

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 May 2024

**Public Authority:** The Charity Commission  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the disposal of assets and monies belonging to a registered charity. The Charity Commission for England and Wales (the Commission) refused to confirm or deny whether the requested information was held by virtue of section 31(3) of FOIA (law enforcement) and section 40(5) of FOIA (personal information).
2. The Commissioner's decision is that the Commission was correct to apply section 31(3) of FOIA to neither confirm nor deny (NCND) the requested information is held. The Commissioner does not require any steps to be taken.

#### **Request and response**

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3. On 15 August 2023, the complainant wrote to the Commission and requested information in the following terms:
  - "1. The Charity Commission gave [name redacted] permission to dispose of assets belonging to the Registered Charity which he had fraudulently removed and not returned.
  2. The Charities Commission does have the power to order the return of the monies which were fraudulently paid into the Trust's charity account [number redacted] by [name redacted] and [name redacted], but the Charities Commission has told the Trust not to

repay these monies to us. Perhaps you would like to confirm this information”.

4. The Commission responded on 10 October 2023 and refused to confirm or deny whether the requested information was held. It stated that the balance of the public interest lay in maintaining the exemption to NCND whether the information is held.
5. Following an internal review on 7 November 2023, the Commission maintained its original position and added that confirming or denying the information is held would be likely to prejudice its functions set out in sections 31(2)(c), 31(2)(f) and 31(2)(g) of FOIA.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 20 November 2023 to complain about the way their request for information had been handled.
7. The Commissioner considers that the scope of his investigation is to determine whether the Commission was correct to neither confirm nor deny that it holds the requested information by virtue of section 31(3) of FOIA.

### **Reasons for decision**

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#### **Neither confirm nor deny (NCND)**

8. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as “the duty to confirm or deny”. However, there are exemptions to this duty, whereby a public authority may NCND whether it holds the requested information.
9. The decision to use a NCND response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
10. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.

11. The Commission has taken the position to NCND holding any of the requested information in its entirety, citing section 31(3) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the Commission is entitled to NCND holding any information of the type requested by the complainant.
12. Put simply, in this case the Commissioner must consider whether or not the Commission is entitled to NCND holding information relating to assets and monies belonging to a registered charity.

### **Section 31-law enforcement**

13. Section 31(3) of the FOIA states that:

The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1)

14. In this case the Commission has relied on the NCND exclusion on the basis that confirming or denying whether it holds the information within the scope of the request would be likely to prejudice the Commission's regulatory functions set out in sections 31(2) of FOIA.
15. In its submissions to the Commissioner, the Commission said its statutory objectives and functions are set out in section 14 and 15 of the Charities Act 2011. It considers that confirming or denying whether the information is held, would be likely to prejudice those objectives. The Commission stated that the request is very specific in the information that is being sought as it names specific individuals and refers to specific allegations. It says that due to the wording of the request, confirming or denying whether the information is held would disclose any regulatory involvement with the charity, that is not already in the public domain.
16. It says that the Commission's approach aligns with ICO guidance which states: "the prejudice in terms of section 31(3) will depend on how the request is phrased. Typically, where a request identifies an individual or an organisation as the possible subject of an investigation or a particular line of enquiry a public authority could be pursuing the more chance there is that confirming the information's existence would, or would be likely to, prejudice that investigation".
17. When explaining how confirming or denying the information is held would be likely to prejudice the Commission's functions the Commission stated that the purposes listed under section 31(2)(a) and (b) of FOIA are also relevant because the information requested relates to an internal dispute within the Charity and any regulatory matters that may result from such dispute. It argued that if it were to confirm or deny that the information is held it would put information in the public domain

about one side of a dispute and would give the appearance of the Commission not being impartial.

18. The Commission argues that there will be a loss of confidence by members of the public or trustees of charities who would be less likely to provide information to it for fear of disclosure due to the inability of the Commission to be impartial and fair. It says that this would impact on the Commission's ability to identify and investigate apparent misconduct or mismanagement in the administration of charities and could prevent it from taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.
19. It added that the Commission is an independent regulator which ensures that charities are accountable, well run and meet their legal obligations. As such, it is entrusted with confidential information, and that to confirm or deny if the requested information is held would likely harm those functions. It argued that to be an effective regulator, those who have an interest in charities must have confidence that it can handle sensitive information carefully. It says that it relies on the voluntary disclosure of information to be able to regulate effectively. Therefore, confirming or denying whether the requested information is held could impact on the willingness of individuals to supply essential information to the Commission and the confidence in the Commission's ability to handle information appropriately.
20. The Commission argued that if it is unable to obtain the relevant information needed to make decisions this could harm its ability to effectively carry out its regulatory functions and objectives set out in the Charities Act. It says that whilst it recognises that it has powers to formerly order information, the process is burdensome and would mean that the Commission would likely receive less information and deal with fewer cases, which in turn would affect its ability to function effectively and meet its duty under the Charities Act. In support of its position, the Commission has cited paragraph 94 of the Commissioner's decision notice FS50184898 which states that:

"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 these 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".

21. In its submission to the Commissioner, the Commission provided additional information which the Commissioner has considered but has not reproduced in this decision notice.

### **Public interest test**

22. The Commissioner has noted the complainant's arguments in their letter of 20 November 2023. The complainant has not provided any public interest arguments.
23. In relation to the public interest in favour of confirming or denying whether the requested information is held, the Commission accepted that there is a wider duty to maintain the principles of regulatory practice of being transparent and accountable for its decisions. It stated that confirming if the information is held would help educate and inform the public about how the Commission handles regulatory matters and concerns, providing a clearer understanding of the Commission's statutory functions and duties. It states that the charity in question is well known locally and raises money from the public and hence this is a public interest factor in favour of confirming or denying the information is held.
24. The Commission has argued that, confirming, or denying whether the requested information is held would likely undermine the trust between the Commission and third parties. It maintains that this is not in the public interest as it is likely to deter the voluntary provision of information. It emphasizes that the Commission would be unable to identify and deal with certain issues falling within its regulatory remit and would prevent it from exercising its relevant functions as efficiently and effectively as possible. It stressed that given the ongoing internal dispute in the charity, there is a significant public interest in preserving this trust and confidence so that the Commission is able to exercise its relevant functions effectively.
25. It says that confirming whether or not the information is held would risk demonstrating partiality by the Commission. It stresses that the appearance of fairness and impartiality are important in dispute cases to ensure cooperation of all sides to the dispute. It argued that it is in the public interest for the Commission to maintain fairness in decision making based on evidence, aligning with its 2024-29 strategy which states:

"We act impartially, making decisions based on evidence. We listen to all concerns with the respect they deserve – but we are beholden to no-one in applying the law. We act without fear or favour from any other entity – whether that's Government, the sector, or the public."
26. The Commission explained that, in meeting its transparency obligations, it routinely provides updates to the public about its regulatory actions. It therefore argued that the public interest in transparency, accountability, and public awareness of how the Commission handles regulatory

concerns is met by the disclosure of its policies, guidance, annual report, and the final report of charity commission safeguarding taskforce. The Commission considers that the information it has already released goes to satisfy the public interest in disclosure of its regulatory activities which in turn supports maintaining the exemption. It argued that confirming or denying whether the information is held will not assist the public's understanding of its regulatory actions because the issue is live and confirming whether or not the information is held could harm the charity's own functions.

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

27. In making his decision, the Commissioner has taken into account the information provided by the Commission as well as the arguments it has presented to support its position. He has also considered the complainant's reasons for making the request for information. Whilst there is always a public interest in public authorities being transparent and accountable, in this case the Commissioner is persuaded by the Commission's argument that confirming or denying whether the information is held would likely harm the Commission's functions. In the circumstances of the case, the Commissioner accepts that it is necessary for the Commission to maintain impartiality and fairness as a regulator in the execution of its obligation under the Charity Act and to ensure that it performs its regulatory functions without the potential prejudice that could thwart the performance of its functions.
28. Therefore, the Commissioner is satisfied that the balance of the public interest in this case rests in the exemption in section 31(3) being maintained. The Commissioner's decision is that the Commission was correct to NCND holding the information under section 31(3) of FOIA.
29. As the Commissioner has found that the public authority was correct to apply section 31(3) of FOIA, he has not found it necessary to go on to consider the application of section 40(5) of FOIA.

## **Right of appeal**

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30. 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](mailto:grc@justice.gov.uk)

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

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Esi Mensah**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**