

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 September 2012

**Public Authority:** Charity Commission

**Address:** PO Box 1227

Liverpool

L69 3UG

### Decision (including any steps ordered)

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1. The complainant has requested communications between the Charity Commission, the Bath Recreation Ground Trust, Bath Council and Bath Rugby Club since 2007.
2. During the course of the investigation the Charity Commission disclosed several documents it had previously been withholding on the basis of section 31(1)(g) leading to 31(2)(c) and (g) but continued to withhold information under section 31, 41 and 42.
3. The Commissioner's decision is that the Charity Commission has correctly applied the section 31, 41 and 42 exemptions to withhold the remaining information and after considering the public interest arguments has concluded the public interest favours withholding the information.

### Request and response

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4. The complainant initially requested information from the Charity Commission on 3 December 2010 which she then clarified on 10 December 2010. This request was for:

*"all contact notes, minutes or records of phone calls, meetings, emails, and letters in fact any and all contact whether formal or informal that the Trustees of the Rec [the Bath Recreation Ground Trust] and or Bath Council and or Bath Rugby Club have had with the Charity Commission from 2007 until the present day".*

5. The Charity Commission responded on 23 December 2010. It stated that it held relevant information but any information it held relating to a statutory inquiry that concluded on 16 March 2007 was exempt from disclosure under section 32(2). In addition to this the Charity Commission also withheld other information on the basis of sections 22, 31(1)(g), 31(2)(c), 31(2)(g) and 43(2).
6. Following an internal review the Charity Commission wrote to the complainant on 28 February 2011. It stated that it believed it was correct to withhold the requested information under the exemptions cited in its refusal notice and in addition also considered section 41(1) applied to the requested information.

### Scope of the case

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7. The complainant contacted the Commissioner to complain about the way her request for information had been handled. The Commissioner explained that previous cases<sup>1</sup> had found that an inquiry held by the Charity Commission under the Charities Act was an inquiry for the purposes of section 32(2) of the FOIA. As a result the complainant confirmed she would not be pursuing access to information about the Charity Commission's statutory inquiry and therefore any information that pre-dates the end of the inquiry (16 March 2007) has not been considered in this investigation.
8. During the course of the Commissioner's investigation, the Charity Commission disclosed several of the 151 documents containing information within the scope of the request. It continued to withhold the remainder of the information on the basis of sections 22, 31(1)(g), 31(2)(c), 31(2)(g), 40(2), 41(1), and 42. The Charity Commission accepted that section 43 was not relevant and dropped its reliance on this exemption.
9. The Commissioner notes that, whilst the Charity Commission did disclose several of the documents it had previously applied exemptions to, it continued to maintain that section 31(1)(g) was engaged in relation to all of the 151 documents but agreed to disclose those it considered likely to cause the least prejudice to its functions in an effort to resolve the complaint.

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<sup>1</sup> ICO reference FS50128888

10. Although the Commissioner's role under section 50 of the FOIA is to consider the application of exemptions at the time of the request, and at the time of the request these documents had not been disclosed, as these documents have now been provided to the complainant he considers this aspect of the complaint to have been informally resolved. Consequently, the Commissioner has not reached a formal decision as to whether, at the time of the request, the Charity Commission was entitled to withhold the information that has now been disclosed. He has therefore focused his investigation solely on the remaining withheld information.
11. The Charity Commissioner had also relied on section 40(2) to redact names and contact details of individuals within Bath and North East Somerset Council ("BANES") who it corresponded with. After discussions with the complainant it was agreed that the Commissioner would not pursue the use of section 40(2) to redact personal data from the remaining withheld information.
12. The focus of this decision notice will therefore be the remaining information which has been withheld by the Charity Commission under sections 22, 31, 41 and 42.
13. As well as the application of the exemptions the Commissioner will also consider whether the Charity Commission considered this request correctly under the FOIA or should have considered if the information is environmental and therefore subject to the Environmental Information Regulations 2004 ("EIR").

## **Background**

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14. The request relates to the long term future of the Recreation Ground Bath ("the Rec") and the Charity Commission's position as a regulator in respect of the Rec charity.
15. The Rec is operated by BANES who are the Trustees of the charity. In 2002 the High Court determined that the Rec was held on charitable trusts and BANES (as sole trustee) was charged with maintaining the Rec as an 'open space' and as a 'recreational facility for the benefit of the public at large'.
16. Following the High Court decision the Charity Commission became concerned that not all of the activities on the Rec complied with the purpose of the Trust. The Charity Commission had two main concerns. Firstly, the council-run leisure centre did not comply with the charity's purpose of maintaining land as an open space for sports and recreation. Secondly, the disposal of charity assets for the use of a commercial

organisation, in this case a lease to Bath Rugby Club ("BRC"), is not permitted.

17. Therefore, the Trust agreed to undertake a Strategic Review to determine the future uses of the Recreation Ground. This was completed in March 2007. In 2008 the Trust submitted plans to the Charity Commission involving the retention of both the leisure centre and BRC on the Rec. The Charity Commission accepted that the leisure centre could remain and there were circumstances in which BRC could remain on the Rec, including the possibility of a land swap.
18. The withheld information in this case relates to communications between the Charity Commission and the trustees of the charity regarding the future of the Rec following the Strategic Review.

## Reasons for decision

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### *Access regime*

19. The Commissioner firstly considered if the request information was environmental information within the meaning of regulation 2 of the EIR. The information relates to plans to change the use of land and would fall under the definition of environmental information under regulation 2(1)(c) which states that environmental information is:

*"any information in any material form on:*

- a. measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;"*

20. The Commissioner therefore considers the requested information would be environmental information but the Charity Commission does not consider information provided to it in these circumstances should be considered under the EIR.
21. The Charity Commission explained that all the requested information is correspondence relating to an application to it for a Scheme under section 16 of the Charities Act 1993. The Charity Commissioner has explained that it has *"concurrent jurisdiction with the High Court to make Schemes in respect of Charities"*. Under section 16 it can exercise the jurisdiction of the court to make a Scheme for the administration of a charity where the Court has made an order directing it do so or a valid application for a Scheme has been made. By establishing a Scheme the

Charity Commission gives legal status to these arrangements and, in carrying out these functions, is acting in a judicial capacity. Therefore, the Charity Commission argues that information held by it for these purposes is not caught by the EIR by virtue of Regulation 3(3).

22. Regulation 3(3) of the EIR states that:

*“These Regulations shall not apply to any public authority to the extent that it is acting in a judicial or legislative capacity”.*

23. Section 16 of the Charities Act clearly sets out that the Charity Commissioners may exercise the same jurisdiction as are exercisable by the High Court when establishing a scheme for the administration of a charity and there is no dispute that the Charity Commission's role with regards to the Rec is to establish a Scheme.

24. The Commissioner is therefore satisfied that the Charity Commission is acting in a judicial capacity and the EIR do not apply to it when acting in this capacity. The Commissioner has therefore gone on to consider the withheld information under the FOIA and has not considered any of the exceptions under the EIR.

25. As the Commissioner has focused his investigation on the remaining withheld information he will consider each of the documents that have either been withheld in whole or in part. The majority of the information has been withheld on the basis of section 31(1)(g) leading to 31(2)(c) and (g). As such the Commissioner has considered the application of this exemption first.

#### Section 31 – law enforcement

26. The Charity Commission has maintained that the majority of documents should be withheld in whole on the basis of section 31(1)(g). The Charity Commission has also redacted information from documents it has now provided on the basis of section 31(1)(g). A table has been provided as an annex setting out each document the Charity Commission has continued to apply an exemption to.

27. Section 31(1)(g) of the FOIA states that information is exempt if its disclosure would, or would be likely to prejudice the exercise by a public authority of any of its functions listed in subsection (2). The Charity Commission have relied on subsections (2)(c) and (2)(g). Subsection (2)(c) applies where the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or could arise and would, or would be likely to be, prejudiced by disclosure.

28. With regards to subsection (2)(g), the Commissioner's view is that this is most likely to be engaged where the Charity Commission considers it necessary to protect or secure the charity or its assets from loss, damage or misuse and the disclosure of information would, or would be likely to, prejudice the Charity Commission's ability to fulfil this function.
29. In determining whether this exemption has been applied correctly the Commissioner has first considered whether the potential prejudice argued by the Charity Commission relates to the interests identified in the exemption. When considering this the Commissioner has looked at whether, if the prejudice occurred, it would relate to the Charity Commission's regulatory function of ascertaining if regulatory action is needed and of protecting charities.
30. The Charity Commission has explained that the statutory functions and duties it is under are set out in the Charities Act 2006. These include encouraging the better administration of charities, identifying and investigating apparent misconduct and mismanagement in the administration of charities and taking remedial action in this respect.
31. As well as this, the Charity Commission also has powers to conduct inquiries (as set out in section 8 of the Charities Act). The Charity Commission's statutory inquiry in relation to the Rec was closed in 2007 and since then the Trust Board has been taking steps to rebuild the charity's relationship with its trustees and the Charity Commission. The Charity Commission has indicated the administrative powers of the Trust (which the Charity Commission gives regulatory advice on and make orders in relation to) may need to be changed. This will involve the Charity Commission making a scheme and keeping the protective powers already in place over the land owned by the Trust to ensure that future proposals do not cause loss or misapplication.
32. As all the withheld information is communications between the Charity Commission and the Trust Board on the subject of the future of the land owned by the Trust the Commissioner is satisfied that the potential prejudice relates to the interests identified in the exemption. He has now considered the nature of the prejudice and whether the Charity Commission has sufficiently demonstrated a causal link between the potential disclosure and the prejudice. When evidencing a causal link between the potential disclosure and the prejudice a public authority should be able to demonstrate that the prejudice would be "real, actual or of substance"<sup>2</sup>

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<sup>2</sup> Hansard HL (VOL. 162, April 20, 2000, col. 827)



33. The Charity Commission has explained that following receipt of formal proposals on the long-term future of the charity it will then consider whether it needs to exercise its statutory powers under section 16 of the Charities Act to facilitate the charities future. At this stage the Charity Commission has not received all the information it needs to give full consideration to the issues and it has not yet made a decision with regard to the future of the charity.
34. In addition to this the Charity Commission has stated it continues to exercise its functions under the Charities Act in providing guidance and making orders and is therefore acting for the purpose of ascertaining if regulatory action may arise. A large part of the Charity Commission's ability to ascertain if regulatory action may be required relies on the voluntary supply of information, particularly from trustees and the charities.
35. The Charity Commission has expanded on this point by explaining that it, along with the Trust Board, has invested resources into putting the charity back on a secure footing so that it operates charitably for the public benefit. One of the Charity Commission's key statutory duties is to increase public trust in charities which, as mentioned above, it has been working to achieve with the Trust Board. In doing so, the Charity Commission argues that it needs to be able to obtain information from, and hold dialogue with, charities and Trust Boards.
36. The Charity Commission states that it generally relies on the voluntary supply of information and any disclosure of information detailing communications between the Charity Commission, the Trust Board and trustees would be likely to affect the willingness of these parties to continue to correspond with the Charity Commission. In turn this is likely to impact on the Charity Commission's ability to ascertain if regulatory action may arise as it will not be able to obtain frank information to make decisions on the long-term future of the charity and its assets.
37. The Charity Commission does have more formal powers to compel trustees to provide it with information so that it can carry out its functions. However, the Commissioner has previously accepted the Charity Commission's argument (*ICO decision notice FS50184898*) that it could not rely solely on these powers to gather information and avoid any real or significant prejudice to its functions.
38. This is because if the Charity Commission uses its formal powers it is normally seeking particular types of information, often specific to a particular investigation. The scope of sections 31(2)(c) and, more specifically (g), is effectively wider and deals with the compliance of charities as opposed to investigations of charities. The Charity

Commission had previously advanced this argument and explained that it expects trustees to provide it with full and complete disclosure and, at times, these disclosures may inadvertently reveal past faults on behalf of the trustees.

39. The Commissioner has previously acknowledged there is some validity to the argument that full disclosure of information of a similar nature to the requested information in this case could prejudice the Charity Commission's functions in that it may not become aware of non-compliance issues with charity law if charities are reluctant to provide full and frank disclosures voluntarily.
40. As the Commissioner recognises that the arguments relied upon by the Charity Commission are not unique to this case, that disclosure may prejudice its functions by disrupting the flow of information it receives on a voluntary basis, he has considered a number of factors in determining whether the disclosure of the requested information in this case would affect the flow of information to the Charity Commission.
41. Firstly, the Commissioner has considered the fact that the Charity Commission's formal inquiry into this issue had concluded in 2007. However, the Charity Commission was continuing to exercise its powers and duties under the Charities Act in providing guidance and making orders at the time the request was made. In the Commissioner's opinion the likelihood of disclosure impacting on the Charity Commission's regulatory functions is therefore still relatively high.
42. The Commissioner has also considered the powers available to the Charity Commission to compel engagement in the regulatory process and notes that although the Charity Commission does have some powers to compel trustees to provide it with information, these powers are limited, particularly when compared to other regulators.
43. In the Commissioner's opinion the trustees of charities who are ultimately responsible for ensuring the charity complies with the legal requirements of charity law, in order to meet these requirements, need to discuss issues openly with the Charity Commission.
44. On the basis of the cumulative weight of the above factors, the Commissioner accepts that disclosure of the documents identified in the attached table could result in a real and significant level of prejudice occurring to the Charity Commission's functions as described in section 31(2)(c) and (g). The Commissioner accepts that the nature of this prejudice would slow down the Charity Commission's regulatory process and may lead to less timely regulatory action. For this reason the Commissioner considers section 31(2)(g) to be most relevant.



45. In terms of the likelihood of this prejudice occurring, the Commission has considered the number of charities which the Charity Commission regulates: at the end of March 2012 there were 162,098<sup>3</sup> charities registered with the Charity Commission and it provides advice and guidance to a large number of these when dealing with just over 213,000 emails, letter and phone calls at its contact centre. Therefore, the Commissioner's view is that given the significant number of charities regulated by the Charity Commission, even if a relatively small number of these charities altered their behaviour following disclosure of this information this could still have a real and significant effect on the Charity Commission's ability to carry out its functions.
46. However, the Commissioner is aware that complete acceptance of this argument could suggest that all information that the Charity Commission has been provided with on a voluntary basis should be exempt from disclosure. He has therefore considered the particular circumstances of this request, including the nature of the information that the Charity Commission has argued is exempt under section 31.
47. As the attached table demonstrates the Charity Commission has withheld a significant number of documents on the basis of section 31; these documents include both those provided to the Charity Commission by the trustees or their representatives and internally created documents which reflect the content of these communications. However, the Charity Commission has disclosed a number of documents during the course of the Commissioner's investigation. These included documents provided to the Charity Commission and those created by the Charity Commission discussing information provided to it by the trust and its trustees. These documents contain information on arrangements to meet, statements of known fact, references to information and proposals from the published Strategic Review and orders made under the Charities Act in the public domain.
48. The Commissioner has therefore used the documents now disclosed by the Charity Commission as a benchmark against which to judge whether other still withheld information and documents could be disclosed without significant prejudice to the Charity Commission's functions.
49. On this basis, the Commissioner considers that the remainder of the documents that the Charity Commission has argued are exempt from disclosure, either in whole or in part, on the basis of section 31 contain information which was provided to the Charity Commission during its

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<sup>3</sup> [http://www.charity-commission.gov.uk/About\\_us/About\\_charities/factfigures.aspx](http://www.charity-commission.gov.uk/About_us/About_charities/factfigures.aspx)

investigation or contain frank opinions on the information provided and the ongoing issues. The Commissioner therefore accepts that disclosure would be likely to result in the prejudicial effects to the Charity Commission's purposes as described in sections 31(2)(c) and (g).

50. As section 31 is a qualified exemption the Commissioner has now gone on to consider the public interest arguments in relation to the withheld information.

*Public interest arguments in favour of disclosure*

51. There is an inherent public interest in disclosure of information which would promote accountability and transparency by public authorities for decisions taken by them. The withheld information in this case relates to the proposed future of the Rec and regulation of the charity. The Commissioner accepts that disclosure of the withheld information would increase transparency and would allow the public to determine if BANES as the local authority and BANES as the trustees of the charity are acting in the best interests of the charity.
52. The complainant argues that there is considerable public interest in general in any information relating to the management and decisions about the Rec within the local area. The complainant considers that in order for interested parties to fully engage in any consultation on the future of the Rec they must be provided with all the information on the negotiations between the charity and the regulator.
53. The Commissioner accepts that disclosure of the remaining information withheld under section 31 could go some way to addressing the arguments that the complainant has raised, specifically that further disclosure is needed so that those involved and interested can have a greater understanding of the decisions taken by the Charity Commission and the relationship with the charity.
54. The Commissioner recognises that it could be in the public interest to disclose the information to reassure the public that the Charity Commission did follow appropriate procedures when taking decisions and negotiating the future of the charitable assets, and that the Charity Commission properly carried out its functions related to the purposes set out in sections 31(2)(c) and (g).
55. The complainant has indicated that the Charity Commission may have failed in its regulatory duties and, therefore, if the withheld information revealed evidence of this it could be in the public interest to disclose information in order to expose the failings of a public authority regulator.

*Public interest arguments in favour of maintaining the exemption*

56. The Commissioner recognises the need for confidentiality in exchange of information and accepts the Charity Commission's arguments that it relies on the voluntary provision of information from trustees and third parties to effectively carry out its functions. Effective and efficient regulation is in the public interest as if investigations can be conducted properly and issues of compliance with charity law addressed quickly this will be at less cost to taxpayers. More widely, the Charity Commission argues that having an efficient regulator of the charity sector ensures that charities themselves can operate effectively and ensures that donations to charities are used to provide best value for money.
57. The ability of the Charity Commission to carry out its functions effectively and efficiently is in the public interest and the Commissioner considers there is a strong weight attributed to the Charity Commission being able to operate and regulate charities effectively.
58. The Charity Commission has expanded on this point and explained that the request incorporates information obtained and created by the Charity Commission in its role as regulator. The Charity Commission depends on the cooperation of charity trustees and other parties and if they become aware that communications may be routinely disclosed, cooperation may be withdrawn affecting the Charity Commission's work. If this happens there is a risk that this may lead to public and charitable resources being misapplied or wasted.
59. The Commissioner accepts there is some validity to this argument and that the remaining information withheld under section 31 was provided voluntarily to the Charity Commission and constitutes frank exchanges of information and opinions, showing the changing and evolving nature of the regulators relationship with the charity. As such, the Commissioner considers this argument should be afforded weight as disclosure may well prejudice the Charity Commission's relationship with this charity, and other charities in the future, and set back any progress that has been made in rebuilding trust between the Charity Commission and the charity following the strategic review in 2007.

*Balance of the public interest arguments*

60. The Commissioner recognises there is a strong public interest in information on this issue being disclosed. The Rec is a large public space and the future of this is of importance to local residents and the potential for a land swap to accommodate BRC on the Rec is controversial given the potential value of the land. That being said, the Commissioner has to consider whether the disclosure of the specific

information withheld in this case would assist in the public's understanding of the negotiations between the regulator and the charity on this issue and the decision making process.

61. The Commissioner does accept that disclosure of the information would allow the public to establish the relationship between the Charity Commission and the trustees and to see how negotiations have progressed and evolved. However, much of the information that has been withheld relates to discussions about short-term solutions for accommodating BRC and for operating the leisure centre and car park on the Rec whilst the longer-term future of the Rec is determined. The Commissioner does not agree that disclosure of this information would allow the public to participate more fully in any future consultations on the future of the Rec by having complete information on the negotiations and decision making processes of the Charity Commission.
62. The Commissioner does, however, accept that disclosure would have the prejudicial effect on the Charity Commission's functions as set out in sections 31(2)(c) and (g) by affecting the voluntary provision of the information to the Charity Commission and thus affecting the effectiveness of the regulator. In addition to this, the Commissioner recognises that a lot of work has gone in to rebuilding the relationship and the trust between the charity and the Charity Commission and disclosure of some of the withheld information would be likely to undermine this by showing the frank nature of the communications that have taken place.
63. In summary, on the particular circumstances of this case the Commissioner finds that, on balance, the prejudice that would be likely to occur to the Charity Commission's functions and the public interest in the Charity Commission remaining an efficient and effective regulator outweighs the public interest in the disclosure of the information specifically withheld under section 31(1)(g) of the FOIA. The Commissioner therefore finds that the Charity Commission correctly withheld this information. As the Commissioner has upheld the application of section 31 he has not gone on to consider whether section 22 would have provided a valid basis for refusing to provide the remaining information.
64. The Charity Commission also specifically withheld some information on the basis of sections 41 and 42 of the FOIA after introducing these exemptions during the Commissioner's investigation. The Charity Commission also argued that the documents it considered exempt on the basis of section 41 and 42 were also likely to be exempt under section 31. However, the Commissioner has first considered the application of sections 41 and 42 to these specific documents as they are absolute exemptions.

Section 41 – information provided in confidence

65. The Charity Commission has withheld some information on the basis of section 41 of the FOIA. Section 41 provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.
66. The Charity Commission has withheld the following information on the basis of section 41(1);
- Document 19 – Attached letter from BRC to the charity;
  - Document 75 – Attached letter from BRC to the charity;
  - Document 119 – Attached letter from BANES to charity.

*Was the information obtained from another person?*

67. The information withheld under this exemption, as set out above, are all letters sent by third parties to the charity and then provided to the Charity Commission in confidence to support the charities position. These letters were provided to the charity on a voluntary basis and subsequently passed to the regulator on a voluntary basis to assist in its decision about the future of the Rec and whether a scheme under the Charities Act was needed. The information contained within these documents is therefore information obtained from a third party and the Commissioner therefore accepts the first limb of section 41 is met.

*Would disclosure constitute an actionable breach of confidence?*

68. 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.
69. 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.
70. The Charity Commission received the information from the charity and there was an expectation by the trustees that the information would be

used by it to inform its decision making and not for any other purpose until such time as the Charity Commission decided to publish a draft scheme. The information was provided to the Charity Commission in its role as regulator and was not intended to be circulated more widely.

71. Based on the above, the Commissioner accepts that the withheld information cannot be said to be publicly available and such it cannot be considered to be otherwise accessible. After viewing the withheld information the Commissioner does not consider it to be trivial as it contains full and frank communications between commercial third parties and the charity on issues of relevance to the future of the charitable assets. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.
72. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence. These letters offering the views of third parties were provided to the Charity Commission by the charity on the understanding they would be used solely to inform the Charity Commission's decision making.
73. The Commissioner recognises that the relationship between the Charity Commission and its charities is one that relies on the voluntary provision of information to assist the regulator in assessing whether action is needed. As such there is an implied obligation of confidence on the part of the charity when it received the information from BRC and the local council.
74. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The letters contain frank assessments of BRC's position and the local council's position with regards to the use of the Rec. The contents of these letters demonstrate the evolving relationships between the charity and these third parties and are sensitive in nature as they show the progress being made by the charity in its negotiations.
75. The test under section 41 is whether disclosure would constitute a breach of confidence actionable by the person who provided the information or any other person. The Commissioner considers that disclosure of the letters could result in an actionable breach of confidence by the charity as not only could disclosure impact on the charity's relationship with relevant third parties but also may have a detrimental effect on the Charity Commission as it may make charities more reluctant to voluntarily provide full disclosures to it.



*Would a public interest defence be available?*

76. As section 41(1) is an absolute exemption there is no public interest. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.
77. The complainant has argued that it is in the public interest that all information is disclosed so that the public can be fully informed on the decision-making processes of the Charity Commission. However, as the only information withheld on the basis it was information provided in confidence is letters provided to the charity by third parties and then passed to the Charity Commission as the regulator, the Commissioner does not accept that this argument would be sufficient to allow disclosure without it being a breach of confidence.
78. The Commissioner recognises there is always some public interest in the disclosure of information held by public authorities to bring about more accountability and transparency. However, the Commissioner has to be mindful of the wider public interest in preserving the principle of confidentiality. It is in the public interest that the duty of confidentiality between confiders and confidants is preserved. The Charity Commission has argued that there is a strong public interest in preserving the flow of information to it to enable it to discharge its functions effectively.
79. The Charity Commission argues that if this information was to be disclosed it may result in the perception that it does not treat information provided to it by third parties in confidence and this may restrict the voluntary flow of information, particularly where it relies on charities to not only supply it with information they generate but information they have relied on when forming opinions and making decisions.
80. The Commissioner recognises that an erosion of the confidentiality that exists when charities pass on information they have obtained would be detrimental to the Charity Commission given that the Commissioner accepts that the ability of the Charity Commission to obtain full and frank information is essential to its ability to carry out its functions effectively.
81. Taking into account all the circumstances of this case, the nature of the relationships between the parties and the content of the withheld information the Commissioner considers the Charity Commission would

not have a public interest defence for breaching its duty of confidence. The Commissioner cannot conclude that there is a strong enough public interest argument to disclose the requested information. Therefore the Commissioner finds that the information listed in paragraph 66 is exempt under section 41.

### Section 42 – legal professional privilege

82. The Charity Commission has withheld some information on the basis of section 42 of the FOIA. Section 42(1) provides that information is exempt from disclosure if the information is protected by legal professional privilege. The Charity Commission is applying the section 42 exemption to information contained within several documents as shown in the table contained in the annex and described in paragraph 86 below.
83. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.
84. The category of privilege the Charity Commission is relying on to withhold the information in the documents listed below and in the annex is advice privilege.
85. Although the legal advice was not provided directly to the Charity Commission it considers it is still subject to legal advice privilege as the advice was provided to the charity by a professional legal adviser in relation to the trusts of the charity and the purposes to which its lands were used.
86. The Charity Commission considers that information contained within the following documents is subject to legal advice privilege:
- Document 22 – the information consisting of the charity's legal counsel's opinion has been withheld;
  - Document 42 – all information withheld as it is a note of legal advice given by legal counsel to the charity on the leisure centre and car park on the Rec;
  - Document 50 – the information which is the summary of legal advice provided by the charity's legal counsel has been withheld;

- Document 91 – the information which is the content of the email from legal advisors has been withheld;
- Document 107 – information which consists of an email from legal advisors to the charity on leases and contracts has been withheld; and
- Document 144 – Attached copy of amended Heads of Term reviewed by charity's advisors.

87. The Commissioner has previously accepted in other decisions (*FS50269559 and FS50398765*) that the section 42 exemption can be engaged even when the advice is not advice generated by the public authority. The Commissioner notes that in the case of the information listed above the legal advice was provided to the charity and the Trust board and not directly to the Charity Commission but he accepts that section 42 can still be engaged.
88. The Commissioner accepts that these documents fall within the scope of the exemption contained at section 42(1). He acknowledges that documents which are not themselves communications actually asking for advice or providing advice, but are in fact documents which reflect such communications such as notes recording legal advice which was sought, also fall within the scope of section 42(1). This is because the dominant purpose of all of the above information was the provision of legal advice by a professional legal adviser to their client.
89. However, as section 42 is a qualified exemption the Commissioner has gone on to consider the public interest test.

*Public interest arguments in favour of disclosure*

90. The Charity Commission did not specifically highlight any reasons why disclosure of the information falling within the scope of section 42 may be in the public interest. However, the Commissioner has identified several relevant arguments.
91. There is an inherent public interest in disclosure of information which would promote accountability and transparency by public authorities for decisions taken by them. In this particular case the legal advice relates to the legal opinions obtained by the charity to support its position about the situation with regards to the Rec, specifically with reference to the current uses such as the leisure centre, car park and BRC presence on the land. This legal advice was sought in order for the charity to be able to provide comprehensive information to the Charity Commission to assist in its determination as to whether a scheme is needed.

92. Although some information has now been disclosed, the complainant has argued that further disclosure is needed so that those interested can have a greater understanding of the decision making process and be able to scrutinise the communications between the regulator and the charity to determine that regulation of the charity's assets has been conducted properly. The complainant has suggested that the Charity Commission has failed in its regulatory duties and if the information that has been withheld revealed evidence of this then the Commissioner accepts it could be in the public interest to disclose information in order to expose the failings of a regulator.
93. The Commissioner is also of the view that it could be in the public interest to disclose information to reassure the public and interested parties that the Charity Commission followed appropriate procedures and were acting as an impartial regulator and that the information it received from the charity trustees was based on sound and detailed legal advice.

*Public interest arguments in favour of maintaining the exemption*

94. Inherent in the concept of legal professional privilege is the strong public interest in allowing clients to seek full and frank advice from their legal advisers in confidence. The Commissioner recognises the importance in client's being able to obtain candid and full advice and to be able to be open about disclosing this in the course of its dealings with regulators.
95. The Commissioner accepts that disclosure of legal advice would potentially undermine a client's position in the future and may impact on its ability to seek full and frank advice in the first place or to freely pass this advice on to regulators to demonstrate its position. This would lead to a more guarded approach to seeking advice and the provision of the advice itself, lessening its effectiveness and the client's ability to make fully informed and robust legal decisions.

*Balance of the public interest arguments*

96. Although the information has been requested from the Charity Commission and not the charity itself, the Commissioner is of the view that the privilege attached to the withheld information has not been diminished by being provided to a third party. There is no evidence to suggest that the charity considers the privilege has been waived particularly in view of the fact that the Charity Commission is still in the process of deciding the long-term future of the Rec, the subject on which the legal advice was sought by the trustees of the charity.
97. The advice does date back several years (to 2008) but reflects the legal position of the charity and continues to do so whilst a final decision is

still to be made. As such the Commissioner considers the privilege attached to the information was not waived when it was passed to the Charity Commission and is still relevant now.

98. It is the Commissioner's view that none of the arguments mentioned in favour of disclosure outweigh the inherent public interest in maintaining the exemption and withholding the information which is subject to legal professional privilege in this case. The Commissioner places particular weight on the inherent public interest in allowing decisions to be taken on a fully informed and robust legal basis and in the regulator in this case being provided with frank legal opinions from the charity on which to base its decisions.
99. He therefore concludes that the Charity Commission correctly withheld the information listed at paragraph 87 on the basis of section 42(1).

## Right of appeal

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100. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

101. 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.

102. 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 .....**

**Gerrard Tracey  
Principal Adviser  
Information Commissioner's Office  
Wycliffe House  
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SK9 5AF**