The Charities Act accounting package [1996] includes for the first time a requirement that grant-making charities should disclose the identities of the institutions to which they give material grants. Nigel Siederer examines practicality of the requirement and how it matches up to the original intentions.

Disclosing grants

Until the first edition of the *Directory of Grant-Making Trusts* was published in 1968, little information was available about the UK's grant-making trusts and foundations. Although some individual trusts published information about their policies, criteria for awarding grants, and the actual grants made, the trust sector had a largely deserved reputation for secrecy. Over the following twenty years or so, the volume of available information increased, but the reputation lingered, and virtually no information was available about some determinedly secretive trusts. Tackling this was no doubt what lay behind a proposal in the 1989 White Paper on Charity Law: *"...[R]egulations should require all statements of account to give details of grants made by charities out of their income and property. In particular, they should disclose the names of their institutional beneficiaries, together with the amount of grant paid. Some of the resulting accounts will be lengthy. Nevertheless the Government believe this requirement to be justified in the interests of greater openness."*

Grant-making trusts and foundations, who were the main charities affected, gave this proposal a mixed reception. Some resisted the whole idea. They argued that trusts are quintessentially independent organisations established with private funds. The benefactors and trustees had the right to distribute these confidentially and at their absolute discretion. The return of tax paid was not an extra gift from the State, but a refund of a deduction that should not have been made in the first place. Any check that funds were being used for public benefit was not a matter for public scrutiny, but a private one between a trust and the Inland Revenue.

The mood of trusts was however changing, and a partial consensus had been emerging around the converse view:- that organisations which receive tax concessions in return for acting for public benefit have a duty to explain to the public what they do. This was not an obligation of accountability (which would trespass on trusts' independence), but one of transparency - that what trusts do and how they do it should be visible to the public. In particular, it should be visible to grant-seekers, and the efficiency of the grant-seeking/making process could be expected to improve with an enhanced quality of information. The emerging generation of trustees and administrators gave less weight to the argument that a right of confidentiality exists because of the private origins of trusts' endowments or incomes. Since the introduction of Gift Aid in 1990, individual givers have had the option of making single charitable gifts (alongside the older option of four-year covenants) privately - rather than establishing a charitable trust. The notion of the charitable trust as a public rather than a private institution has thus gained strength. It has also seemed desirable for trusts to come into line with the normal standards of openness that increasingly apply to public bodies.

Most grant-making trusts had been established between the wars and the 25 post-war years, and control had largely passed to the children and appointees of the original settlors. The newcomers took on the trusteeship role out of a sense of duty to continue the settlor's philanthropic impulse of deploying funds for public good. But members of the new generation were not necessarily motivated by clear visions of their own. Where resources permitted, they

saw it as appropriate to hire skilled professional advisers, who often came to trusts with direct experience of running operational charities - where the capacity to raise funds has a natural component of openness about the work done. In many cases, the settlor's wealth-generating business had also changed, taking it in a divergent direction from the trust. Professional managers had been employed; shares had been sold - sometimes by the charitable trust itself, pursuing the twin obligations to maximise financial return and minimise the risk by diversifying the trust's assets. Such charitable trusts thus acquired complete independence, not only from the government but from the original source of the trust's funds. Moreover, the aggregate income over a couple of decades would have outstripped the value of the original endowment, further reducing the moral obligation to follow the settlor's wishes. But conversely, the perceived duty to act for public good, and to be seen to be doing so, had grown.

The UK's present-day array of 3000+ grant-making trusts includes many at diverse stages of this evolutionary picture. Trusts with a living settlor tend to be more sensitive to the settlor's wishes, and - though this is not always the case - to resist operating transparently. Those where control is more diversified and independent, are instinctively more open. In the 1980s, this second group of endowed trusts was joined by some new charitable grant-makers who were funded by high-profile public appeals: the Prince's Trust, the resurgent BBC Children in Need Appeal (actually formed in 1927, but with a twenty-fold growth income in the 80s), the ITV Telethons (since a casualty of the reorganisation of independent television), Comic Relief / Charity Projects, and Band Aid. Such appeals could not possibly distribute funds in secret, but operated under the same law as grant-makers established with private funds. By the time the White Paper was published in 1989, trusts who believed in openness were in the ascendant. This did not mean that they were in a majority, but rather that the trusts who preferred secrecy were generally unwilling to argue their case in public.

The proposal to make openness a statutory duty received was welcomed by the new Association of Charitable Foundations - whose very formation in 1989 was another symptom of recognition of the need for a more public, albeit low-key, role for trusts. But all trusts, whatever their views on the *principle* of disclosing grants, need procedures which are workable. Six years after the publication of the White Paper, the legal requirements have now been issued and come into force from 1 March 1996. It is time to assess their content and practicality against the original intentions and the principle that trusts' work should operate in a transparent but independent manner.

The first draft of the requirements, in the March 1993 Exposure Draft of the *Statement of Recommended Practice on Accounting for Charities*, was not encouraging. It set too low a standard, requiring disclosure only of a trust's twenty largest material grants over £1,000, with no guidance as to *what* should be disclosed. (How, for example, should multiple grants to the same recipient be treated?) The drafting left three loopholes which a determinedly secret trust would have had no difficulty in negotiating. A grant made pursuant to a legal obligation was not to be disclosed, thus inviting grant-makers to preserve secrecy by using a form of contract with recipients and setting aside the normal view of a grant as a legally unenforceable gift. Grants made by an *"agency charity"* need not be disclosed, no doubt to protect the position of Charities Aid Foundation's popular cheque book scheme, where every one of the thousands of payments is a grant. This would however have allowed any family foundation to avoid disclosure by defining itself as an "agency charity" for its settlors. And finally, *"...if trustees consider that there are special circumstances which justify the non-disclosure of material grants, those circumstances should be stated in the notes to the accounts..."*. Trustees could

therefore consider that their own desire to give anonymously was a *"special circumstance"* which would justify secrecy.

This set of proposals was so flawed as to undermine the intention of requiring trusts to act openly. Thus the Association of Charitable Foundations, which might have been expected to be the defender of foundations' secrecy against a regulatory body determined to bring openness, found itself doing exactly the opposite - nagging away at the Home Office and Charity Commission to remind them of Government policy set out four years previously in the White Paper.

Quite apart from the principle, there were also practical difficulties. The disclosure requirement, however formulated, was intended to affect mainly those charities where grant-making was the primary function. However, some large operating charities ran small grants programmes as part of their developmental work, where detailed disclosure of the grants might unbalance the overall record. The format of disclosure also caused problems. The White Paper had proposed that grants should be disclosed in a charity's *accounts*, which threatened high audit costs and appeared to rule out disclosure in other media - such as an annual report or research review, where the *purpose* of grants could be explained.

Draft proposals in January/February 1995 showed much improvement, but there were still some loopholes - all but one of which has now been removed in the promulgated versions of the Charities (Accounts and Reports) Regulations 1995 and the SORP. (Grant disclosure is one of the few issues where the Regulations simply give statutory force to the SORP.) This is what the package now requires.

A reasonably high standard of disclosure has been set. The largest 50 grants to organisations are to be disclosed, *"...or such larger number as may be considered necessary to convey a proper understanding of the charity's grant-making activities"*. Though not the 250 suggested by ACF, fifty grants is a much more revealing figure than the Exposure Draft's twenty, and the extra phrase places a clear burden on a grant-making charity to give a *"proper understanding"* of its activities. The name of each recipient body must be given, and *"the aggregate amount of grants made to it"* in the accounting period. Only organisations receiving more than £1000 in aggregate need be listed, thus resolving the _multiple grant' problem and setting a sensible lower limit. To help operating charities which make grants but are not primary-purpose grant-makers, grants to institutions need not be disclosed at all if they amount in total to less than 5 per cent of expenditure. For grants to individuals, only the aggregate number and value need be shown. It will however not be enough simply to disclose grants; they should be *"appropriately analysed and explained"*, creating a virtual obligation for the larger trusts to provide statistical information. There is a separate Regulation on the content of annual reports, which requires a description of a trust's activities and achievements, and of significant developments in its work.

Welcome flexibility has been introduced as to the format of disclosure - which may now take place in the accounts (either in the *Statement of Financial Activities* or in notes), or *"by means of a separate publication referred to in the notes"*. Alternative disclosure formats are thus encouraged, without the need to have detailed explanations of grants expensively verified by the auditor. Research reviews, annual reports, and even CD-ROM can be used, the only proviso being that the total in the alternative format must reconcile with the figure in the accounts. The word *"publication"* implies that the document should be readily available, even though it won't be subject to the strict rule applying to accounts: that a copy must be supplied within two months to any person who asks for one.

The loopholes have been largely closed. The _legal obligation' letout has, on careful scrutiny, been tackled. A payment for services must be counted as a grant unless it entails *"the supply to the grant-making body of assets or services"*. Contracts for research etc entail payment for services not to the grant-making body itself but to the public, and so must be disclosed as grants. The _agency charity' concept has, mercifully, disappeared; CAF's cheque book scheme will have to find another way through, probably by treating all cheque book accounts as _restricted funds' given on condition that secrecy is maintained (a device that isn't possible with endowed funds, but would perhaps be allowable for funds donated to a foundation for current expenditure).

As for anonymous grants, a loophole remains, and indeed has been widened. *"If the trustees consider that disclosure of material grants in the statement of account may prejudice the furtherance of the purposes of the recipient institution or the [grant-making] charity, they may withhold details of the grant concerned, but should disclose in the statement of accounts the total amount of all such grants for the year."* Details of such grants must be supplied to the Charity Commission or other regulatory body, together with the reasons for non-disclosure. The weakness of this clause is that, while the Commission must be informed, it has no power to *overturn* a trust's decisions to treat individual grants as anonymous in these ways. However, as can be seen, the wording includes both plural and singular, thus creating an uncertainty as to whether a trust can adopt a policy of non-disclosure of *all* grants across the board, or whether it must decide on non-disclosure (and explain it) case-by-case. It is for the Charity Commission to interpret the wording, and its interpretation may be challenged in the courts, should any trust feel strongly enough.

The small minority of trusts that are incorporated as companies are not yet legally bound to follow the SORP, but further regulations are expected soon, which would bring incorporated charities into line with non-incorporated ones. Since 1992, Scottish grant-making trusts have been required to disclose details of their grants under the Charities Accounts (Scotland) Regulations 1992, made under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. While enforcing the principle of disclosure, the Scottish regulations are less flexible than the Charities Act ones, which only have legal force in England and Wales. Details must be given in the notes to the accounts of any grant (or of multiple grants to a single organisation) which exceed £1000 or 2 per cent of a grant-making charity's gross income. Grant-makers in Northern Ireland and the Republic are expected to follow the England and Wales requirements set out in the SORP, but again this does not have legal force.

Overall, the disclosure package should bring a great improvement in the available information about trusts and their grant-making. Some trusts will wish to avoid the new climate, and *may* be able to do so by exploiting the loophole that allows them to declare that the furtherance of their purposes would be prejudiced by general disclosure. But the times are against them, and it is difficult to see how they can properly describe their achievements and activities (as required to conform with the new statutory duty to publish an Annual Report), without giving reasonable information about the grants they have given.

They may be reassured by similar changes in the law in the USA almost two decades ago. These forced openness on a reluctant trust sector, but openness has now become an accepted norm. Grant-seekers, now better informed about the destinations of trust money, are able to write more apposite applications, and the efficiency and image of trusts has improved. Similar benefits can be expected in the UK as the new régime comes into effect from March 1996

onwards. Meanwhile, public interest in grant-making has now dramatically increased because of distributions from the National Lottery, underlining the changing mood on issues of transparency.

The scale of the task of the compilers of Henderson 2000 Charities and all the various directories of grant-making trusts will grow, because there will be much more information to analyse, but the potential for enhanced products is there to be exploited.

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He has worked in the voluntary sector for over twenty years, starting out at the National Council for Civil Liberties in 1974. Most of his experience is with co-ordinating and resource bodies, of which he has been variously a committee member, development worker, chief officer, and funder's representative. From 1978 to 1985 he co-ordinated the local advice centres in Lambeth, and played a part in setting up the national Federation of Independent Advice Centres. From 1986 to 1990 he ran the Local Development Agencies Fund at the National Council for Voluntary Organisations.

The Association of Charitable Foundations was set up in 1989 as a development and support organisation for the UK's grant-making trusts and foundations. It has 230 members - now including the National Lottery Charities Board - who give over £400 millions to voluntary organisations each year.

This article originally appeared in *Baring Asset Management Top 3000 Charities 1996*. The *Top Charities* series is now published annually by CaritasData Ltd, and the current sponsor [2006] is RCM.