



Appeal number: CA/2018/0007

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(CHARITY)**

**DAVID SWETTENHAM
HELEN KING**

Appellants

- and -

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

RULING ON APPLICATION FOR DISCLOSURE

Before:

Judge Alison McKenna

Sitting in Chambers on 20 December 2018

DECISION

1. The Appellants' application for disclosure is refused.

REASONS

Background

2. The Appellants have lodged an appeal dated 7 September 2018 against the Respondent's decision not to discharge protective orders on review. The case is proceeding towards a hearing.
3. When the Appellants filed their Reply (rule 28) dated 2 November, it included an application for additional secondary disclosure (rule 29).
4. The parties have agreed to my determining that application on the papers. I have received additional written submissions from both of them before making my decision.

The Law

5. Rule 29 itself does not establish a right for an opposing party to request additional disclosure over and above that provided by the Respondent. I have therefore treated the Appellants' application as one falling under rules 6 and 15 (1)(a) of the Rules.
6. Rule 15 (1) (a) provides for Tribunal to direct the exchange of a list of documents and a right to inspection of those documents, in a process similar to that conducted by a court in a civil trial under part 31 CPR¹. Following the approach of CPR, it is extremely unlikely that the Tribunal would allow a party to rely at hearing on any documents which it had not disclosed when under an obligation to do so.
7. In order to decide whether it is fair and just to make a specific disclosure direction under rule 15 (1)(a), I would need first to be satisfied that the documents concerned are relevant to the issues the Tribunal must decide.
8. As Mr Swettenham has previously appealed to the Tribunal against the same protective orders with which I am now concerned, he will recall my description of the Tribunal's jurisdiction as follows:

3. An appeal against the Charity Commission's Orders under s. 76 of the 2011 Act requires the Tribunal to "consider afresh" the Charity Commission's

¹ <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part31#31.1>

http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part31/pd_part31a

decision (s.319(4) (a) of the 2011 Act). In so doing, the Tribunal may consider evidence which has become available subsequent to the Charity Commission's Order (s.319 (4) (b) of the 2011 Act).

4. It follows that the issue for the Tribunal in determining this appeal is whether the Tribunal would itself make the Orders under appeal on the basis of all the evidence available to it at the hearing. In the usual way, the Appellant (who brings the appeal as a charity trustee under column 2 of schedule 6 to the 2011 Act) bears the burden of proof to persuade the Tribunal to allow his appeal.

5. Tasked by Parliament with making a fresh decision, the Tribunal has no power to review the procedures followed by the Charity Commission when making the Orders or to consider its conduct prior or subsequent to the making of the Orders.²

9. I note that the grounds of appeal in this matter and the detailed submissions made in support of the applications for disclosure (Ms King's e mail of 4 December) are substantially concerned with the Appellants' trenchant criticisms of the Respondent's historic decision-making process. As I made clear at paragraph [5] of my earlier Decision, the Tribunal will not be considering the Respondent's process at the hearing of this appeal, but rather deciding "afresh" whether it would itself make the protective orders. I have therefore considered whether the requested documents might be helpful to that process.

Submissions

10. The application is for largely unspecified documents falling under thirteen different headings. It concerns documents presumed to have been obtained/produced during the Respondent's inquiry and to have informed its original decision to make the protective orders. The detailed submissions in support of the application are somewhat difficult to follow as they are contained in a long e mail with no paragraph numbers and including much rhetoric. As the Appellants accept in their submission, "*we do not know what we do not know*" so they are unable to be precise about what information the requested documents contain and their relevance to the issues the Tribunal must decide.
11. The Respondent's response to the application is contained in its e mail of 5 December. I note the Respondent's assertion that it understands and has complied with the Tribunal's Rules in respect of disclosure. It regards the present application as raising issues beyond the scope of the present appeal and

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<http://charity.decisions.tribunals.gov.uk/documents/decisions/Decision%2010%20January%202018.pdf>

beyond the Respondent's obligations. It is understandably unwilling to disclose documents relevant to its decision to open an inquiry rather than its decision to make the protective orders, as the decision to open an inquiry has not been appealed³. Items 2, 3, 4 and 10 in particular fall into this category.

12. More specifically, the Respondent has:

- (i) Denied that requested item 1 exists;
- (ii) Agreed to disclose further documents in respect of items 4, 11, and some third-party correspondence under item 12;
- (iii) Agreed to include in the Tribunal's hearing bundle items 5, 7, 8, 9, 11 (in relation to Nick Howell and Alistair King);
- (iv) Already provided a transcript of the interview tape requested as item 6.

13. Requested item 13 is described as "verification of all allegations received by the Commission from any source". I find this request as framed too wide-ranging to constitute a valid disclosure application under rule 15 (1) (a), as I cannot determine its relevance to the appeal.

14. Having considered the Respondent's reply to the application, I am satisfied that it has made an appropriate response. I am not persuaded that it is necessary to a fair hearing of this appeal for me to make a specific disclosure direction in relation to any of the documents it has not agreed to disclose. I do consider that such a direction would impose a disproportionate burden on the Respondent. This matter must now proceed to a hearing without further disclosure. However, I remind the parties that the Tribunal may itself issue directions about the evidence it requires to determine an appeal and that it will keep the issue under review.

Other Matters

15. The Appellants' rule 28 Reply also refers to their proposed application for witness summonses. The Appellants presumably consider that people they have named will be able to give evidence which supports their appeal, but I have no way of confirming this, as I have seen no proof of evidence from those persons. The Tribunal may not direct a person who has not otherwise been called as a witness to attend a hearing merely for another party to cross examine them, as the Tribunal is not an inquiry. It is the Appellant in each

³ The Tribunal has recently received an application to appeal the inquiry decision. The application is more than a year out of time. The Tribunal has not yet decided whether to allow it to proceed.

case who bears the burden of proof and must produce the evidence to substantiate their own case. I am unclear whether the Appellant has yet asked the persons in question whether they are willing to make a witness statement in these proceedings. It would clearly be disproportionate and oppressive for me to compel a witness to attend, when that person might be willing to attend voluntarily.

16. Without yet formally ruling on the proposed application for a witness summons, I hope it is helpful if I make clear to the Appellants now that it is incumbent upon any party, in making an application to a Judge to compel a person to attend a hearing, to show that (a) the evidence they would give is relevant to the Tribunal's deliberations; (b) they have asked that person to attend as a witness voluntarily; and (c) that person has refused to do so.
17. I am aware that the Appellants have been given information about charities which may be able to offer them free legal advice and representation. They are entitled to represent themselves before the Tribunal, but I observe here that this application has raised technical matters which would have benefitted from a lawyer's input.
18. In view of the continuing failure of the parties to agree Directions to bring this matter to a hearing, I have requested an oral directions hearing to be listed before myself in early January 2019. That hearing may of course be vacated if appropriate Directions are agreed by the parties and approved by the Tribunal before the listed date.

Signed

Alison McKenna
Chamber President

Dated: 20 December 2018

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