

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 August 2020

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 evidence held by the Charity Commission relating to the Presidents Club Charitable Trust case. The Charity Commission has withheld the information under section 31 (law enforcement), section 40(2) (personal information) and section 41 (information provided in confidence) of the FOIA.
2. The Information Commissioner's decision is that the information requested is exempt from disclosure under section 31(1)(g) by virtue of section 31(2)(c), and the public interest favours maintaining the exemption.
3. The Information Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 16 November 2018, the complainant wrote to the Charity Commission and requested information in the following terms:
"I'd be grateful for copies of the evidence which the Charity Commission had or obtained and upon which the 'Presidents Club Charitable Trust: case report' (published on 12th July 2018) was based."
5. The Charity Commission responded on 3 December 2018. It refused to provide the requested information citing section 31(1)(g) of the FOIA as its basis for doing so.

6. The complainant requested an internal review of this decision on 16 January 2019.
7. Following an internal review, the Charity Commission wrote to the complainant on 7 March 2019, revising its position. It continued to refuse to provide the requested information, this time citing the exemptions under sections 40(2) and 41 of the FOIA as well as 31(1)(g).

Scope of the case

8. The complainant contacted the Information Commissioner on 9 April 2019 to complain about the way his request for information had been handled.
9. The Information Commissioner understands that the Charity Commission has applied section 31 to the requested information in its entirety and has also applied sections 40(2) and 41 to some parts of the requested information.
10. In the first instance, the Information Commissioner's investigation has focussed on the Charity Commission's reliance on section 31 and will only consider its reliance on sections 40(2) and 41 if necessary.

Reasons for decision

Section 31 – law enforcement

11. Section 31(1)(g) of the FOIA states that information is exempt if its disclosure 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).
12. The purposes listed in section 31(2) which the Charity Commission has cited are:
 - 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 which would justify regulatory action in pursuance of any enactment exist or may arise; and

- f) protecting charities against misconduct or mismanagement in their administration.
13. In order for a prejudice based FOIA exemption such as section 31 to be engaged, there must be at least a likelihood that disclosure would cause prejudice to the interest or interests that the exemption protects. In the Information Commissioner's view, three criteria must be met in order to engage a prejudice-based exemption:
- i. 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 protected by the exemption,
 - ii. 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 designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - iii. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. whether disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
14. Consideration of the exemption at section 31 of the FOIA is a two-stage process. Even if the above test is met and the exemption is engaged, the information should still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
15. The Information Commissioner has first considered whether the Charity Commission is formally tasked with functions for any of the purposes set out in section 31(2).
16. In its submission to the Information Commissioner, the Charity Commission has provided some information on its statutory functions. It explained that sections 14 and 15 of the Charities Act 2011 detail the lawful powers the Charity Commission has in respect of regulating the charity sector. The statutory duties laid out in sections 14 and 15 are:

Section 14:

1. The public confidence objective

The public confidence objective is to increase public trust and confidence in charities.

3. The compliance objective

The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.

4. The charitable resources objective

The charitable resources objective is to promote the effective use of charitable resources.

Section 15(1-2):

- (1) The Commission has the following general functions—
 2. Encouraging and facilitating the better administration of charities.
 3. Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.
 - (2) The Commission may, in connection with its second general function, give such advice or guidance with respect to the administration of charities as it considers appropriate.
17. The Charity Commission considers that the remit of the regulatory case, as aligned to the statutory powers at section's 14 and 15 of the Charities Act 2011, permits the engagement of sub-sections a) to c) and f) of section 31(2) of the FOIA.
 18. In this case, the Information Commissioner has considered the application of section 31(2)(c) in the first instance and having considered sections 14 and 15 of the Charities Act 2011, she is satisfied that this sets out that the Charity Commission is formally tasked with determining whether regulatory action should be taken and, if so, with taking the necessary regulatory action.
 19. The exemption provided by section 31(1)(g) is a prejudiced based exemption and can be engaged on the basis of one of two levels of probability; that prejudice to the Charity Commission's functions either 'would' occur, or that prejudice only 'would be likely' to occur.
 20. With regard to the higher threshold that prejudice 'would' occur, in the Information Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not; in other words, there is a more than 50% chance of the

disclosure causing prejudice, even though it is not absolutely certain that it would do so.

21. In relation to the lower threshold that prejudice 'would be likely' to occur, the Information Commissioner considers that there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
22. In this case, the Charity Commission has confirmed that it is relying on the lower threshold of prejudice, i.e. that disclosure 'would be likely' to result in the prejudice claimed. This means that the Charity Commission considers there to be more than a hypothetical or remote possibility of prejudice occurring, and that the risk of prejudice occurring is real and significant, even if the probability of prejudice occurring is less than 50%. If an authority claims that prejudice would be likely to occur, they need to establish that
 - there is a plausible causal link between the disclosure of the information in question and the argued prejudice;
 - there is a real possibility that the circumstances giving rise to prejudice would occur, i.e. the causal link must not be purely hypothetical; and
 - the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote.
23. The Charity Commission has explained that following newspaper reports of sexual harassment at a charity fundraising event held by the President's Club on 23 January 2018, and subsequent complaints to the Charity Commission from the public and Members of Parliament, it opened a regulatory compliance case into the management of the event by the charity's trustees.
24. The Charity Commission confirmed to the Information Commissioner that it is responsible for regulating the charities sector and derives its powers for doing so from statute, the Charities Act 2011.
25. The Charity Commission's regulatory compliance case was tasked to investigate the following in connection with the charity event which took place:
 - the trustees' compliance with their legal duty to act with reasonable care and skill;

- the trustees' compliance with their legal duty to manage charity resources responsibly, specifically avoiding exposing the charity's assets, beneficiaries or reputation to undue risk; and
 - the trustees' compliance with their legal duty to act in the best interest of the charity, specifically whether trustee decision making was adequately informed and taken solely in the best interest of the charity, not the personal interests of supporters, funders or donors.
26. In terms of how the prejudice would be likely caused, the Charity Commission has stated that it relies upon a wide variety of information sources in order to perform its regulatory functions. These include serious incident reports from charities, complaints from members of the public and whistleblowing reports from insiders.
27. The Charity Commission also stated that it will, on occasion, seek to interview individuals connected to particular issues or complaints in order to gather relevant information which would enable the assessment of risk, and help determine whether charity trustees are guilty of any misconduct.
28. In this particular case, the Charity Commission confirmed that it interviewed relevant parties to the event, including trustees and the agency who supplied staff to the charity, which were subsequently recorded as evidence for the regulatory case. It stated that these interviews were undertaken on a voluntary and confidential basis to enable the Charity Commission to build-up a picture of the nature of the event and what had happened.
29. The Charity Commission argued that if it were to disclose testimonies such as this, it would have the effect of discouraging charities and the wider public from coming forward to volunteer evidence in future, which would hinder its ability to effectively investigate incidents reported to it, and to identify and investigate misconduct as per its statutory duties. The Charity Commission therefore considers that disclosing the notes from these interviews would be likely to prejudice its functions.
30. The Charity Commission also argued that the additional information was obtained from the charity's trustees and the event organisers in the weeks following the event as the Charity Commission developed its regulatory case. It stated that these included copies of risk assessments used for the event, copies of Non-Disclosure Agreements signed by staff members who worked at the event, and a serious incident report from the charity's trustees.

31. The Charity Commission stated that its ability to engage productively, and to encourage and continue to receive this information in connection with regulatory incidents, is critical to its ability to operate as an effective regulator of the charities sector. The Charity Commission argued that if it was required to publicly disclose information it receives, this would be likely to have the effect of inhibiting individuals from reaching out to the Charity Commission in future for fear of their communications being made public.
32. The Charity Commission stated that, depending on an individual's particular circumstances, they may perceive that harm would arise to them if the details of their full involvement in a case became publicly known. It stated that it would also alter the nature of communications, as complainants would become wary of how their communications would be interpreted if seen publicly. It stated that the overall effect would be to suppress the quality of information received from trustees and other involved parties, meaning the Charity Commission would be at risk of being uninformed of serious incidents of misconduct within the charity sector. It argued that the knock-on effect of this would be that charities will be more likely to evade the Charity Commission's eye where they are involved in misconduct, as well as there being a potentially serious impact on vulnerable individuals involved with such charities.
33. The Charity Commission stated that it has limited resources at its disposal and the reports and evidence it receives from trustees, interested parties and the wider public are invaluable in helping it to assess where it needs to direct resources and conduct further enquiries. This information also contributes to its 'risk framework' tool, which assists the Charity Commission in deciding when to engage with a charity.
34. The Charity Commission stated that it has a fundamental responsibility to promote public trust and confidence in charities, as per section 14(1) of the Charities Act 2011, which it does in part by being able to hold charities to account where they are found guilty of wrongdoing. In furtherance of this objective the Charity Commission recognises the importance of proactively publishing details of its investigations, including reports of its findings, such as the case report published on 12 July 2018 which detailed the outcome of the regulatory case opened concerning the President's Club. It stated that these reports provide information on the scope of the Charity Commission's investigation and the outcomes of that investigation, including details of where any non-compliance has occurred.
35. Given the commitment to transparency the Charity Commission stated that it has in the regulation of the charity sector, and in furtherance of the responsibility to promote public trust and confidence in the sector, it

considers that being required to disclose evidence acquired in the course of an investigation would be likely to prejudice the Charity Commission's ability to fulfil this function. It stated that the disclosure of evidence would not provide the full picture of a regulatory compliance case, such as the involved decision-making of skilled and experienced caseworkers in managing and resolving a case. It stated that evidence disclosed on its own will appear out of context without consideration against charity law and previous case precedents, and also in isolation from its 'risk framework'. The Charity Commission therefore considers that disclosure of case evidence in this manner would be likely to prejudice its objective to promote public trust and confidence in the charities sector.

36. Whilst the Information Commissioner recognises the Charity Commission's arguments with regards to its objective of increasing public trust and confidence in the charities sector, she notes that this objective does not fulfil any of the regulatory purposes listed in subsections a) to c) or f) of section 31(2) of the FOIA.
37. The Charity Commission noted to the Information Commissioner that in operating its risk framework, the Charity Commission accumulates evidence on charities (for example, from the public, whistle blowers, serious incident reports) which may point to wrongdoing or misconduct within a particular charity. The regulatory action the Charity Commission decides to take as a consequence will be dependent upon the nature, volume and quality of evidence it receives. It stated that decisions may be made at a later date to open/re-open a case dependent upon any new information that it receives. It stated that if a precedent were to be set that the Charity Commission would be required to disclose evidence it has collected on regulatory issues within its remit, it would be likely to prejudice the ability of the Charity Commission to continue operating its risk framework as charities would become aware of evidence the Charity Commission holds, which would in turn enable them to destroy further evidence/evade further detection. It stated that such an outcome would be likely to prejudice the Charity Commission's ability to effectively regulate the charities sector.
38. The Information Commissioner notes that the Presidents Club has publicly stated that its Trustees *"...have decided that the Presidents Club will not host any further fundraising events as a result of the Financial Times story. Remaining funds will be distributed in an efficient manner to the children's charities and it will then be closed."*
39. At this stage, it is not entirely clear from the information available in the public domain whether the Presidents Club has now closed. However, the Information Commissioner would point out that the disclosure of evidence held in relation to a charity that is still operating is not the same situation as the disclosure of evidence held in relation to a closed

charity. If a charity has closed, the disclosure of evidence held in relation to it would be less likely to set a precedent requiring the disclosure of evidence that is held in relation to charities that are still operating.

40. The Information Commissioner has had sight of the withheld information, and the Charity Commission has explained to her why it considers releasing this information would prejudice its functions. Based on the representations provided by the Charity Commission and the nature of the withheld information, the Information Commissioner is satisfied that there is a real and significant risk of prejudice to the Charity Commission's regulatory work if the withheld information was disclosed.
41. There appears to be an expectation of confidence in the Charity Commission's work, particularly as regards to the voluntarily provided information such as individual reports and interviews with the parties involved. It is the impact on this work of the Charity Commission which is more likely to be affected by disclosure as there is a legitimate argument that the relevant parties will be reluctant to voluntarily supply information requested of them if they believe it may be disclosed. This in turn may impact on the Charity Commission's regulatory work.
42. The Information Commissioner therefore accepts there is a causal relationship between the requested information and the prejudice being claimed.
43. Having considered all the circumstances in this case, the Information Commissioner has therefore decided that section 31(1)(g), by virtue of section 31(2)(c), is engaged.

Public interest test

44. Section 31 is a qualified exemption and therefore the Information Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosing the information

45. The complainant has argued in his submission to the Information Commissioner that "*given the level of public interest and relevance to (say) charitable trustees, the public interest would certainly be served by seeing the evidence the Commission had to explain the (so far, unsubstantiated) decisions it made.*"
46. The complainant stated that the public interest had not been satisfied by the published case report. He stated that "*it appears to show a*

'whitewash' enquiry and nothing at all in its findings is supported by any of the actual evidence."

47. The complainant has stated that disclosing the evidence will reassure the public that charities are being regulated efficiently and effectively by the Charity Commission.
48. The complainant also stated that disclosing the evidence will support the need for the Charity Commission, as a public body, to be not only transparent and accountable, but also to provide assistance to members of the public as far as possible.
49. The Charity Commission accepts that it has a duty of openness and accountability, and to uphold public trust and confidence in the charity sector.
50. The Charity Commission recognises that there is a public interest in understanding how it makes decisions of regulatory significance and how a high-profile charity operating for the public benefit has failed to comply with charity law.

Public interest in maintaining the exemption

51. The Charity Commission has argued that it requires a safe space to operate and undertake decision-making on regulatory matters without prejudice to its functions.
52. The Charity Commission stated that it must continue to be able to fulfil its duties as the charities regulator, which it stated would be significantly impaired if individuals were less willing to come forward and provide information on charity misconduct. As explained above, the Charity Commission considers that disclosing the requested information would have the effect of discouraging individuals from doing this.
53. The Charity Commission argued that it needs to be able to continue to uphold public trust and confidence in the charity sector, which it stated would be prejudiced if it were required to disclose the evidence it holds on regulatory cases.

Balance of the public interest

54. The Charity Commission has stated that it recognises that there is a substantial public interest in it being open and transparent in how it goes about fulfilling its public task to regulate the charity sector. It stated that in high-profile cases such as this, there will be a particular interest in understanding the effectiveness of the Charity Commission and how it reaches its decisions.

55. However, the Charity Commission argued that it is imperative that, if it is to continue to perform its regulatory functions effectively, it has a safe space in which to perform decision-making away from the public eye. It stated that the disclosure of evidence would leave decision-making susceptible to outside influence and have the effect of inhibiting individuals with evidence of charity wrongdoing from coming forward and supplying their evidence to the Charity Commission. It stated that disclosing evidence for this case would also set a precedent which would have a prejudicial effect on regulatory cases the Charity Commission opens, as it would enable charities to make successful requests for evidence the Charity Commission may hold as part of its risk framework.
56. In view of the prejudicial risks posed to the Charity Commission's core functions as detailed above, the Charity Commission considers that the balance in this case lies in favour of withholding the requested information. The Charity Commission also highlighted the public disclosures it has made, and does make, on regulatory cases, such as the case report.
57. The Information Commissioner has considered the public interest arguments for and against disclosure. She notes that there is a public interest in the general openness, transparency and accountability of public authorities. She also accepts that providing the public with access to information assists them in understanding how certain functions are being carried out, evaluating the effectiveness of that function and assessing whether the resolutions reached are indeed fair and reasonable. The Information Commissioner considers that this is met, to some extent, by the publication of any action the Charity Commission takes against a charity which would increase the public's understanding of the Charity Commission's regulatory functions.
58. With regards to the Charity Commission's argument that it needs safe space in which to make its decisions, the Information Commissioner notes that the report was published in July 2018 and the request in this case was made in November 2018. The Information Commissioner considers that the main time for safe space had already passed by the time of the request. However, as explained above, it is not entirely clear whether the President's Club is still open or has closed. If the charity did not close and therefore there was potential for the case to be re-examined at some unknown future date, then there is more strength in the safe space argument.
59. The Information Commissioner does accept that the principle of confidentiality is important. Undermining this by disclosing information which is voluntarily supplied by individuals to assist the Charity Commission perform its regulatory functions would not be in the public interest, as it is important that there is trust in a regulator so it can

have open and frank communications with individuals in order that it can make the right regulatory decisions.

60. There is a significant public interest in ensuring that the Charity Commission, with its statutory functions under the Charity Act 2011 to ensure that charities are regulated, can operate efficiently and effectively, something which the Information Commissioner has determined would be negatively affected by disclosure. Against this, she does not consider the arguments for disclosure outweigh the public interest in maintaining the exemption.
61. The Information Commissioner has therefore concluded that, in all the circumstances, the weight of the public interest lies with maintaining the exemption under section 31(g) by virtue of section 31(2)(c).
62. Because the Information Commissioner has found that the requested information engages the exemption under section 31(g) by virtue of section 31(2)(c), and that the public interest favours maintaining this exemption, it has not been necessary for her to consider whether section 40(2) or section 41 are also engaged.

Right of appeal

63. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

64. 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.
65. 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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