

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2022

Public Authority: Charity Commission

Address: 102 Petty France
London SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested information from the Charity Commission relating to a whistleblowing complaint. The Charity Commission has disclosed some of the requested information, however it has refused to disclose the remainder, citing sections 40(2) and 41 of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Charity Commission has correctly applied section 41 of FOIA.
3. The Commissioner requires no steps to be taken by the public authority.

Request and response

4. On 25 January 2021 the complainant wrote to the Charity Commission and requested information relating to a whistleblowing complaint. That request was in the following terms:

"Can I at least see a copy of what regulatory issues were raised and what needs to be done to deal with them?"
5. The complainant received a response from the Charity Commission on 5 February 2021. That response stated that it held the requested information but that it was refusing to disclose it, citing section 31(1)(g) by virtue of subsections (2)(a-c) and (f) of FOIA.

6. The complainant requested an internal review of the Charity Commission's decision on 8 February 2021, the result of which was provided to him on 8 March 2021. The reviewer upheld the original decision.
7. The complainant complained to the Commissioner on 15 April 2021 about how the Charity Commission had handled his request for information.
8. The Commissioner wrote to the Charity Commission on 14 October 2021 seeking its detailed submissions regarding the application of section 31 as set out in paragraph 6 above.
9. The Charity Commission responded to the Commissioner on 23 December 2021. That response stated that the Charity Commission felt that it was now able to disclose part of the requested information (which it attached to its response for the Commissioner's perusal). However, it was still withholding the remaining requested information and was now relying on sections 40(2) and 41 of FOIA.
10. The Commissioner asked the complainant if they were satisfied with what the Charity Commission had disclosed. The complainant stated that they were not satisfied with this and were still seeking the entirety of the requested information.

Scope of the case

11. The complainant contacted the Commissioner on 15 April 2021 to complain about the way their request for information had been handled.
12. Following the Commissioner's intervention, the complainant again contacted him on 30 January 2022 stating that they were not satisfied with the information now received and wished to pursue the complaint under FOIA.
13. The Commissioner has considered the Charity Commission's handling of the request, in particular its application of the specified exemptions.

Reasons for decision

Section 41 – Information provided in confidence

14. The Commissioner has considered the application of this exemption first as, if the exemption is applicable to the information as a whole, then he does not need to consider the application of section 40(2) to the parts of the information which constitute personal data.
15. Section 41 of FOIA provides that: "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."
16. The Commissioner's guidance on the exemption¹ states that, in order for this particular exemption to apply, four criteria must be met:-

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- the authority must have obtained the information from another person,
 - its disclosure must constitute a breach of confidence,
 - a legal person must be able to bring an action for the breach of confidence to court, and
 - that court action must be likely to succeed.
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17. Section 41 is an absolute exemption. This means that the Charity Commission does not need to apply the public interest test in section 2 of FOIA. However, the Commissioner does still need to consider the public interest in disclosure, because the law of confidence recognises
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¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

that a breach of confidence may not be actionable when there is an overriding public interest in disclosure.

18. The withheld information consists of information contained within a letter written by the Charity Commission itself. However, the letter records information that was originally obtained from the charity trustees as part of the Charity Commission's regulatory case regarding concerns raised by the charity. The relevant information was therefore provided by a third party, ie another person for the purposes of this exemption.
19. In determining whether a breach of confidence would occur, the Commissioner applies the three-step test set out by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415:
 - the information must have the necessary quality of confidence,
 - it must have been imparted in circumstances importing an obligation of confidence, and
 - there must have been an unauthorised use of the information to the detriment of the confider.

(i) The quality of confidence and communication in circumstances importing an obligation of confidence.

20. The Commissioner has viewed the withheld information and has been party to the comments made by the charity to the Charity Commission regarding the information. In the circumstances, which were communicated to the Commissioner in confidence, on the understanding that they were not to be disclosed into the public domain, the Commissioner accepts that the charity wished the information to be kept confidential by the Charity Commission. Therefore the withheld information has the necessary quality of confidence and was also imparted in circumstances importing an obligation of confidence.

(ii) Would disclosure constitute an unauthorised use of the information to the detriment of the confider?

21. The withheld information relates to concerns raised regarding the charity. The Charity Commission considers that disclosing the detail of these would be highly likely to prejudice the charity in the circumstances.

22. The Charity Commission has informed the Commissioner that it has looked into those concerns and has made findings in relation to the charity's conduct. Unusually, the key actions arising from those findings have since been proactively published by the charity, which is why the Charity Commission no longer considers that section 31 of FOIA applies.
23. The Charity Commission has informed the Commissioner that it is highly likely that the limited additional detail which it is seeking to withhold could impact upon the charity in current circumstances, which are known to the Commissioner but are not in the public domain. This is not in the interests of the charity and is inconsistent with the Charity Commission's statutory objective to promote the effective use of charitable resources.
24. Disclosure of confidential information would also be to the detriment of the Charity Commission. The Charity Commission deals with many cases in which confidential information is required to consider the regulatory issues arising. It is imperative that people have confidence in the Charity Commission's ability to protect confidential information where appropriate. Disclosure may lead to this confidence being undermined which would significantly impact the Charity Commission's ability to achieve its objectives and functions efficiently and effectively.

Is there a defence available to render the breach of confidence unactionable?

25. If the Charity Commission could establish a defence to a breach of confidence for disclosure of the withheld information, otherwise than under the FOIA, the breach of confidence would be rendered unactionable and section 41 of the FOIA would not be engaged.
26. The Charity Commission is aware that the law of confidence contains its own inbuilt public interest test. The Charity Commission has taken into account the strong public interest in favour of keeping information confidential where a duty of confidence exists.
27. The Charity Commission also notes that the courts have traditionally recognised that the defence to breach of confidence in the public interest applies where disclosure would protect public safety, or where there has been wrongdoing, such as misfeasance, maladministration, negligence or other iniquity on the part of the public authority. The Charity Commission has considered whether the public interest would be served in disclosing the relevant information but considers that there is no reason or justification to depart from the position that the relevant information should remain confidential..

28. The complainant has argued that the public interest in disclosure is substantial due to the nature of the whistle-blowing complaint. The Commissioner considers that this public interest has been met in large part by the information already disclosed by the Charity Commission, which has also been proactively published by the charity in question.
29. The Commissioner considers that there is a wider public interest in preserving the principle of confidentiality. He considers that in this case it would be likely to damage the confidence people have in the Charity Commission's ability to protect confidential information where appropriate. This would be likely to lead to a significant impact upon the Charity Commission's ability to effectively carry out its functions.
30. In all of the circumstances of the case, the Commissioner does not consider that a public interest defence would be available to the Charity Commission.
31. For the reasons outlined above, the Commissioner considers that the Charity Commission was entitled to rely on section 41 of the FOIA to withhold the disputed information. As he considers that section 41 applies to the entirety of the withheld information, he has not gone on to consider the Charity Commission's application of section 40(2) of FOIA.

Right of appeal

32. 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

33. 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.
34. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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