounts as at the accounts on March 2015.*

*I would be grateful if you could provide this information to me promptly given the tight deadline we are facing."*

3. On 13 February 2017 the Charity Commission responded. It confirmed that although it holds information within the scope of the request, the information was supplied to it for the purpose of the charity being removed from the Charity Commission's register, and therefore section 41 of the FOIA applies.

4. On 13 March 2017 the Charity Commission conducted an internal review and wrote to the complainant upholding its initial decision.

5. On 13 June 2017 the Charity Commission revisited the request [during the Commissioner's investigation] and decided to release the information to the complainant under section 56 of the Charities Act 2011. It explained that, as the request was made by a Local Authority, the information could be released under the Charity Commissioner's discretionary powers [section 56] for the purpose of assisting or enabling the complainant to carry out its functions. However, the Charity Commission also said that as the information was supplied to it in confidence by the charity, should the complainant wish to disclose the information to the world at large, they should write to it again and it will re-consider the request under the FOIA.

6. The complainant informed the Commissioner that as the information concerned the distribution of public funds; it should be released to the world at large and they therefore wanted the request to be considered under the FOIA.

7. On 11 July 2017 the Charity Commission reconsidered the request under the FOIA [upon request by the Commissioner] and responded maintaining its initial decision to apply the exemption at section 41 of the FOIA to withhold the information.

## Scope of the case

8. The complainant contacted the Commissioner to complain about the way its request for information had been handled.

9. The Commissioner therefore considers the scope of her investigation to be; the Charity Commission's application of section 41 of the FOIA to withhold the requested information.

## Reasons for decision

10. Section 41(1) of FOIA states:

*"Information is exempt information if –*

*(a) It was obtained by the public authority from any other person (including another public authority), and*

*(b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

**Was the information obtained from another person?**

11. The Charity Commission was provided with information about the distribution of funds following the dissolution of the charity by its former Trustees, a third party. The information was therefore obtained by the Charity Commission from another person.

**Would disclosure constitute an actionable breach of confidence?**

12. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- whether the information has the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information to the detriment of the confider.

*Does the information have the necessary quality of confidence?*

13. The Commissioner finds that information will have the necessary quality of confidence it if is not otherwise accessible, and if it is more than trivial.

14. In this case, the information relates to the possible distribution of funds to another/other organisation(s) prior to the charity's dissolution.

15. The Charity Commission has explained that the information is part of a report that was created and submitted to it by the charity's accountant

on the instruction of the charity's former Trustees, but that the report does not represent the charity's final accounts nor does it meet Statement of Recommended Practice applicable to charities, and therefore the contents of the report [including the withheld information] have not been published or placed in the public domain.

16. The Commissioner is therefore satisfied that the withheld information is not otherwise accessible, and is clearly more than trivial.

*Was the information imparted in circumstances importing an obligation of confidence?*

17. A breach of confidence may be actionable if the information was communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.

18. The Charity Commission has explained that the charity supplied it with the information in order for it to carry out its regulatory functions under the Charities Act 2011.The information was not supplied for any other purpose, or to be shared with others and so was provided to the Charity Commission in confidence.

19. The accountant's covering letter (enclosing the information) to the former Trustees of the charity, supports this. It states:

> *"In order to assist you to fulfil your duties under the Charities Act 2011, and subsequent agreement with the Charity Commission …Our work has been undertaken solely to enable you to provide the required information to the Charity Commission"*

20. The Commissioner is satisfied that, due to the nature and circumstances in which the information was created and supplied by the charity to the Charity Commission, an obligation of confidence exists in this case.

Would disclosure be of detriment to the confider?

21. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the party who confided the information.

22. The Commissioner notes that in the accountant's covering letter (enclosing the information) to the former Trustees of the charity, it states that as it has not been instructed by the charity to carry out an audit on the information [in the report] it has not verified the accuracy or completeness of the information.

23. The Charity Commission argues that the information was provided by the charity in confidence; in 'draft' and is untested, and that disclosure of it without any context or where the context could easily be lost, could impact the former Trustee's professional reputation.

24. Having considered the withheld information in this case, the Commissioner agrees that releasing information about the transfer of funds following the dissolution of a charity that has not been verified for its accuracy or completeness may have the potential to cause serious detriment to the former Trustees professional reputation.

25. The Commissioner notes that in this case the 'confider' (the charity) is an organisation that is now dissolved. However, the Charity Commission has explained that there are circumstances in which it can take action against the former Trustee(s) of a charity even after a charity has dissolved.

26. The Commissioner also notes that the central government website www.gov.uk advises that former charity Trustees remain responsible for the decisions they made while there were in office[1], and that they remain personally liable to a third party that has a legal claim against the charity which the charity can't meet, and/or if they cause financial loss by acting improperly[2] .

27. Having considered the above factors, the Commissioner therefore accepts that that disclosure of the information could have serious detriment to the confider in this case.

*Is there a public interest defence for disclosure?*

28. Section 41 of the FOIA is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Charity Commission could successfully rely on such a public interest defence to an action for the breach of confidence in this case.

29. The Commissioner takes the view that a duty of confidence should not be overridden lightly, particularly in the context of a duty owed to the

[1] https://www.gov.uk/guidance/how-to-close-a-charity#your-responsibilities-after-your-charity-has-closed

[2] https://www.gov.uk/guidance/charity-trustee-whats-involved#when-trustees-can-be-personally-liable

confider. Disclosure of any confidential information undermines the principle of confidentiality, which itself depends on a relationship of trust between the confider and the confidant. It is the Commissioner's view that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. It is therefore in the public interest that confidences are maintained.

30. The Charity Commission argues that releasing information that was created and supplied to it by the charity *after* it had already been dissolved could result in the unwillingness for other organisations to provide it with voluntary information freely if it was felt that information cannot be given in confidence.

31. The complainant has stated that:

> *"This request was made to discover where £262,299, which was from the sale of* [redacted name]*, was transferred to upon this dissolution of this company. This organisation was a charity for the provision of arts in* [redacted] *and our community… It is my belief that this information should have been provided under the Freedom of Information Act, as it is in the interests of the public to know how these charitable funds were used …"*

32. The Charity Commission has considered whether disclosure of the information on the basis of accountability and transparency of the spending of charitable funds could form the basis for a public interest defence and justify any adverse personal detriment suffered by the confider. However, as the information is untested, unverified, could be construed in ways that could cause personal detriment to the charity's former Trustee and the fact that there is no evidence of any wrong doing by the former Trustees in this case, the Charity Commission does not consider disclosure on this basis to amount to an adequate public interest defence to a breach of confidence.

33. The Commissioner has considered the general public interest in ensuring that the public authority remains transparent, accountable, and open to scrutiny. She notes that although the spirit of the complainant's request is in the public interest, the information concerned has not been verified as accurate or complete by the charity's accountant nor has any work been undertaken by the Charity Commission to this end. Therefore, the Commissioner does not consider that release of the information would further public understanding, or enable the public to form informed opinions and participate in any meaningful debate on the matter and would therefore be disproportionate to any personal detriment suffered by the charity's former Trustees.

34. In light of the above, the evidence available to the Commissioner suggests there is not sufficient public interest in the information being disclosed. The Commissioner therefore takes the view that the public interest in preserving the principle of confidentiality is much stronger than that in disclosing the information, and that there would be no public interest defence available should the Charity Commission disclose the information.

35. The Commissioner therefore accepts that the disclosure of the information to the public would constitute an actionable breach of confidence for the purposes of section 41(1)(b) of the FOIA and the exemption is engaged.

**Other matters**

Consistency and timeliness

36. The complainant says:

> *"I am concerned that the Charities Commission have refused this request on two occasions, but now have chosen to provide the information under the Charities Act 2011, not the Freedom of Information Act. This raises our concerns on the understanding on how the information provided to them should processed."*
>
> *This information should have been disclosed four months ago. This time delay is a detriment to our community. The company in which the funds were transferred to, have now been struck off and the funds lost to the purposes in which they were originally intended."*

37. The Commissioner notes that in its initial response and internal review outcome, the Charity Commission applied/upheld its application of section 41 of the FOIA to withhold the requested information. During the course of the Commissioner's investigation, the Charity Commission then released the information to the complainant under the Charity Commissioner's discretionary powers to assist the complainant [a local authority] to carry out its functions. When the Commissioner later asked the Charity Commission to reconsider the request under the FOIA it co-operated and responded maintaining its previous stance [applying section 41 of the FOIA to withhold the information]. The Commissioner also notes that in this case the Charity Commission has handled the request within the required timescale set out in the FOIA. The Commissioner is also mindful that a request under the FOIA is purpose blind.

38. The Commissioner is therefore satisfied that the Charity Commission has maintained a consistent and timely approach in responding to the request under the FOIA.

**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: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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 .....**

**Pamela Clements**
**Group Manager**
**Information Commissioner's Office**
**Wycliffe House**
**Water Lane**
**Wilmslow**
**Cheshire**
**SK9 5AF**