Chapter 1: Accessibility & Transparency

Introduction

The issue of transparency received considerable attention from the Table on Improving the Regulatory Framework. In its contribution, 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. Over the last four years, the amount of information that the Charities Directorate of Canada Customs and Revenue Agency 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, the majority of information about them was, in the past, considered confidential.

Until a legislative change in 1998, the Charities Directorate was only allowed to 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 T3010, *Registered Charity Information Return*, 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 If a charity's registration had been revoked, the revocation date could also be released.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. Information about the Directorate's policies and operational guidance to its employees is not published. People cannot find out whether a charity has been audited or the results of that audit, unless the charity is deregistered.

Current rules raise a significant issue – how to balance privacy that should be enjoyed by charities dealing with the regulator with 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 blameless?

In order to address these concerns, 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 court decisions and precedents from previous decisions of the regulator.

Even with the amendment of 1998, there is not enough information available to allow the public – including other charities – to assess the performance of

Canada Customs and Revenue Agency (CCRA). We are convinced that the regulator must be open to greater scrutiny.

However, we also accept the fact that certain information should be withheld to protect the privacy of individuals as well as to avoid "tarring" a charity that has done nothing wrong.

In reaching its 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.

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 that would come from advertising the fact that a certain organization has applied for charitable status. It is unlikely that individuals will be able to give 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 objector 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 conclude 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.[3]

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.

Where 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

[3] In 1996, the Ontario Law Reform Commission, in its *Report on the Law of Charities*, noted that the Charities Directorate deals with some 4,000 applications and de-registers some 2,000 organizations each year, and in almost all cases there is no public record of the decision. It urged the Directorate to publish an annual report along the lines of that published by the Charity Commissioners for England and Wales. Arthur Drache, in "Charities, Public Benefit and the Canadian Income Tax System" (1998), pointed to the confidentiality provisions in the *Income Tax Act* as responsible for leaving practitioners in complete ignorance of what types of organizations were or were not being registered. He urged that key decisions should be published.

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.

Documents related to a compliance action

Before the regulator has decided what action to take[4]

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 investigations should be disclosed.

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 fearful that someone will 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. We have concluded that the regulator should be allowed to disclose the fact that an audit has taken place if it is requested to confirm this.

That raises the question of whether results from an audit should be reported. To be consistent with our recommendations on Intermediate Sanctions[5], we conclude they should not. However, we would allow the regulator to say, in response to a question on what the outcome of an audit was, whether a Tier 3 (financial penalty or suspension of qualified donee status) or Tier 4 (de-registration) sanction was imposed. As noted in the chapter on Intermediate Sanctions, 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 de-register a charity, that information too will be available through the sanctions regime we have recommended.

[4] In relation to the regulatory authority's compliance program, we exclude from consideration the special procedures for handling of security or criminal intelligence reports under the *Anti-terrorism Act*.
[5] Our recommendations related to Intermediate Sanctions are contained in a later chapter in this report.

The detailed information that was obtained during the audit as well as the regulator's instructions to the auditor should not be publicly available.[6] Legal opinions obtained by the regulator, because they are privileged, should also not be available.

Documents on a charity's files 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 T3010, *Registered Charity Information Return* 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 make the annual Information Returns available on request. As the regulator's technological capabilities improve, we recommend that Returns for each charity be available on-line. We leave it to specialists to figure out how best to accomplish that and encourage them to give priority to the project.

We are recommending one change related to information filed with the annual *Information Return* (T3010). 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

[6] Note, however, that in the chapter on Intermediate Sanctions, the Table is recommending that under certain circumstances, information obtained during an audit should be made available to appropriate enforcement authorities.

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 do, therefore, recommend that the necessary legislative change be made to allow for release of financial statements filed by a charity.

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.[7]

Information not dealing with any specific organization

There is regulatory 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
- an annual report on operations and service standards.

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

[7] 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.

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, make 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 investigative information, "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, and we have identified below what some of that information might be.

This practice is consistent with practices in other jurisdictions. For example, in England and Wales, the *Charities Act*, 1993, requires the Charity Commission to maintain a register containing the name of every registered charity and any other information that the Commissioners think should be included. The

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

register is open to public inspection, as are "copies (or particulars) of the trusts of any registered charity as supplied to the Commissioners."

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,
- precedents from 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 step, 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 was 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 and advice.

This role should not come into play only after an organization has been investigated 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 available more widely. However, we do not believe it should wait until a publication is necessary and developed before making this sort of operational guidance available.

We believe there is public interest in the administrative functioning of the regulator. For that reason, we suggest that the regulator publish an annual report with statistical data on its operation as well as information about its budget, staff complement, and related information. We also encourage the regulator to publish regularly its established service standards and the data to indicate how well it meets those standards.