

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 February 2022

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

Decision (including any steps ordered)

1. The complainant has requested information about Watton Sports and Recreation Centre ('the Charity').
2. The Charity Commission disclosed some information in response to the request but withheld the remainder, citing several exemptions under FOIA including section 40(2) (personal information).
3. The Commissioner's decision is that the Charity Commission has correctly withheld information under section 40(2). However, the Commissioner also finds that the Charity Commission has breached section 10 of FOIA.
4. The Commissioner does not require the Charity Commission to take any steps.

Background information

5. The Charity Commission is responsible for the registering and regulating of charities in the U.K.
6. On 30 October 2020 and 24 November 2020 the complainant raised a concern with the Charity Commission. The complainant, a former chairman of the Charity, was concerned that the Charity had employed a trustee inappropriately.

7. On 12 February 2021, the Charity Commission wrote to the complainant and explained that this matter was reported to it by the Charity itself. The Charity Commission explained that it had given appropriate advice to the Charity following this incident.

Request and response

8. On 27 February 2021 the complainant requested the following information:

“Please will you send me copies of the correspondence and any other relevant communications and information regarding this matter.”
9. The Charity Commission responded on 18 March 2021 and refused to provide the requested information. It cited section 31 (law enforcement) of FOIA as its basis for doing so.
10. Following an internal review the Charity Commission wrote to the complainant on 4 June 2021. It upheld its original position.

Scope of the case

11. The complainant contacted the Commissioner on 25 June 2021 to complain about the way that their request for information had been handled.
12. During this investigation, the Charity Commission changed its position. On 24 January 2022 the Charity Commission wrote to the complainant and confirmed that it had failed to identify all relevant information falling within the scope of the request. The Charity Commission also confirmed that it had erred in withholding some information which was eligible for disclosure and disclosed this information.
13. The Charity Commission confirmed the only information that remained withheld was: the complainant’s own personal data under section 40(1) (personal information), the names of junior employees of the Charity Commission under section 40(2) (personal information), third party data relating to trustees of the Charity under section 40(2) (personal information), the Charity Commission’s internal risk assessment process under section 31 (law enforcement) and the Charity’s accounts for the financial year ending 31 March 2019 under section 21 (information reasonably accessible to applicant by other means).
14. The Commissioner asked the complainant, in light of the Charity Commission’s change in position, if the grounds of their complaint had

changed. The complainant confirmed that they only wished to know the identity of the trustees involved in the incident.

15. The personal email address of the trustee who reported the matter to the Charity Commission, and the details of the trustee who has employed by the Charity, are being withheld under section 40(2). The scope of the Commissioner's investigation is to determine whether the Charity Commission is entitled to withhold these details.

Reasons for decision

Section 40(2) – personal information

16. Section 40(2) of the FOIA states:

“Any information to which a request for information relates is also exempt information if-

- (a) It constitutes personal data which does not fall within subsection (1), and
- (b) The first, second or third condition below is satisfied.”

Subsection (1) refers to exempt information that constitutes personal data of which the applicant is the data subject.

17. In this instance the relevant condition is contained in section 40(3A)(a) which states:

“The first condition is that the disclosure of the information to a member of the public otherwise than under this Act-

- (a) Would contravene any of the data protection principles.”

18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA18'). If this is not the case then section 40 cannot be used as a basis for refusing to disclose the information.
19. Secondly, and only if the Commissioner is satisfied that the requested information constitutes personal data, he must establish whether disclosure of that information would breach any of the data protection principles.

Is the requested information personal data?

20. Part 1, Section 3(2) of the DPA18 defines personal data as:

“any information relating to an identified or identifiable living individual.”

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable from that information.
22. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
23. An identifiable living individual is one who can be identified, either directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
24. The Commissioner has reviewed the information that is being withheld under section 40(2) which is contained within 'Annex B'. Annex B is a contact form that a named trustee, who is listed on the Charity's 2019 accounts, submitted to the Charity Commission. The trustee is asking for advice about an unintentional breach of constitution and describes the role of the employed trustee. A redacted version of Annex B has been disclosed to the complainant.
25. The Charity Commission has explained 'we no longer consider it appropriate to apply an exemption under section 31 to this information because the fact that the charity had employed a trustee is publicly available information as it is included in the accounts.' However, the Charity has redacted the personal email address of the trustee who reported the matter and descriptions relating to the employed trustee.
26. The Charity Commission has stated 'Although the employed trustee is not named in Annex B, the information in Annex B goes beyond what is contained in the 2019 accounts because the employed trustee is referred to by gender with details about the role undertaken. It is therefore highly likely that this individual would be identifiable.'
27. The Charity Commission has redacted all details of the employed trustee's job role, including the staff they worked alongside and examples of the work they achieved whilst employed by the Charity. It has also redacted all references to the gender of the employed trustee.
28. The Commissioner does not have a detailed working knowledge of the Charity, including the ratio of male to female trustees. The

Commissioner must consider whether disclosure of this information would lead to the identification of the employed trustee.

29. The Charity Commission has indicated that identification is likely due to the fact the Charity is a 'local charity operating in a relatively small geographic area.' Users of the Charity who are familiar with its activities could potentially identify the employed trustee from the activities described. Also, volunteers at the Charity may be aware of the events described and could potentially deduce the identity of the employed trustee from their gender or details of the job role. The Commissioner is particularly mindful that the complainant is a past Chairman of the Charity and may use the disclosed information to confirm or disprove any suspicions they may have about the identity of the employed trustee.
30. Having considered the circumstances of the case, the Commissioner is satisfied that the information relates to the employed trustee and disclosure of this information could lead to the identification of the employed trustee, despite the fact that they are not explicitly named.
31. The Commissioner also notes that the personal email address of the trustee who reported the matter to the Charity Commission relates to, and identifies, the trustee in question.
32. The fact that information constitutes personal data does not automatically exclude it from disclosure under FOIA. The Commissioner must now consider whether disclosure of the requested information would contravene any of the data protection principles.
33. The most relevant data protection principle in this case is principle (a) which states that "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

Would disclosure contravene principle (a)?

34. Personal data is processed when it is disclosed in response to the request. This means that a public authority can only disclose personal data in response to an FOI request if to do so would be lawful, fair and transparent.
35. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK General Data Protection Regulation (UK GDPR) must apply to the processing.

Lawful processing: Article 6(1)(f) of the UK GDPR

36. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states: "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party

except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data.”

37. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information made under the FOIA, it is necessary to consider the following three-part test:

i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

38. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest test

39. The Commissioner must first consider the legitimate interest in disclosing the personal data to the public and what purpose this serves. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may represent legitimate interests; they can be the requester's own interests, third party interests, or wider societal benefits. These interests can include the broad principles of accountability and transparency that underpin FOIA, or may represent the private concerns of the requestor.

40. It is important to remember that disclosure under FOIA is effectively disclosure to the world at large. The Commissioner is of the opinion that, if the requester is pursuing a purely private concern which is unrelated to any broader public interest then disclosure is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden by the fundamental rights and freedoms of the data subject during the test under stage (iii).

41. The complainant has expressed their concern that 'As a past chairman I was not consulted when I would have stated that the person employed was aware of the constitution rules.' The complainant has made allegations of cronyism against the Charity.

42. The complainant has also stated 'At the next AGM when all trustees must put up for re-election if they wish to continue, beneficiaries should be in possession of the candidates record of previous performance as a trustee and be ready to respond to any questions regarding their role in

appointing a trustee contrary to the constitution.' There is a clear, private legitimate interest being pursued here.

43. The Charity Commission has acknowledged 'We recognise there may be a legitimate public interest in the public being properly informed of the regulator's decisions, findings and regulatory conclusions to ensure the proper functioning and regulation of charities.'
44. The Commissioner accepts that there is both a private legitimate interest and a wider legitimate interest being pursued here. Therefore, he will move onto the necessity test.

Necessity test

45. The Commissioner must now consider if disclosure is necessary or if there is an alternative method of meeting this legitimate interest.
46. 'Necessary' means more than desirable but less than indispensable or absolute necessity. The necessity test is a means of considering whether disclosure under FOIA is necessary to meet the legitimate interest identified, or whether there is another way to do so that would interfere less with the privacy of individuals.
47. The Charity Commission states 'it is not necessary to process the personal data even if there is a legitimate interest. Information that the trustees (who are jointly and severally liable to the charity) have acted in breach of duty is in the public domain as this is information held in the accounts. We have also explained our regulatory response to the requestor and to the charity and this information is now being disclosed in response to the request.'
48. The Commissioner agrees. It does not seem necessary to disclose the details of the employed trustee, or the personal email address of the trustee who submitted the form, bearing in mind the information that the Charity Commission has already disclosed about its decisions, findings and regulatory conclusions.
49. However, the Commissioner is mindful of the private legitimate interest being pursued here – the identities of the trustees involved. The name of the trustee who submitted the form is not redacted because this information is already included in the Charity's 2019 accounts. It is not necessary for their email address to be disclosed to identify the trustee as they have already been identified in Annex B and online. Therefore, the Commissioner has determined that the disclosure of the personal email address is not necessary.
50. However, the identity of employed trustee has not otherwise been made available to the public. There are no less intrusive means of achieving

the private legitimate interest identified in stage (i) and so the Commissioner will move onto the balancing test.

Balancing test

51. Since the Commissioner is satisfied that disclosure (of the personal data of the employed trustee) is necessary for the purpose that this legitimate interest represents, he will now go onto consider whether the identified interests in disclosure outweigh the interests or fundamental rights and freedoms of the data subject.
52. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
53. In performing this balancing test, the Commissioner has considered the following:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
54. In the Commissioner's view, the balancing test should take into account whether the data subjects' concerned have a reasonable expectation that their information would not be disclosed. This expectation may be influenced by a number of factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose which this personal information serves.
55. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
56. The Charity Commission has cited section 16 of the Charities Act 2011 which states:

"So far as is reasonably practicable the Commission must, in performing its functions, act in a way which is compatible with the encouragement of—

 - (a) all forms of charitable giving, and
 - (b) voluntary participation in charity work."

57. The Charity Commission has indicated that disclosure of this information would make the voluntary role of trustee less attractive for the Charity and more widely.
58. The Charity Commission has also identified that 'From the information we have on file, the decision to employ a trustee was a collective decision of the trustees acting in good faith. It would therefore be very unfair to single out one trustee...we have taken into account that the law generally protects trustees who have acted honestly and reasonably from personal liability to their charity.'
59. The Charity Commission has explained that the employed trustee in question would have no expectation that the circumstances of their association with the Charity would be put into the public domain.

The Commissioner's view

60. The Charity Commission has stated 'The requestor has an interest in the Charity as he is a complainant and despite the breach of duty being included in the 2019 accounts, we have not had complaints from other parties about this issue. We have provided the requestor with the vast majority of the information falling within his request explaining our regulatory approach. We have therefore, in general, been open about our approach to regulation and decision making in this case.'
61. The Commissioner must balance the rights and freedoms of any data subject with the legitimate interest that the request represents. Whilst the Commissioner acknowledges the complainant's concerns about a breach of duty, he is satisfied that the Charity Commission has been as transparent as it can be about this matter without infringing upon the rights of any data subject.
62. Furthermore, the information being pursued here appears to be of limited, if any, interest to the wider public despite the breach of duty being in the public domain. The Commissioner does not consider that the disclosure of this personal data holds the Charity or the Charity Commission any more accountable or make either organisation any more transparent.
63. Ultimately, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. He considers that there is no Article 6 basis for processing and disclosure of information relating to the employed trustee, would be unlawful.
64. It is therefore the Commissioner's view that the Charity Commission has correctly applied section 40(2) to withhold the personal data of the employed trustee.

65. Having decided that disclosure would be unlawful, the Commissioner does not need to go on to separately consider whether disclosure would be fair or transparent.

Section 10 – time for compliance with request

66. Section 1(1) (general right of access to information held by public authorities) states that:

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

67. Section 10 time (for compliance with the request) of the FOIA states that:

“...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt”

68. If there is information that falls within the scope of the request to which an exemption does not apply, this must be disclosed within twenty working days. As the Charity Commission erred in its identifying, and disclosure, of certain information that fell within the scope of the request it has breached section 10.

Other matters

69. During a phone call with the Commissioner of 31 January 2022, the complainant indicated that they wished to know the identities of all the trustees involved in the incident, including those who signed off on the decision to employ the employed trustee.

70. The Commissioner has had sight of all withheld information in relation to the request and is satisfied that the Charity Commission is only withholding under section 40(2): the names of two junior members of staff at the Charity Commission (which the complainant is not concerned with), the personal email address of the trustee who reported the incident and the details of the employed trustee.

71. The Charity Commission has explained that the decision to employ the trustee in question was taken collectively by the trustees at the time and this is the only further information it holds on the subject. The Commissioner notes that a list of trustees for the Charity, contained

within its 2019 accounts¹, has been withheld under section 21 (information reasonably accessible to the applicant by other means) and details of how to access such information were provided to the complainant on 24 January 2021.

¹ <https://register-of-charities.charitycommission.gov.uk/charity-search/-/charity-details/268128/accounts-and-annual-returns>

Right of appeal

72. 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

73. 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.
74. 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

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