Chapter 4

Accessibility and Transparency

Introduction

The issue of transparency received considerable attention from the Table on Improving the Regulatory Framework. In its contribution to the *Working Together* report (1999), it defined transparency as covering informing, reporting, responding to requests for information, and conducting regulatory affairs in a manner that can be easily observed and understood. Accessibility is a related concept and refers to making information available to others. In the context of this chapter, it refers specifically to the regulator making available to the public the information it holds about charities.

Over the last five years, the amount of information that the Charities Directorate can release about a charity has increased significantly. But it is still limited. The *Income Tax Act* has, for good reason, a bias that information provided by a taxpayer should remain confidential. Even though charities (and not-for-profit organizations that are not registered charities) do not pay taxes, they are considered "taxpayers" under the Act. Therefore, most information about them was, in the past, considered confidential.

Until a legislative change in 1998, the Charities Directorate could confirm that an agency is or was a registered charity, the location of the charity, its registration number, and the date of registration. Also, the Directorate could release the information provided by charities in the public portion of their annual information return (T3010) and, with the charity's permission, could make its annual financial statements available on request. If a charity's registration had been revoked, the revocation date could also be released.

As a result of the 1998 amendment, the Charities Directorate now may, at the request of any individual, release the following additional information about a registered charity:

- the charity's governing documents, including its statement of purpose;
- information provided on the application form;
- names of the charity's directors and the periods during which they were directors;
- the letter notifying an organization of its registration as a charity, including any warnings or conditions; and
- the letter sent by or on behalf of the Minister to a charity revoking its registration, including the reasons.

Despite this amendment, there is still much information held by the Charities Directorate that cannot be or is not released, including information relating to an application for charitable registration that is denied. People also cannot find out whether a charity has been audited or the results of that audit, unless the charity is deregistered. Information about the Directorate's policies and operational guidance to its employees is not published.[1] In general, even with the amendment of 1998, there is not enough information available to allow the public – including other charities – to assess the performance of the Charities Directorate.

The current rules raise a significant issue – how to balance the privacy that charities should enjoy when dealing with the regulator against the need for transparency of the regulator's policies, procedures and decisions.

We considered what information should be readily available to the public, either on request or through a mandated requirement that it be published. At the same time, we also considered the impact of the wholesale release of information about a charity. For example, if a charity is about to be audited, should that fact be known? Would it not help an unscrupulous organization to avoid detection? Would it not damage the public's trust in a charity, even if it were eventually found to be wholly in compliance with the law?

In reaching our recommendations on the release of information, we looked at the "life cycle" of a charity and considered what information the regulator gathers at each stage. We then examined whether that information should be released or kept confidential. We have come up with a series of recommendations covering the following documents:

- documents related to an application;
- documents related to a compliance action;
- documents on a charity's files that do not relate to either applying or complying; and
- other information that would promote accessibility and transparency such as the policies and procedures of the regulator and previous decisions of the court and the regulator.

[1] In November 2002, the Directorate started placing its policies on its website.

Documents related to an application

Before a decision has been made

Normally, the first time the regulator becomes aware of an organization is when it applies for registration as a charity. There is some disagreement as to whether the regulator should, before a decision is made, release the fact that an organization has applied for registration. The *Working Together* report said this information should be available. With respect, we disagree.

We do not see the benefit of advertising that a specific organization has applied for charitable status. It is unlikely that individuals will be able to provide information that is relevant in determining whether the applicant's proposed purposes are charitable or not. On the other hand, we see room for significant mischief. Individuals or organizations that are opposed to a particular group's beliefs, or who might see the applicant as a potential competitor, could raise objections to the application. If an examiner were to receive and consider an objection, then procedural rules would have to be established to allow the applicant to examine the objection and to submit additional material. We believe that this would create a procedural logjam.

If someone believes that there are valid objections to the registration of a particular charity, the regulator could use that information as part of its compliance program. After considering the objection, it could decide whether or not closer scrutiny must be given to the newly registered charity.

Therefore, we propose that no information should be made available about an applicant until the regulator decides on the application.

After a decision has been made

By contrast, we believe that significantly more information should be available about the regulator's decision after it is made.

The first information that should be available is the reasons for the regulator's decision. As a general rule, we believe that reasons should be given, and should be publicly available, for every registration decision. The reasons do not always have to be an in-depth explanation. If, for example, a new church is registered, the regulator need only say that its decision was based on a conclusion that the applicant falls into the "advancement of religion" category. On the other hand, if the applicant's charitable purpose is a novel one or represents a new interpretation of a charitable purpose, then the purposes of the organization should be given, as well as the category under which it has been registered. Also, an explanation of the reasoning that led to its registration should be provided.

If an application is denied, the reasons should always be more complete and should include the organization's name. This may take the form of releasing the Administrative Fairness Letter in which the regulator states its preliminary determination and the reasons, or it may be in some other format. If the organization is appealing the decision, any release of information should note this fact.

We believe that the reasons for a decision, a critically important part of the transparency issue, should be **actively released**. The regulator should not wait until it is asked for a list of denials or reasons, but should actively publish its decisions on its website. In the case of approvals, this may be linked to the charity's name on the register. In the case of denials, some other part of the website can be used.

We recognize that in a small number of cases, provisions of the federal *Privacy Act* may create a barrier to full release of information about a denied application. In those cases, the regulator should withhold as little information as possible. The *Privacy Act* should be used with precision.

While the regulator should actively publish the decisions and reasons, further information about the application should **only be available on request.** We would maintain the current provisions that allow for the public portions of the application for registration to be made available to anyone requesting them. We would also allow that same information for organizations that do not obtain registration to be available on request. Application files can be voluminous, and contain numerous references that would have to be erased before public release in order to comply with the provisions of the *Privacy Act*. We believe there is insufficient justification for this additional work, in that there would be adequate information available to judge the regulatory authority's decision making if our recommendations are adopted.

Other information on an application file should **remain available only to the applicant**. This information includes communications between the applicant and regulator, internal memos prepared by the regulator's staff, research materials gathered by the regulator, and communications between the regulator and third parties.

The regulator can, from time to time, expect to seek legal opinions about particular issues. These opinions are privileged and should not be disclosed to the applicant or the public.

What we heard

During the consultations, a substantial majority of the speakers supported our proposal against disclosing the names of applicants before a decision is reached on their applications.

On releasing information on denied applications, opinion was divided. A few spoke against releasing any information, including reasons for the denial. A slight majority favoured identifying denied applicants in posting reasons for the denial on the

regulator's website. Giving a detailed explanation of why an organization was denied would allow enhanced scrutiny of the regulator's decisions and enable others to learn about what is required to obtain registration. However, a significant number, while wanting reasons for denials to be given, also wanted the identity of denied applicants to be protected. They felt sufficient accountability could be achieved by actively publishing just the reasons for the denial. Naming the organization was unnecessary and could prove pointlessly damaging.

In addition to actively publishing information about registration decisions, we also proposed that the same documents that are currently available on request for a registered applicant should also be available for denied applicants. Opinion on this proposal was also divided.

Our conclusions and recommendations

We confirm our original conclusion that no information about an applicant organization should be available to the public while the application is still in process. Also, we confirm our original conclusion that once the regulator makes a positive decision on an application, it should publish the names of newly registered charities on its website, along with the reasons for the decision. These reasons need to be detailed when the application raises unusual or novel features, but for routine applications it would be sufficient to identify the charitable category into which the applicant falls.

Given the variety of opinions expressed in the consultations, we reconsidered how denied applications should be treated. On the one hand, we believe that explaining why applications fail is a key element of regulatory transparency, and that in many cases a proper accounting cannot be given if the identity of the applicant has to be withheld. On the other hand, we acknowledge that at least some unsuccessful applicants might not wish to have their identity made known.

We confirm our original proposal for a full release of reasons for a denial, including the name of the organization. However, we would allow organizations that do not wish to disclose this information to formally withdraw their applications after the regulator has issued an Administrative Fairness Letter (for a description of the current registration process, please see Chapter 2). If they withdraw, nothing about their application would be in the public domain (beyond the regulator providing the number of such withdrawals and any pertinent observations in its annual report). To avoid giving an impression of encouraging organizations to withdraw, the regulator should inform them of this option early in the registration process, before reaching the stage of issuing an Administrative Fairness Letter.

We also confirm our original proposal that the same information that is currently available on request for successful applicants should also be available on applicants that are denied registration. This information would not be available if an applicant withdraws its application.

Currently, about 20% of applications are neither approved nor denied. We believe this is too large a number to leave unaccounted for. We thus wish to add to our original proposals that if an applicant does not respond to a request for further information within 90 days, the application should be denied on the basis that it is an incomplete application. Further, if an applicant does not respond within 90 days to an Administrative Fairness Letter, the application should be denied for the reasons stated in the Letter. In both cases, we suggest an applicant could ask the regulatory authority for reasonable extensions to the 90-day period where it needs more time to respond.

Recommendations

29. The identity of applicant organizations should remain confidential until the regulator either accepts or denies the application.

30. The regulator should publish on its website reasons for all its decisions on applications.

31. The same documents that the *Income Tax Act* allows to be disclosed for registered charities should also be available on request for organizations that have been denied registered status, plus the letter setting out the reasons for the denial.

32. Organizations should be made aware early in the registration process that they can withdraw their application after receiving an Administrative Fairness Letter, and that, if they choose this option, then no information about their application will be released.

33. The regulator should establish a policy of denying applications where applicants do not respond within 90 days to communications from the regulator.

Documents related to a compliance action[2]

Before the regulator has decided what action to take

Part of a regulator's role is to ensure that a charity complies with the law. Usually compliance actions are audits of the charity's books and records. These activities are part of enforcing the law. Therefore, we do not believe that any internal or external documents related to ongoing compliance actions should be disclosed.

[2] In relation to the regulator's compliance program, we exclude from consideration the special procedures for handling security or criminal intelligence reports under the *Charities Registration (Security Information) Act*.

After the regulator has decided what action to take

We have struggled with the question of whether or not the fact that a charity has been audited should be disclosed. On the one hand, we are concerned that some people might come to unfavourable conclusions about a charity simply because it has been audited. On the other hand, we think it can be beneficial to a charity, and to the public's trust in the sector, for audits to be made public. Our interim proposal was that the regulator should be allowed to disclose the fact that an audit has taken place if it is requested to confirm this.

This raises the question of whether results from an audit should be reported. To be consistent with our recommendations on the compliance regime in Chapter 6, we conclude they should not. However, we propose to allow the regulator to say, in response to a question on what the outcome of an audit was, whether an intermediate sanction has been imposed. As we note in Chapter 6, this information would already be available, in that these sanctions would be publicly reported.

If an audit reveals information that leads to an application to deregister a charity, that information too will be available through the sanctions regime we have recommended.

The detailed information that was obtained during the audit as well as the regulator's instructions to the auditor should not be publicly available.[3] Legal opinions obtained by the regulator, because they are privileged, should also not be available.

What we heard

In discussing what information should be released about the audits of charities that the regulator conducts, many people in the consultations noted that the public views the word "audit" negatively and as indicating the existence of probable wrongdoing. There is also little public understanding about what an audit is and why an audit takes place.

We heard strong agreement with our proposal that the fact that an audit is being conducted should not be released to the public. The harm that could be done to a charity's reputation by releasing such information, especially given the length of time it takes to complete some audits, was seen to outweigh any possible benefit to donors.

Opinion was more varied on the question of what should be available after an audit is completed. Just under a third of the commentators wanted to make more information accessible than we proposed. These commentators argued that donors have a right to know about an organization's compliance status and would be reassured by evidence of the regulator's compliance work. They called for various versions of a published listing of all organizations audited plus the results of audits.

[3] Note, however, that in Chapter 3 under "Coordinated regulation" the Table is recommending that information obtained during an audit could be made available to other regulatory authorities.

On the other hand, a similar number called for less information than we proposed. These people would either release no information about audits, or would have the regulator report on the audit program in its annual report, giving the numbers audited, compliance problems found, and outcomes but without identifying any individual organizations. They felt that simply associating the word "audit" with an organization's name could harm it, even if the audit revealed no significant problems.

Most of the remaining comments either supported our original proposal or wanted only to identify charities whose audit had shown serious and unresolved compliance problems.

Our conclusions and recommendations

Currently, when the regulator sends an auditor to a charity, the auditor is usually instructed to examine two or three matters. These matters could range from checking that donation receipts have been properly issued to whether the organization's programs still qualify as charitable. Accounting questions may or may not be involved. Referring to this process as a "compliance audit" may help make the point that more than financial detail is involved.

A number of reasons may prompt one of these compliance audits. A relatively small percentage are purely random. These provide the regulator with baseline data on general compliance standards. The majority are conducted for various reasons:

- as repeat visits to determine whether a previously identified problem has been resolved;
- because the regulator has decided to concentrate on a particular compliance area; or
- as a response to complaints the regulator has received.

While there were some calls during the consultations for greater clarity on how organizations are selected for audit, we accept that any regulatory agency cannot telegraph the direction of its compliance program too precisely. Nevertheless, there appears to be a need for the regulator to provide more education to the sector and the public about the audit function.

Given the variety of opinions expressed during the consultations on what should be released about audits, we reconsidered the matter. We have now decided against allowing the regulator to acknowledge whether an organization has been audited or not. It is still our view that greater transparency on audits can serve a number of goals, including that of alerting potential donors when an organization is having serious problems in complying with its legal requirements. However, we believe that the public identification of organizations that receive sanctions, as proposed in Chapter 6, meets this goal to some extent. Ideally, donors should know as soon as possible if an organization is in difficulty, but any earlier release of information

than at the point where a sanction is imposed opens up the possibility of unnecessarily damaging the reputations of perfectly legitimate organizations.

Other goals of releasing audit information are to use audit results to educate other charities and to allow public scrutiny of the regulator's decision making in this area. We believe these latter two goals can be largely met through the regulator using its annual report to convey general information about the number of audits, the kinds of compliance issues raised,[4] and the outcome of the audits, without identifying the organizations concerned.

We believe the ministerial advisory group should review the question of the transparency of the audit process after a couple of years to determine whether our proposal is adequately meeting the goals we have identified.

We further believe the regulator's annual report should include a statement of service standards and how well they are being met. The number of outstanding audit files should be included among these standards. This would permit monitoring of the existing problem of long delays in closing audit files. These delays detract from public trust in the regulator; they are unfair to the charity under audit; and they undermine the effectiveness of the regulator's compliance program. While acknowledging that some audits raise complex issues that require time to resolve, we are recommending, nevertheless, that the regulator take steps to ensure that, on average, audits are finalized more promptly.

Recommendations

34. No organization-specific information about compliance audits should be released, including acknowledging whether an organization is or is not under audit, unless in connection with the imposition of a sanction.

35. The regulator should provide more education to the sector and the public about the audit function.

36. The regulator should provide an account in its annual report of its compliance audits, including the number conducted and the length of time taken to complete audits.

37. The question of transparency in the audit function should be reviewed in two years, by the ministerial advisory group.

38. The regulator should finalize audits more promptly.

[4] Classifying compliance issues for reporting purposes can be done in various ways. The regulator may need the advice of the ministerial advisory group to develop a system that is useful to donors, charities and the regulator alike.

Documents on a charity's file that do not relate to either the application for registration or a compliance action of the regulator

As a normal part of its operation, a regulator will gather information about a charity, including information filed by the charity as required by law or policy and decisions of the regulator on such issues as accumulating assets or obtaining permission not to meet the disbursement quota. Information filed by the charity as a result of law or policy should be available to anyone on request, as should any response from the regulator.

By law, every charity must file a *Registered Charity Information Return* (T3010) each year. The form, which has been redesigned as a result of our work, already contains information that is available to the public as well as certain confidential information. We would maintain the status quo and continue to make the annual information returns available on request. As the regulator's technological capabilities improve, we suggest that returns for each charity be available on-line.[5] We leave it to specialists to determine how best to accomplish this and encourage them to give priority to the project.

We are recommending one change related to information filed with the annual information return. The form requires that every charity file its financial statements with the return. However, the charity is allowed to decide whether or not the financial statements should be made public. The Charities Directorate's position is that, because the statements are attached to the form, but not part of it, Directorate staff have no power to release the statements without the charity's consent.

We think this discretion should be taken away from charities and the financial statements should be released on request. While the T3010 does contain some financial-reporting information, the financial statements provide more information and sometimes information that is particularly important to understanding how a charity operates. Information on such issues as related-party transactions and contingent liabilities is clearly relevant to people with an interest in a particular charity. We therefore propose that the necessary legislative change be made to allow for release of financial statements filed by a charity.

[5] The Charities Directorate is now posting the returns on its website.

We would maintain an exemption only for that small number of religious organizations that currently are exempt from certain reporting requirements. These charities do not receive gifts from other charities nor do they issue receipts for donations.[6]

What we heard

We received few comments on our proposal that requests for special permissions allowed in the law and the regulator's response should be available on request.

The majority of those who commented, however, supported our proposal on releasing financial statements.[7] They saw this as a way for charities to provide accountability to the public or to increase donor confidence, with some commenting that the annual return did not provide sufficient information to donors or granters.

However, even among those supporting the release of financial statements, there was some concern about the capacity of the public to understand them and the uneven quality of the reporting. Many felt that the accounting profession, the sector, and the regulator needed to work together to develop improved reporting standards of relevance to donors and charities and to find ways to help smaller charities improve their statements. As we noted in Chapter 3, we believe this is an area in which the regulator should play an active role.

Our conclusion and recommendations

Based on what we heard, we confirm our interim proposals related to documents on a charity's files that do not relate to either the application for registration or a compliance action of the regulator.

Recommendations

39. If requested, the regulator should provide a copy of information a charity is required by law or policy to file in seeking special status or exemptions allowed under the *Income Tax Act*, as well as any response from the regulator.

40. If requested, the regulator should provide a copy of the financial statements that charities are required to file with their annual information return.

41. The policy granting certain religious charities an exemption from public reporting of financial information should remain as currently formulated.

[6] The exemption was granted in 1977, when the T3010 first became a public document. Some 300 organizations are covered by the exemption. They mainly hold funds to provide pensions for members of various religious orders.

[7] There was virtually no opposition to our proposal that the existing policy exempting certain religious organizations from publicly reporting financial information (which would include their financial statements) should stay as it is.

Information not dealing with any specific organization

The regulator holds other types of information that could be made available subject to the provisions of the *Access to Information Act* and the *Privacy Act*. These include:

- policies and procedures,
- a list of regular charities,
- a research database on court decisions,
- draft policies ready for consultation, and
- operational guidance.

Policies and procedures

The current procedures leave the charitable sector, its legal advisors, and the public "in the dark" about how CCRA exercises its discretion. When an organization is denied registration as a charity, that information will be made public only if the organization appeals the decision to the Federal Court of Appeal, an unlikely occurrence, or if the organization chooses to share with others the letter by which its application was denied.

The lack of precedents, when combined with the lack of availability of CCRA's policies and operational guidance, makes it difficult for organizations to determine, in advance, whether they will qualify or how they need to structure themselves so that they will qualify for registration.

When examiners review an application for registration, they have to take into account internal policies of the CCRA. While this type of information is already accessible under the *Access to Information Act*, we conclude that steps should be taken to actively publish it. The Charity Commission of England and Wales is currently involved in a process to make all such information available on its website, and we believe a similar initiative should occur in Canada. We accept that the CCRA's existing material is not compiled in a way that will make this an easy exercise, but it is one we believe is necessary. We do not think it desirable for all policies to be released. Again, we would follow the provisions of the *Access to Information Act*. In some cases, the policies and operational guidance are in the nature of "triggers" that an examiner should look for to avoid being "taken in" by an unscrupulous applicant. This sort of "intelligence" information should remain confidential.

A list of registered charities

Currently, people can search on the CCRA website for a list of registered charities. That list also shows the address and designation of each charity.[8] The regulator should continue to maintain a searchable list of registered charities. As time and resources permit, additional information should be made available through that list, including the annual information returns.

A research database on court decisions

For the same reason that we believe the regulator's policies and procedures should be available, we encourage the regulator to include on its website a searchable version of a database that includes:

- information about court decisions,
- previous decisions of the regulator, and
- information from other regulatory bodies that may be of value to people seeking information about charities.

Draft policies ready for consultation

Along with its publications, the Charities Directorate has, over the last several years, done an effective job of making draft policy documents available when seeking public consultation. We encourage the regulator to continue this practice, although we also encourage it to find ways to make more broadly known that the drafts have been posted on the website and that public comment is invited.

As part of making the regulator's website a key resource for charities wanting to track and respond to proposed changes in the regulatory environment, we also urge that the website be used to notify charities of impending legislative amendments.

Operational guidance

The sector, the public and, we believe, the regulator itself would also be well served if the regulator were more proactive in releasing operational guidance to charities. Currently, the Charities Directorate issues periodic newsletters to charities containing information that is of value to ensure that the charities remain in compliance with law. The Directorate, through its compliance work and its client-assistance work, is in a unique position to identify trends that may be worrisome or problematic. We believe the regulator needs to be far more active in providing information.

[8] A registered charity may be designated as a charitable organization, a public foundation or a private foundation.

This role should not come into play only after an organization has been audited or sanctioned. The regulator should, through newsletters, its website, and appearances by its staff at events involving charities, be working diligently to communicate important operational information to charities. We acknowledge that the regulator has, over the past several years, done a much better job of ensuring its publications are more widely available. However, we do not believe it should wait until a publication is necessary and developed before making this sort of operational guidance available.

What we heard

Participants welcomed our interim proposal that the regulatory authority allow easy public access to its policies and research database. Participants believed that opening up this information would help to dispel the aura of mystery that surrounds current regulatory decision making. One suggestion was that the database include technical interpretation letters and relevant letters issued by the CCRA's Rulings Directorate.

Our conclusion and recommendation

We confirm our interim proposals, but would add technical interpretation letters and relevant rulings issued by CCRA's Rulings Directorate to the materials that should be included on the regulator's website.

Recommendation

42. The regulator should publish on its website (and make print copies available on request), subject to the provisions of the *Access to Information Act* and the *Privacy Act*:

- **42.1 its policies and procedures;**
- **42.2 its research database (including copies of relevant court decisions, its own previous decisions on novel or unusual applications, relevant information from other charity regulators, and technical interpretation letters, as well as relevant letters issued by the CCRA's Rulings Directorate);**
- **42.3 draft policies ready for consultation;**
- **42.4 impending legislative changes; and**
- **42.5 operational guidance for charities.**