

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 December 2022

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

Decision (including any steps ordered)

1. The complainant has requested the Charity Commission (the CC) to disclose information relating to complaints he submitted to them about the National Trust. The CC confirmed that some of the information is not held. It refused to disclose some under section 31(1)(g) by virtue of section 31(2)(c) and refused to confirm or deny whether the remainder was held in accordance with section 31(3) of FOIA.
2. The Commissioner's decision is that the CC does not hold some of the requested information. In relation to the application of sections 31(1)(g) by virtue of section 31(2)(c) and 31(3) of FOIA, the Commissioner is satisfied that the CC has applied these correctly. He has however recorded a breach of section 10 of FOIA, as the CC failed to respond to the complainant's request within 20 working days of receipt.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 31 July 2021, the complainant wrote to the CC and requested information in the following terms:

"...for a copy of the Commission's assessment against the risk framework in relation to both my complaints.

Additionally, may I have a copy of any written communication or record of verbal communication between the Charity Commission and the National Trust, including Trustees and Council members, that relates to my two complaints.

May I also ask whether you have been able to obtain a copy of the Investors in People review of the South West Region in 2011 from the National Trust? If so, will you please forward me a copy."

5. The CC responded on 28 September 2021. In relation to the first element of the request, the CC said that it does not hold this information. For the second element, it refused to confirm or deny whether the requested information is held under section 31(3) of FOIA. With regards to part 4, the CC confirmed the information is not held.
6. The complainant requested an internal review on 29 October 2021.
7. The CC carried out an internal review and notified the complainant of its findings on 20 December 2021. Regarding element one, the CC explained how it does not hold the information for the complaints raised in 2019 but it does for those raised in May and June 2021. For these it is withholding the information under section 31 of FOIA. It upheld its previous decision for elements two and three of the request.

Scope of the case

8. The complainant contacted the Commissioner initially in January 2022 to complain about the way his request for information had been handled. This correspondence was never received. The complainant resent his complaint on 27 February 2022. This was received on 3 March 2022, at which point the complaint was accepted for full investigation.
9. The complainant is dissatisfied that no information has been provided. He disagrees the information that is held is exempt from disclosure under FOIA.
10. The Commissioner considers the scope of his investigation to be to determine whether or not the CC is entitled to:
 - (a) rely on section 31(1)(g) of FOIA by virtue of section 31(2)(c) for element one of the complainant's request and;
 - (b) rely on section 31(3) of FOIA for element two.

He will also address whether, on the balance of probabilities, any further recorded information is held to that already identified.

Reasons for decision

Element one of the request

11. The CC confirmed that it received complaints from the complainant in 2019 and in May and June 2021. When it first responded to the complainant's request it only addressed the 2019 complaints and the 'not held' response that it issued only addressed them.
12. It explained that the initial regulatory assessment process stage looked at the issues raised in 2019 and concluded that the matters were outside of the CC's remit. As such the issues were assessed by an officer as 'not for the Commission' and the assessment process for the issues raised in 2019 ended at that point. It therefore does not hold any recorded information of the nature specified in this element of the request for the 2019 complaints.
13. The Commissioner is satisfied with this explanation and has concluded that on the balance of probabilities no recorded information of the nature specified in this element of the request is held for the complaints submitted in 2019.
14. Turning now to the complaints submitted in May and June 2021, the CC advised that an assessment was conducted against the risk framework; the outcome being that due to no further information regarding the complaint being received, the CC would not be taking the matter any further.
15. The CC confirmed that it holds this assessment for the 2021 complaints, however it considers it is exempt from disclosure under section 31(1)(g) of FOIA by virtue of section 31(2)(c).
16. The Commissioner will now consider if this exemption applies.

Section 31 – law enforcement

17. Section 31 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the exercise of any of the public authority's functions specified in subsection (2).
18. The CC considers section 31(2)(c) applies, which states the purpose of ascertaining whether any circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
19. Being a qualified exemption it is subject to the public interest test.

20. The CC advised that its statutory functions include encouraging and facilitating the better administration of charities and identifying and investigating apparent misconduct or mismanagement in the administration of charities. It is also responsible for taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.
21. Its Regulatory and Risk Framework outlines how the CC operates as a risk-led regulator and how it decides when and how to engage and the possible outcomes of its engagement. However, disclosing how the Framework is actually applied in an individual case regarding each element would be likely to be prejudicial to the efficient and effective operation of the CC. It explained further that such information goes into more detail than that contained in the Framework. Disclosure has the potential to undermine the CC's ability to collect accurate information from complainants and charities and could be used to help trustees in the future delay or avoid regulatory action. It argued that this would be likely to be prejudicial to the CC's ability to regulate effectively.
22. The Commissioner accepts the potential prejudice claimed by the CC, which clearly relates to the interests the exemption contained at section 31(1)(g) by virtue of section 31(2)(c) is designed to protect.
23. The Commissioner is also satisfied that the prejudice being claimed is "real, actual or of substance", and that there is a causal link between disclosure of the withheld information and the prejudice claimed. It is clearly logical to argue that disclosure of how the CC has considered a particular complaint against the Framework and assessed what action to take or not would be likely to prejudice the CC's ability to carry out its regulatory functions effectively. It would be likely to hinder the ability of the CC to gather the information its needs for such assessments and assist trustees to delay or even avoid scrutiny and any regulatory actions that may be required.
24. In terms of the public interest test, the CC has argued that there is a public interest in openness and transparency in relation to its regulatory activities. Disclosure would promote public awareness and understanding of its regulatory functions and the decisions it makes.
25. However, the CC considers the public interest rests in maintaining the exemption and its ability to be an effective and efficient regulator to ensure that compliance with the relevant law is upheld.
26. It said that disclosure would be likely to cause charities, other organisations and individuals to be aware of the level of risk by which the CC would become involved. This would therefore be likely to prejudice the ability of the CC to exercise its powers in order to protect

charitable assets and, where necessary, hold trustees to account for their actions and decision making in relation to a specific issue. It stated that this is not in the wider interests of the public.

27. In terms of the public interest test, the Commissioner is satisfied that the public interest rests in maintaining the exemption. It is clear that the complainant's interests in the withheld information are mostly private; it relates to complaints he has submitted and what action if any has been taken. There is a public interest in openness and transparency and in allowing members of the public access to information to enable them to understand how the CC operates and how complaints of this nature are assessed and handled. However, this should not be at the expense of the regulatory functions of the CC and its ability to regulate charitable assets and bring trustees to account when necessary.
28. The Commissioner considers the public interest rests in maintaining the exemption and the ability of the CC to carry out regulatory functions efficiently and effectively. He agrees it is not in the wider public interest to disclosure information which may enable trustees to delay or even avoid regulatory action, by having a greater knowledge of how such complaints are assessed and at what point the CC will become involved.

Element two of the request

29. Section 31(3) has been applied to this element of the request. It states that a public authority may refuse to confirm or deny whether any recorded information is held if that confirmation or denial itself would or would be likely to prejudice law enforcement (any matters outlined in section 31(1) of FOIA).
30. The same subsection has been applied here. The CC considers confirming or denying whether any recorded information is held would be likely to prejudice the functions outlined in section 31(2)(c).
31. The CC explained that it receives complaints about a charity from members of the public. These are assessed against its Risk Framework. But it also has a separate regime for charity trustees to self-report issues at their charity through the RSI process. These, too, are assessed against its Risk Framework. Sometimes it might receive a complaint from a member of the public about an issue at a charity which is also separately reported by the charity trustees under the RSI regime. These RSI submissions are not public but instead enable the CC to have regulatory oversight where issues arise at charities which are brought to its attention by the trustees themselves. Therefore it is possible that the Commission may hold information on the same matter from different parties which are related to each other but might not be as a result of each other.

32. It stated that due to the way in which this element of the request was worded (using the specific words 'relates to') it means that this type of recorded information, if held, would come within the scope of the request. The Commissioner agrees with this analysis.
33. The CC has said that confirming or denying whether the information is held would be likely to cause prejudice to its regulatory functions. As stated above, the RSI process is not public and it is a separate process for charities themselves to raise issues with the CC. Confirming or denying whether the recorded information is held would be likely to impact upon the relationship of the trust between the CC and the charity sector. It would undermine the confidence in its ability to handle such reports sensitively and carefully if charities and third parties recognised that the CC confirmed to the wider public specific regulatory issues reported to them.
34. It stated that it relies heavily on the voluntary supply of information and on charities and third parties providing free and frank disclosure of often sensitive information, so that it can identify issues falling within its regulatory remit. Confirming or denying if there has been any reports via the RSI process on a given topic or relating to a specific charity would be likely to undermine this process and the free and frank provision of information.
35. The Commissioner is satisfied that the CC is entitled to rely on section 31(3) for this element of the request. The RSI process allows charities themselves or third parties to raise any issues or concerns with the CC on a confidential basis. Confirming or denying whether recorded information is held relating to a certain issue or charity would be likely to hinder the free flow of often sensitive information, discourage those that would normally use it from doing so, thereby hindering the CC's ability to identify issues falling within its regulatory remit efficiently and effectively.
36. In terms of the public interest, the majority of the arguments outlined above in paragraphs 24 to 28 apply here. There is a public interest in the CC confirming or denying whether it has received any information via the RSI process relating to a specific charity or trustee. This will allow members of the public to understand more closely what the CC may be looking at, at any given time. However, it is accepted that confirming or denying if this information is held would be likely to prejudice the CC functions and the ability of the CC to carry out these efficiently. The Commissioner does not consider this is in the wider interests of the public.
37. For these reasons, the Commissioner is satisfied that the public interest rests in maintaining the application of section 31(3) in this case.

Element three of the request

38. From the outset the CC has informed the complainant that it does not hold this information.
39. The CC has confirmed that it has carried out all relevant searches for this document but it is not held. The Commissioner has no reason to doubt this and so has concluded that, on the balance of probabilities, the CC does not hold this information.

Procedural matters

40. As the CC did not respond to the complainant's request within 20 working days of receipt, it breached section 10 of FOIA.

Right of appeal

41. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

42. 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.
43. 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

Samantha Coward
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