

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 May 2016

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

Decision (including any steps ordered)

1. The complainant made a complaint to the Charity Commission about a named charity. He subsequently requested a copy of the response which the charity had provided to the Charity Commission in response to those allegations. The Charity Commission refused the request under section 31 on the basis that its disclosure would prejudice its ability to investigate such complaints. During the course of the Information Commissioner's investigation additional information was released. However some information was still withheld under section 40(2) – third party personal data.
2. The Information Commissioner's decision is that the Charity Commission is entitled to rely on section 40(2) to withhold that information.
3. The Information Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 21 July 2015, the complainant wrote to the Charity Commission regarding the outcome of a complaint he had made about a particular charity and requested information in the following terms:

"I would like to request a copy of the response from the [named charity] in answer to my complaint in order that I can identify the justifications given by the [named charity]."
5. The Charity Commission responded on 18 August 2015. It refused to provide the requested information citing the exemption provided by

section 31(1)(g) and section 31(2)(c). In brief, section 31(1)(g) provides that a public authority can refuse a request if disclosing the requested information would, or would be likely to, prejudice the exercise of any of the functions set out in subsection (2). One of the functions listed in subsection (2) is, (c), any function carried out in order to ascertain whether regulatory action is required.

6. Following an internal review the Charity Commission wrote to the complainant on 23 October 2015. It maintained that the information was exempt under section 31.
7. During the Information Commissioner's investigation the Charity Commission contacted the charity in question. The requested information comprises of one letter together with a number of attachments. At this stage the charity said that it was content for its letter to be released following minor redactions being made to remove personal data. The charity did not consent to the disclosure of any of the attachments.
8. Having considered the charity's views, the Charity Commission released the letter, having redacted some personal data from it, on 11 February 2016. The Charity Commission relied on the exemption provided by section 40(2) to redact the personal data. The attachments were withheld under a combination of section 40(2), section 31, section 41 – information provided in confidence and section 43 - prejudice to commercial interests.

Scope of the case

9. The complainant contacted the Information Commissioner on 4 November 2015 to complain about the way his request for information had been handled. At that time he had not been provided with any information. However following the disclosure of the majority of the information contained in the letter the Information Commissioner contacted the complainant to discuss whether the complainant was now satisfied with the response or whether there were matters he still wished to pursue.
10. The complainant advised the Information Commissioner that he was not interested in the attachments. However he still wanted some of the information which had been redacted from the letter. The information in question is that which has been redacted from the bottom of page three, and the top of page four, of the letter.

11. The Charity Commission also redacted the author's signature from the letter. The complainant has not sought to challenge that redaction.
12. The Information Commissioner considers that the matter to be decided is whether the Charity Commission is entitled to rely on section 40(2) to withhold the personal data removed from pages three and four of the letter.

Reasons for decision

13. Section 40(2) of FOIA states that information is exempt from disclosure if it constitutes the personal data of someone other than the applicant and its disclosure to a member of the public would contravene any of the data protection principles as set out in the Data Protection Act 1998 (DPA).
14. For the exemption to apply the withheld information must first be personal data. Personal data is defined in section 1 of the DPA and, as far as is relevant to this case, constitutes information which relates to a living individual who can be identified from that data. The withheld information provides details of those trustees of the charity who had also been contracted to work as tutors on courses run by the charity. The Information Commissioner finds that the withheld passages are clearly personal data relating to these individuals.
15. The second element of section 40(2) is that the disclosure of this personal data must contravene at least one of the data protection principles. In this case the Charity Commission claims that disclosing the information would breach the first principle. The first principle states that personal data shall be processed fairly and lawfully and, in particular shall not be processed unless at least one of conditions in Schedule 2 is met. The term 'processing' includes the disclosure of information from one party to another. It is important to recognise that the test established by section 40(2) is whether disclosing the withheld information to a member of the public would contravene the principles. The circumstances of the actual requestor are not relevant when considering whether the disclosure would be fair and lawful.
16. The Information Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will he go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
17. 'Fairness' is a difficult concept to define. It involves consideration of:

- The possible consequences of disclosure to the individual.
- The reasonable expectations of the individual regarding how their personal data will be used.
- The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

18. When considering fairness it is important to consider the context in which the information was created. The Charity Commission had received a complaint about a particular charity. The Charity Commission can institute formal inquiries under section 46 of the Charities Act where the threshold for doing so is met. In such cases the Charity Commission will publish a statement of the results of the inquiry. However much of the Charity Commission's regulatory work is carried on outside the framework of a formal inquiry. This was the case in respect of the complaint to which this request relates. The findings of these less formal investigations are not published except in exceptional circumstances. Where there is potential for the results of one of these less formal investigations to be published, the Charity Commission will indicate as much in its correspondence with the charity. These procedures are set out on the Charity Commission's website. The Information Commissioner understands that the findings of the investigation into the complaint to which this request relates were not published.
19. Furthermore, the Charity Commission has explained that at no point was the charity given any indication that there was any potential for the findings to be published. This point is reinforced by the charity itself. When reconsidering its position prior to making the disclosure of 11 February 2016, the Charity Commission corresponded with the charity in order to seek its views. As explained in paragraph 7, the charity was content for some information to be released. However it makes it clear in its response that at no point was it given any indication that that the requested information would be released. The Information Commissioner is therefore satisfied that the charity and, more importantly, its trustees would have no expectation that any of the details contained in its correspondence with the Charity Commission about the complaint would be made public.
20. Although it is not necessary to go into the details of the allegations which the Charity Commission was investigating, it is appropriate to say that the complaint received by the Charity Commission related to payments made to trustees.

21. In this context releasing information about particular individuals named in the charity's response to such allegations could be interpreted as identifying them as the subject of the complaint. Although the Charity Commission's investigation found that no regulatory action was required, this would still be intrusive for the individuals concerned. It should be noted that any prior knowledge the complainant may have as to the identity of the individuals concerned is irrelevant when considering the application of section 40(2) as the test is whether disclosing the withheld information to a member of the public (not just the complainant) would be unfair.
22. Some information about one of the trustees was released by the Charity Commission as part of the disclosure made on 11 February 2016. Therefore their association with the complaint has already been revealed.
23. The information which was released related purely to their role as trustee and the Charity Commission took account of the importance of this role when deciding it would be fair to disclose that information. The Charity Commission has described the information which is still being withheld as being more biographical in nature and relating solely to the individual's role as a tutor. The withheld information comments on the ability and experience of that trustee as a tutor. The Charity Commission explained to the Information Commissioner that as this information did not directly relate to the role of this individual as a trustee it considered there was less justification in its disclosure. It is clear to the Information Commissioner that when deciding to release this information the Charity Commission considered the legitimate interests in the public having access to such information and weighed this against the rights of the data subject (the test set out in the third bullet point to paragraph 17).
24. The outstanding issue therefore is whether the legitimate interests of the public in having access to the remaining information on the role of this trustee as a tutor is sufficient to warrant its disclosure having regard for the rights of the individual concerned. The Commissioner recognises that the withheld information is pertinent to the complaint made against the charity. There is therefore a legitimate interest in its disclosure. The complainant has also argued that one would expect any individual to be happy for information to be disclosed about the experience and expertise which qualified them to act as a tutor.
25. Whilst the Information Commissioner recognises that this information has some bearing on the Charity Commission's consideration of the complaint and would not be detrimental to the individual's professional career as it does not contain any adverse comments, the

Information Commissioner still considers that bearing in mind their expectation of confidentiality the disclosure of additional information would be a further intrusion in to the privacy of the individual concerned. Therefore the Commissioner finds that the further disclosure would be unfair.

26. In respect of the other individuals referred to in the passages redacted from pages three and four the Information Commissioner notes that their identities are not revealed elsewhere in the information already disclosed. Therefore they have not been associated with the complaint. The Information Commissioner considers that these individuals would not have had any expectation that their details would be disclosed as a result of being associated with the complaint made against the charity. Any such disclosure would be intrusive. Having viewed the withheld information relating to these individuals the Information Commissioner is satisfied their association with the issue to which the complaint relates is very limited. Therefore there is little or no legitimate interest in the disclosing this information. Therefore the Information Commissioner finds that it would also be unfair to disclose this information.
27. As the Information Commissioner has found that the disclosure of any of the information withheld from pages three and four of the letter would be unfair, he does not require the Charity Commission to take any further action in this matter.

Right of appeal

28. 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

29. 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.

30. 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

Rob Mehan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF