

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 September 2016

Public Authority: Charity Commission

Address: PO Box 211
Liverpool
L20 7YX

Decision (including any steps ordered)

1. The complainant has requested information on the numbers of incidents of financial abuse reported to the Charity Commission and the number of whistleblowing reports about charities received by the Charity Commission, broken down by names of charities. The Charity Commission considered the information exempt from disclosure on the basis of section 31 and 41 of the FOIA.
2. The Commissioner's decision is that the Charity Commissioner has correctly applied the provisions of section 41 to withhold the requested information. She requires no steps to be taken.

Request and response

3. On 12 January 2016, the complainant wrote to the Charity Commission and requested information in the following terms:

"totals of all "serious incidents" of financial abuse and/or financial mismanagement for each of the last 5 years broken down by the charity where the abuse or mismanagement was alleged to have occurred. Please consider this a new request.

Please also list the number of whistleblower reports about charities for each of the last 5 years broken down by charity and nature of report. By nature I mean categories of report e.g. "financial abuse and/or financial mismanagement"."

4. The Charity Commission responded on 8 February 2016. It confirmed that it held the requested information. For the first part of the request (the totals of serious incidents of financial abuse) the Charity

Commission cited section 21 of the FOIA as it considered the information was already reasonably accessible and provided a link to its website¹. For the second part of the request where a breakdown by charity was requested the Charity Commission refused the request on the basis of section 41, 31(1)(g) and 31(2) of the FOIA.

5. Following an internal review the Charity Commission wrote to the complainant on 7 March 2016. It stated that it had incorrectly applied section 21 to the first part of the request as it did not; in fact, publish the information broken down by charity name. Instead, the Charity Commission clarified it sought to rely on section 41 and 31(1)(g) with 31(2) to withhold this information. The Charity Commission also maintained its position to withhold the information in the second part of the request under the same exemptions.

Scope of the case

6. The complainant contacted the Commissioner on 14 April 2016 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation the Charity Commission confirmed the subsections of section 31(2) it considered relevant where (a), (b), (c), (f), (g) and (h).
8. The Commissioner considers the scope of his investigation to be to determine if the Charity Commission has correctly applied the provisions of the sections 41 or 31 exemptions to withhold the requested information.

Background

9. The Charity Commission is the registrar and regulator of charities in England and Wales. A Serious Incident Report (SIR) is a report to the Charity Commission that identifies a serious issue such as a matter of regulatory concern, an allegation of fraud or other financial abuse of charities, a safeguarding matter involving, the misuse of charity, or

¹ <https://www.gov.uk/government/collections/tackling-abuse-and-mismanagement-in-charities>

significant breaches of trust or non-compliance that affect the public trust and confidence in charities.

10. A disclosure in the public interest (otherwise known as a whistleblowing report) can be made to an employer or to a Prescribed Person. The Charity Commission is a Prescribed Person as a regulator of charities under the Public Interest Disclosure Act 1998 (PIDA). A report can be made to the Charity Commission about the proper administration of charities in England and Wales (PIDA report). A disclosure about financial abuse or mismanagement would meet the terms of a PIDA report.
11. The Department of Business Innovation and Skills (DBIS) "List of Prescribed Persons and Bodies guidance" provides an email address so that workers can make the necessary disclosure. If a report of wrongdoing in the public interest is made to the Charity Commission the worker is protected under the PIDA and the Charity Commission must treat the information confidentially.

Reasons for decision

Section 41 – information provided in confidence

12. Section 41(1) of the FOIA states 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 that under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

Was the information obtained from another person?

13. The Commissioner recognises that the nature of the requested information is such that it would have to have been obtained from a third party either via a whistleblowing report or an SIR. Information on serious incidents of abuse would have initially been received from allegations made to the Charity Commission from third parties. Similarly, by its very nature, a whistleblowing report is information provide to the Charity Commission by an anonymous third party.

14. The Commissioner is satisfied that the information was obtained from another person and therefore the requirement of section 41(1)(a) is satisfied.

Would disclosure constitute an actionable breach of confidence?

15. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

16. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
17. The Charity Commission has explained that the information it receives on a confidential basis is used in a variety of ways to allow the Charity Commission to ensure the efficient and effective running of charities and to fulfil its objectives and functions as set out in the Charities Act 2011.
18. The Charity Commission considers the information it receives has far reaching and significant implications for charities as it can either represent fraud or other financial abuses of charities; it can relate to safeguarding matters where children or vulnerable adults need to be protected; it can relate to the misuse of a charity for terrorist purposes or other significant breaches of trust or non-compliance that affects public trust and confidence in charities.
19. Having regard to the above, the Commissioner notes that the request does not ask for details of the reports made to the Charity Commission but rather asks for numbers of allegations and whistleblowing reports received by the Charity Commission with these broken down by charity. The information is not publicly available in this form and the only information which the Charity Commission publishes is statistical

information reports of serious incidents and whistleblowing reports². The Charity Commissioner does not publish information showing which charities have been the subject of any allegations. The Commissioner accepts therefore that the requested information is not otherwise accessible. The Commissioner also accepts the information cannot be said to be trivial as the allegations made in SIR's or whistleblowing reports are used by the Charity Commission to investigate potential issues of financial abuse or mismanagement.

20. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

21. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.

22. The Charity Commission has explained it has an open and transparent policy to preserve confidentiality in relation to SIR's and whistleblowing reports. In support of its position, the Charity Commission has pointed to a regulatory alert published in September 2014³ which stated:

"We will not proactively disclose to the media or the public the list of names of charities that have made serious incident reports. It is important that charities have confidence to report sensitive information to us and know that it will be handled properly and carefully."

23. Similarly the Charity Commission's guidance "*Reporting Serious Incidents – guidance for trustees*"⁴ also contains information on how confidential and sensitive information is handled and repeats much of what was said in the regulatory alert.

24. In addition to this, as explained the background section of this notice, reports made to the Charity Commission about the proper

² <https://www.gov.uk/government/collections/tackling-abuse-and-mismanagement-in-charities>

³ <https://www.gov.uk/government/news/alert-on-reporting-serious-incidents-rsi>

⁴

http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375979/Reporting_Serious_Incidents_LowInk.pdf

administration of charities are made as part of the Charity Commissioner's role as a Prescribed Person under the Public Interest Disclosure Act 1998 (PIDA). If a report of wrongdoing in the public interest is made to the Charity Commission the work is protected under the PIDA and the Charity Commission must treat the information confidentially. A whistleblowing report can be classed as a report under the PIDA.

25. Based on this, the Commissioner accepts that information communicated by a whistle blower is clearly information communicated in confidence to the Charity Commission in its capacity as a regulator of charities and the Charity Commissioner a Prescribed Person under the PIDA.
26. Information in an SIR is also information communicated in confidence to the Charity Commission in its official capacity as a regulator. The Commission is satisfied there would have been no reasonable expectation on behalf of the confiders at the time that this information may be put in the public domain in the future. In this case the information is the number of reports made and the names of the charities and the Commissioner does not believe that confiders would expect any of the information they provide, even the name of the charity they are reporting on, to be made publicly available given the clear policy of the Charity Commission on handling sensitive information.
27. Therefore, the Commissioner accepts there is both an implied and explicit obligation of confidence on the part of the Charity Commission that it will not share information it receives from a SIR or whistleblowing report.

Would disclosure be of detriment to the confider?

28. The Charity Commission maintains its position that the names of charities which have been the subject of allegations in SIR's or whistleblowing reports should not be disclosed into the public domain. The Charity Commission believes disclosure would undermine the confidence the public has in knowing that they can approach the Charity Commission to raise concerns in a confidential manner.
29. The Commissioner notes that in a decision by the Information Tribunal⁵ it was noted that *"the loss of privacy can be a detriment in its own right"* and the Commissioner therefore acknowledges there is not necessarily a

⁵ *Bluck v ICO & Epsom and St Helier University Hospital NHS Trust (EA/2006/0090)*

need for there to be any detriment to the confider, in terms of tangible loss, in order for it to be protected by the law of confidence.

30. The Commissioner considers that while disclosure would cause no harm to the confider in terms of loss, knowledge of the disclosure of the names of charities who have been reported to the Charity Commission could identify employees of the charity who might have reported matters to the Commission and it could be of distress to whistle blowers who will normally only report when they are assured that their concerns will be treated in the upmost confidence.

Is there a public interest defence for disclosure?

31. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Charity Commission could successfully rely on such a public interest defence to an action for breach of confidence in this case.
32. The Charity Commission accepts that it has an important public role as a regulator in demonstrating to the public that charities and their assets are being properly managed and protected and this is recognised in the Charity Commission's statutory objectives to increase public trust and confidence in charities (as set out in section 14(1) of the Charities Act 2011).
33. However, the Charity Commission argues that this is met by the publication of information on how it conducts its regulatory work. As an example, the Charity Commission refers to its annual publication "*Tackling abuse and mismanagement*"⁶ which demonstrates how it promotes compliance by charity trustees with their legal obligations in order to promote public trust and confidence in the charity. In addition to this, the Charity Commission publishes Statement of Regulatory Inquiry Reports⁷ and Regulatory Case Reports⁸ which are published at the end of a regulatory case and deal with the regulatory concerns that have come up, often this will involve financial abuse or mismanagement.

⁶ <https://www.gov.uk/government/collections/tackling-abuse-and-mismanagement-in-charities>

⁷ <https://www.gov.uk/government/collections/inquiry-reports-charity-commission>

⁸ <https://www.gov.uk/government/collections/case-reports-charity-commission>

34. The Charity Commission therefore considers that the information accessible in all of these publicly available reports is sufficient to assist the public in understanding its regulatory role and that disclosure of further specific information about its regulatory action in relation to particular named charities would compromise the future voluntary provision of information or disclosure to the Charity Commission as a Prescribed Person under the PIDA.
35. The Charity Commission also argues that disclosure without the consent of the confiders would interfere with its ability to carry out its statutory functions and properly regulate charities. This is because trustees would be less likely to provide disclosures to the Charity Commission if they believe it possible that this information, or parts of it, would be routinely made publicly available. In terms of whistleblowing reports, and the information obtained by them, the Charity Commission treats all the information as confidential under the PIDA and would not disclose it unless legally obliged to do so.
36. The Commissioner acknowledges there is a public interest in transparency but she is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant. She considers this to be particularly strong in this case where the information may be obtained by trustees, reporting issues within their own charities. She also notes that confidentiality with regard to whistle blowers is very strong and her own guidance on *“Protection for Whistleblowers disclosing information to the ICO”*⁹ reiterates that information received by whistle blowers will be treated as confidential and not disclosed without lawful authority.
37. The Commissioner also accepts there is a public interest in maintaining trust and preserving a free flow of information to the Charity Commission as without it there could be an impact on its regulatory functions as the Charity Commission relies on members of the public and employees of charities to inform it of potential issues with financial abuse and/or mismanagement.
38. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure

⁹ https://ico.org.uk/media/report-a-concern/documents/1042550/protection_for_whistle_blowers.pdf

of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.

39. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining the trust between confider and confidant; and that the Charity Commission would not have a public interest defence for breaching its duty of confidence.
40. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA. As she has found section 41 to be engaged and provide a basis for withholding the information she has not gone on to consider the use of the section 31 exemption to withhold the same information.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

Jill Hulley
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