

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 October 2009

Public Authority: Charity Commission
Address: PO Box 1227
Liverpool
L69 3UG

Summary

The complainant submitted a request to the Charity Commission seeking all documents involved in its consideration of complaints about a particular school which was run by a registered charity. The Charity Commission disclosed some documents but withheld further documents on the basis of the exemptions contained at sections 21 (information reasonably accessible by other means), 31(2)(f) to (h) (law enforcement), 40(2) (personal data), 41 (information provided in confidence), 42(1) (legal professional privilege) and 43(2) (commercial interest) of the Act. The complainant subsequently complained to the Commissioner about the application of all of these exemptions with exception of the application of sections 21 and 40(2).

During the course of the Commissioner's investigation the Charity Commission disclosed a number of further documents which it had previously withheld on the basis of sections 31, 41 and/or 43. With regard to the remainder of the information that has not been disclosed the Commissioner has concluded that the majority of this information is exempt from disclosure on the basis of either section 42(1) or sections 31(2)(f) to (g) and in all the circumstances of the case the public interest favours maintaining the exemptions. The only exceptions to this conclusion are a small number of pieces of information which the Commissioner has concluded are not exempt from disclosure by virtue of any of the exemptions cited by the Charity Commission. By failing to disclose this information in response to the request the Commissioner has concluded that the Charity Commission breached sections 1(1)(b) and 10(1) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant submitted the following request to the Charity Commission on 21 June 2007:

‘Further to our earlier correspondence, I should like to apply under the Freedom of Information Act to see all documents involved in the Commission’s consideration of complaints about the closure of the Parsons Mead School.

These should include minutes of all meetings held and correspondence with the Trustees of PMET [Parsons Mead Education Trust] and the Trustees of the Vernon Education Trust [VET]. I should also like details of any advice given by the Commission over the sale of the Parsons Mead site.’

3. The Charity Commission responded on 20 July 2007 and provided the complainant with a number of pieces of information falling within the scope of his request. However, the Charity Commission explained that it had redacted the names of individuals who had complained to it about the closure of Parsons Mead School on the basis of the exemptions contained at sections 40(2) and 41(1) of the Act. The Charity Commission also explained that it held a number of newspaper cuttings and company information about Parsons Mead School but such information was exempt from disclosure on the basis of section 21 of the Act as it was reasonably accessible to the complainant by other means. Furthermore, the Charity Commission explained it believed that the internal legal advice which fell within the scope of this request, as well as any information recording the substance of the advice, was exempt from disclosure by virtue of section 42 of the Act. Finally, the Charity Commission explained that it held a number of further documents which fell within the scope of the request but it needed further time in order to determine where the balance of the public interest lay with regard to disclosing this information as it believed that this further information may be exempt from disclosure by virtue of sections 31 and/or 43.
4. The Charity Commission contacted the complainant again on 17 August 2007 and provided him with a small number of further documents, again with redactions made to the names of individuals on the basis of sections 40 and/or 41. The Charity Commission also explained that having given due consideration to the remaining information which fell within the scope of this request it had concluded that this information was exempt from disclosure on the basis of section 31(1)(g), and in particular the purposes set out at sections 31(2)(f) to (h), and also section 43 of the Act and the public interest favoured maintaining all of these exemptions.
5. On 28 August 2007 the complainant asked for an internal review to be conducted of the decision to refuse to disclose further information.

6. On 18 October 2007 the Charity Commission contacted the complainant and informed him that it had completed an internal review and concluded that all of the exemptions had been correctly applied.

The Investigation

Scope of the case

7. On 15 November 2007 the complainant contacted the Commissioner to complain about the Charity Commission's decision to withhold some of the information that he had requested. The Commissioner subsequently clarified with the complainant that he was not disputing the Charity Commission's decision to refuse to disclose the names of other individuals who had made complaints to the Charity Commission or the Charity Commission's decision to withhold certain documents on the basis of section 21. Rather, the focus of his complaint was the decision to withhold internal Charity Commission documents on the basis of the exemptions contained at sections 31, 41, 42 and 43.
8. During the course of the Commissioner's investigation, as is detailed in the Chronology section which follows, he received a lever arch file of information from the Charity Commission regarding the affairs of PMET and the VET. On receipt of this file the Commissioner created a schedule of the information contained within this file which fell within the scope of the complainant's request. (A version of this schedule is attached to the decision notice. A more detailed version of the schedule which includes more details of the withheld documents will be supplied to the Charity Commission only).
9. During the course of the Commissioner's investigation he has reached the conclusion that some of the documents that he originally numbered and included in the schedule were documents that did not fall within the scope of the complainant's request. It follows, therefore, that such documents are not in the scope of this investigation.
10. Such documents are:
 - Documents 10 and 11 because they relate to discussions within the Charity Commission's press office following the conclusion of the Charity Commission's investigation of the complaints about Parsons Mead School. The documents do not relate to the Charity Commission's consideration of the complaints themselves.
 - Document 88 because this document was included in the file provided to the Commissioner in error (it is in fact entirely unrelated to Parsons Mead School, the Parsons Mead Educational Trust or the Vernon Educational Trust).
 - Documents 89 to 92 because these documents relate to privacy issues surrounding the publication on the internet of the letter referenced at

paragraph 29 rather than the Charity Commission's consideration of the complaints about the decision to close Parsons Mead School.

11. Similarly, as the Commissioner has established that the basis of this complaint were the documents which the Charity Commission withheld using the exemptions contained at sections 31, 41, 42 and 43 of the Act he has not considered whether the Charity Commission was correct to argue that some documents were exempt solely on the basis of section 21 of the Act. Such documents include press articles, copies of letters provided to parents of Parsons Mead School (the complainant is a parent of a child who attended Parsons Mead School), information available from Companies House and accounts of the charities concerned which are available on the Charity Commission website. The file provided to the Commissioner also contained copies of the Charity Commission's correspondence with the complainant in relation to a complaint he originally submitted to it about the disclosure of Parsons Mead School. As the complainant already has copies of this correspondence the Commissioner has not considered it for the purposes of this complaint.
12. As also noted in the Chronology section below during the course of the Commissioner's investigation the Charity Commission disclosed a number of documents to the complainant. Although the Commissioner's role under section 50 of the Act is to consider the application of exemptions at 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 his 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 documents that have now been disclosed.

Chronology

13. The Commissioner contacted the Charity Commission on 19 June 2008 and asked to be provided with copies of the information that had not been provided to the complainant along with detailed submissions as to why the Charity Commission had concluded that this information was exempt from disclosure.
14. The Charity Commission provided the Commissioner with a copy of the information that had been withheld from the complainant on 1 July 2008. The Charity Commission explained that it believed its reasoning as to why it decided that this information was exempt from disclosure was sufficiently set out in the internal review letter to the complainant dated 18 October 2007 and there was nothing that it could usefully add to support its position.
15. The Commissioner wrote to the Charity Commission on 12 September 2008. The Commissioner explained that he had compiled a schedule of the documents which the Charity Commission had provided him on 1 July 2008. (As noted, a version of this schedule is attached to this notice.) The Commissioner explained that he had reviewed in detail the various documents listed in the schedule and on the basis of this review he asked the Charity Commission to clarify exactly which exemptions it was relying on to withhold certain documents as this was not

entirely clear from the information that had previously been provided. Furthermore, the Commissioner also asked to be provided with more detailed submissions to support the Charity Commission's position that the withheld documents were exempt from disclosure on the basis of the exemptions contained at sections 31, 41, 42 and 43 of the Act.

16. The Charity Commission provided an initial response to the Commissioner's enquires on 20 November 2008 and then further responses on 27 November and 3 December 2008 which indicated which exemptions the Charity Commission was relying on to withhold which documents. The Charity Commission indicated that it was now prepared to disclose some of the withheld documents to the complainant.
17. The Commissioner contacted the Charity Commission on 12 December 2008 and asked it to forward to the complainant the documents which it was now prepared to disclose. The Commissioner noted that some of the documents that the Charity Commission suggested that it would be willing to disclose were emails containing attachments; the Commissioner explained that these attachments fell within the scope of the request and therefore they would also need to be disclosed.
18. On 29 January 2009 the Charity Commission contacted the complainant and provided him with a number of documents that had previously been withheld.
19. Having reviewed these disclosures, the Commissioner established that the attachments to a number of documents had not been disclosed. (These attachments consisted of a number of draft section 26 orders and a copy of the final section 26 order – see paragraph 28 for an explanation of these documents.) The Commissioner therefore contacted the Charity Commission on 18 February 2009 and asked it to disclose these attachments to the complainant; alternatively if the Charity Commission considered these attachments to be exempt from disclosure, the Commissioner asked for submissions to support this position.
20. On 2 March 2009 the Charity Commission provided the complainant with the attachments to the various documents which it had disclosed to the complainant on 29 January 2009.

Findings of fact

21. The Charity Commission regulates charities in England and Wales and aims to promote the effective use of charity resources but within an overall framework which safeguards and supports the independence of charities. The Charity Commission cannot consider policies pursued or actions taken by the trustees of charities that are within the law and the provisions of the charity's governing document and that constitute an acceptable exercise of trustees' powers, duties, responsibilities and discretions.
22. Parsons Mead Educational Trust Limited (PMET) was a charity with the objective of 'the promotion of education'. Parsons Mead School, an independent girls' school in Ashted, Surrey was an activity carried out by the charity in furtherance

of this object. (PMET was removed from the Charity Commission's Register of Charities in September 2008.)

23. Vernon Educational Trust (VET) is a charity whose objective is 'to promote and provide for the advancement of education of children and adults by the provision of schools, tutorials and other establishments'. Danes Hill School, which is a co-educational independent school in Oxshott, Surrey, is an activity carried out by the VET in furtherance of this objective.
24. In March 2005 parents of Parsons Mead School were informed that the school was suffering from financial difficulties and as a consequence was in discussions with Cognita, a private company which invests in independent schools.
25. In July 2005 parents of pupils at Parson Mead School were informed, incorrectly as it subsequently transpired that the two charities, PMET and VET, had merged.
26. In June 2006 it was announced that Parsons Mead School would be closed at the end of the summer term.
27. Subsequently the Charity Commission received a number of complaints from parents of pupils at Parsons Mead School about the decision to close the school and asked the Charity Commission to investigate. These complaints focused on the short notice that was given with regard to the decision to close the school and the PMET's failure to consider other options which would have led to the school being kept open and also the fact that a significant number of trustees of PMET and VET were similar and thus there was a potential conflict of interest.
28. On 31 October 2006 the Charity Commission issued, under section 26 of the Charities Act 1993, an order authorising the transfer of the PMET's assets to VET. The PMET's assets included the site of Parsons Mead School.
29. On 17 November 2006 the Charity Commission informed the individuals who had complained to Charity Commission that it would not be taking any further action in relation to the complaints it had received about the PMET and VET. A copy of this letter can be viewed at:
http://www.pmparents.co.uk/charity_commission_findings.htm
30. The VET subsequently sold the site of Parsons Mead School; for the financial year ending 31 August 2007 VET's accounts noted that its income for the past year included a net surplus from the sale of freehold property of £10,110,000.¹

¹ http://www.charity-commission.gov.uk/registeredcharities/SIR/ENDS33/0000269433_SIR_07_E.PDF

Analysis

Exemptions

31. As the attached annex indicates the Charity Commission has withheld a number of documents on the basis of a variety of exemptions.
32. The Commissioner's approach has therefore been to consider the Charity Commission's application of the each of the exemptions in turn, beginning with section 42.

Section 42 – Legal Professional Privilege

33. Section 42(1) provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
34. There are two categories of legal professional privilege: advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
35. The category of privilege which the Charity Commission is relying on to withhold some information is advice privilege. This privilege is attached to communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege.
36. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact which can usually be found by inspecting the documents themselves.

The Charity Commission's position

37. As the attached annex indicates the Charity Commission has argued that a significant number of documents are exempt from disclosure on the basis of section 42 because they attract advice privilege. The Charity Commission has described these documents – numbers 93 to 118 – as relating to internal legal advice provided by Charity Commission staff by its own legal advisers and requests for, and references to, such advice.
38. Furthermore, the Charity Commission has also argued that some other specific documents, or parts of these documents, are also exempt by virtue of section 42(1) because they contain legal advice, or summarise legal advice that was

given to the PMET by its solicitor. These specific documents are those numbered 16, 20 and 78.

39. The Charity Commission has also argued that for all documents numbered between 35 and 88 section 42 'is engaged and applied in so far as the solicitors are repeating and referring to legal advice that they have given or are giving their clients'.

The Commissioner's position

40. The Commissioner accepts that the vast majority of the documents numbered 93 to 118 fall within the scope of the exemption contained at section 42(1). This is because the dominant purpose of these communications is either Charity Commission staff seeking legal advice from Charity Commission lawyers or these lawyers providing such advice. The Commissioner also accepts that documents which are not themselves communications actually asking for advice or providing advice, but are in fact documents which reflect such communications, e.g. documents which consist of a file note recording legal advice which was sought and provided orally, also fall within the scope of section 42(1) for the same reasons.
41. The only exceptions to this are certain emails contained within the documents numbered 101 and 102. Although some of the emails which form part of the emails chains in these documents attract advice privilege for the reasons set out above, parts of these email chains do not. This is because parts of these email chains constitute a third party asking the Charity Commission for an update on the situation with Parsons Mead School and the VET and an employee of the Charity Commission making arrangements to update this third party. Although the employee of the Charity Commission who responds to this query is a lawyer, in the Commissioner's opinion the dominant purpose of these particular emails is not the provision of legal advice.
42. For document 101 such emails are the five oldest ones in the chain beginning with the enquiry email dated 19 October 2006 at 17:05 up to and including the further enquiry email dated 26 October 2006 at 10.35.
43. For document 102 there is only one such email which is in fact a copy of one the emails already identified in document 101 (this is the last email in the chain forming document 102).
44. For the reasons set out above the Commissioner does not accept that such emails are exempt from disclosure by virtue of section 42(1) of the Act. The Commissioner has therefore ordered these particular emails to be disclosed (see the step at paragraph 131).
45. With regard to information contained within the documents numbered 35 to 88 the Commissioner notes that with the exception of document 78, the Charity Commission has not provided any specific indications as to which sections will be covered by section 42. Rather it has merely highlighted that it considers section 42 will apply where the legal advice provided to the PMET is repeated. In the

circumstances of this case the Commissioner is not minded to forensically analyse these documents in order to determine where section 42 may, or indeed may not apply; therefore he has not considered whether section 42 applies to any of the documents numbered 35 to 88. This is because, with regard to the outcome of this case this does not make any material difference because the Commissioner has concluded that save for the documents that have already been disclosed, he has decided that the documents numbered 35 to 88 are all exempt from disclosure by virtue of section 31. (The Commissioner's consideration of section 31 is discussed in detail below). The only exception to this is document 78 which the Charity Commission has actually disclosed because it contains the same information as document 74 which has now been provided to the complainant.

46. Similarly, with regard to documents 16 and 20 the Commissioner accepts that some of the information contained within these two documents falls within the scope of section 42(1) for the reasons set out by the Charity Commission. However, as the Commissioner has concluded that all of the information contained within documents 16 and 20 is exempt from disclosure on the basis of section 31 he has not reached a formal conclusion in terms of the public interest test in relation to the legally privileged information contained within documents 16 and 20.
47. However, section 42 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption as it applies to the documents numbered 93 to 118 outweighs the public interest in disclosing the information.

Public interest test

Arguments in favour of maintaining the exemption

48. The Charity Commission argued that proper administration of justice, and the part that confidential legal advice plays within it, is strongly within the public interest. Moreover it is important that clients are candid and fulsome in disclosing the facts and background to their case if justice is to be done; it is recognised that clients are likely to hold matters back if they have reason to believe that their lawyers will be compelled to disclose it. The Charity Commission argued that effective legal advice is unlikely in the absence of all the relevant facts and information.

Arguments in favour of disclosing the information

49. The Charity Commission did not highlight any reasons why disclosure of the information falling within the scope of section 42(1) may be in the public interest.
50. However, the Commissioner has identified the following arguments:
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. In the particular circumstances of this case the legal advice relates (albeit in some respects, tangentially so) to a number of decisions taken by the

Charity Commission: its decision not launch and formal investigation into the affairs of the PMET and VET; the decision in October 2006 to issue a section 26 Order authorising the transfer of assets from PMET to VET; and the Charity Commission's general regulation of the PMET and VET over the period set out in the findings of fact section.

52. Although some information has been disclosed, not least the explanation provided to those who made complaints to the Charity Commission about why no formal action has been taken, the complainant has argued that further disclosure is needed so that those involved and interested can have a greater understanding of the decisions taken by the Charity Commission. The complainant has argued that such an argument is key given the fact that VET received a significant amount of money following the sale of the site of Parsons Mead School and the difficult consequences that the closure of the school at such short notice had. Furthermore, the complainant has suggested that the Charity Commission should not have issued a section 26 Order because it was not in the interests of the PMET, albeit that it may have been in the interests of VET. Rather the complainant has argued that the Charity Commission should have used section 19 of the Charities Act 1993. (It is the Commissioner's understanding that section 19 of the Charities Act 1993 provides supplementary provisions relating to the Charity Commission's ability under section 18(1)(vii) to appoint a receiver and manager in respect of the property and affairs of the charity.)
53. The Commissioner is of the view that it could be in the public interest to disclose the information to re-assure the public that the Charity Commission followed appropriate procedures when taking the decisions set out in the previous paragraph and received sufficiently detailed internal legal advice; this could improve confidence in the Charity Commission as a regulator.
54. Equally, the complainant has argued that the Charity Commission has failed as a regulator; therefore if the withheld information revealed evidence of this it could be in the public interest in order to disclose information in order to expose the failings of a public authority regulator.

Balance of public interest arguments

55. In considering the balance of the public interest under section 42, although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty that those in favour of maintaining the exemption'. (Tribunal at para. 41).

56. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice was disclosed by reference to the following criteria:
- how recent the advice is; and
 - whether it is still live.
57. With regard to the age of the advice the Commissioner accepts the argument advanced by a number of Information Tribunals that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more it is to have served its purpose and the less likely it is to be used as part of decision making process.
58. In many cases the age of the advice is closely linked to whether the advice is still live; advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
59. The legal advice which falls within the scope of this request dates from June to October 2006 and the complainant submitted his request in June 2007. On the basis of these dates alone, the Commissioner believes that it is reasonable to describe the advice as recent. As the legal advice relates to the decision to issue a section 26 order which authorised the transfer of the assets from the PMET to the VET, and the time of the complainant's request the PMET was still a registered charity, as was the VET with the latter carrying out its activity of Dane Hill School, the Commissioner believes that the advice could be accurately described as live.
60. With regard to the amount of money involved in this case the Commissioner has referenced in the findings of the fact the benefit he understands the VET received from the sale of the Parsons Mead School site; the complainant's views of this benefit and its impact on the balance of the public interest are clear from the proceeding paragraphs. The Charity Commission's figures reveal that the £10,110,000 income the VET received from the sale of the Parsons Mead site contributed to an annual income of £19,233,810 for the year ending 31 August 2007. The Charity Commission's figures also reveal that for the year ending 31 August 2005 the PMET received annual income totalling £2,349,000. The Commissioner therefore accepts that the legal advice can be set against a background where the level of funds involved is certainly not insignificant.
61. However, this is not to say that the legal advice on this case directly affects the receipt and spending of all this money. Furthermore, in the only significant case to date in which the Information Tribunal has ordered disclosure of information which was exempt by virtue of section 42(1), *Mersey Tunnel Users Association v Information Commissioner* (EA/2007/0052), the amount of money involved was

around £70m and in case EA/2007/0055 quoted above which dealt with pension funds, the value of the fund was estimated to be £1bn.

62. Similarly in terms of the number of people affected by the issues related to this case, the Commissioner acknowledges that the closure of the Parsons Mead School affected several hundred children and their families and that the short notice given about the school's closure resulted in considerable difficulty and uncertainty. However, in both of the cases referenced in the previous paragraph, the issues upon which the legal advice was taken affected significantly more people: in the EA/2007/0052 the decision of Merseytravel to repay councils rather than reducing the toll fees would impact upon all the users of the Mersey Tunnel, approximately 80,000 people per weekday and to a lesser extent all council tax paying residents of the five districts of Merseyside approximately 1,485,900. In the EA/2007/0055 around 19,500 people and their dependents would be affected by the pension fund.
63. Consequently whilst the Commissioner is not suggesting that the amount of money involved in this present case, and the number of people affected by decisions made by the Charity Commission, are not insignificant, they are clearly not as large or as numerous as in the two pieces of case law referenced above.
64. Turning to the final factor, that of transparency and accountability, in the Commissioner's opinion the Charity Commission has been relatively open about how and why it reached the decisions in this case that it did. The Commissioner bases this on the level of information that was communicated to the parents/complainants who had contacted the Charity Commission to complain about PMET and VET. Whilst the Commissioner is sympathetic to frustration that many parents may feel about the closure of the Parsons Mead School and the feelings that the subsequent sale of the site has generated in the Commissioner's opinion the Charity Commission has clearly explained why it has reached the decisions that it did, i.e. its decision not to launch a formal investigation into the affairs of the PMET and VET; the decision in October 2006 to issue section 26 Order authorising the transfer of assets from PMET to VET; and the Charity Commission's actions and powers in relation to the general regulation of the PMET and VET.
65. In conclusion, when taking into account the strong inbuilt weight in favour of protecting legal professional privilege, the fact that this information is recent and still being relied upon and the fact that disclosure would not add substantially to issues of transparency, the Commissioner believes that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
66. The Charity Commission was therefore correct to withhold documents numbered 93 to 118 on the basis of section 42(1) with the exception of the particular emails contained within documents 101 and 102 which have been identified above.

Section 31 – Law Enforcement

The Charity Commission's position

67. The Charity Commission has argued that a number of the documents that fall within the scope of the complainant's request are exempt on the basis of sections 31(1)(g) which provides that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority of the functions set out in section 31(2).

68. The purposes that the Charity Commission has argued would likely to be prejudiced if this information was disclosed are the following within section 31(2):

- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication, and
- (h) the purpose of recovering the property of charities.

69. The Charity Commission has submitted the following arguments to support its position:

70. The Charity Commission has explained that at the time it was considering the complaints it received about the closure of the Parsons Mead School and the wider issues relating to PMET and VET its remit was defined by the Charities Act 1993 and specifically section 1(3) of this piece of legislation which stated that its role was defined as:

'the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses.'²

71. The Charity Commission also explained that this piece of legislation has been amended by the Charities Act 2006 (which received Royal Assent in November 2006) but for the purpose of this notice the functions of the Charity Commission are substantially similar with its general functions being set out in section 7, 1C(2) of the 2006 Act as:

- 1. Determining whether institutions are or are not charities.
- 2. Encouraging and facilitating the better administration of charities.
- 3. Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement therein.
- 4. Determining whether public collections certificates should be issued, and remain in force, in respect of public charitable collections.

² http://www.opsi.gov.uk/ACTS/acts1993/ukpga_19930010_en_2#pt1-l1g1

5. Obtaining, evaluating and disseminating information in connection with the performance of any of the Commission's functions or meeting any of its objectives.
6. Giving information or advice, or making proposals, to any Minister of the Crown on matters relating to any of the Commission's functions or meeting any of its objectives.'³
72. The role of the Charity Commission is therefore varied but includes the roles of advising and assisting trustees, ensuring compliance with the Charities Acts and also investigating potential abuses of charity law.
73. The Charity Commission explained that when it undertook the functions set in the Charities Acts quoted, i.e. advice, compliance and investigatory functions, it was dependent upon the voluntary provision of information from trustees, charities and their advisors. Moreover, the Charity Commission explained that it was dependent upon these communications being full and frank in nature so that it could effectively provide advice and investigate and check any abuses. The Charity Commission argued that if it disclosed information which had been provided to it on a voluntary basis – such as the information withheld on the basis of section 31 – then it would be likely to affect the willingness of trustees and their advisors to provide information to the Charity Commission in the future. This in turn would affect the ability of the Charity Commission to carry out its functions listed at sections 31(2)(f) to (h) of the Act because in order to carry out these functions it was dependent upon having complete knowledge of the situation which was gained from the free and frank communications it received from trustees and their advisors. The Charity Commission also argued that disclosure of internal documents it had created which revealed the nature of communications it had received from the trustees and their advisors would be likely to have the same effect.
74. In submissions to the Commissioner, the Charity Commission did acknowledge that under sections 8 and 9 of the Charities Act 1993 it has the power to compel trustees (and others) to provide it with information and copy documents so that it can carry out its functions. However, the Charity Commission argued that it was too simplistic to suggest that it could rely on these powers as basis upon which it could gather information and avoid any real or significant prejudice to its functions as described at sections 31(2)(f) to (h) of the Act.
75. This was because in relying on these more formal powers, the Charity Commission would be seeking particular types of, and in some cases, specific information for the purpose of particular investigations. However, the scope of sections 31(2)(f) to (g) was effectively wider; in dealing with compliance of charities as opposed to investigations of charities, the Charity Commission expects trustees to provide it with a full and complete disclosure and at times such disclosures inadvertently reveal past faults on behalf of the trustees. If such full disclosure was prejudiced by disclosure of the information which is the focus of these requests the Charity Commission may not become aware of non-compliance issues with charity law.

³ http://www.opsi.gov.uk/acts/acts2006/ukpga_20060050_en_3#pt2-ch1-pb1-l1g6

76. Furthermore, the Charity Commission suggested that if it did use more formal powers to extract information from trustees, or simply the process of receiving such information became more interrogatory in nature, then although it may eventually receive all of the information that it needed, the process of gathering such information would be less efficient and more prolonged.
77. To illustrate this point the Charity Commission provided two hypothetical examples. The first scenario was as follows: in the case of a straightforward scheme altering the administrative provisions or purposes of a charity, where the charity trustees provide all the information, the process may take three months from beginning to end involving five rounds of correspondence. However, where the Charity Commission has to probe (in the case of less than full provision of information), the work and time needed to amend a scheme will be doubled. The second scenario was as follows: in the case of enabling orders, optimally, the Charity Commission explained that it could provide an order within one month involving two rounds of correspondence; but if full information is not initially provided by the trustees, the case will involve around five rounds of correspondence over two months.

The Commissioner's position

78. As noted above, section 31 is a prejudiced based exemption. This means that for the exemption to be engaged the public authority has to explain how the prejudice which the exemption is designed to protect will occur and then provide sufficient evidence to demonstrate that the likelihood of this prejudice occurring is one that is either likely to occur or would occur.
79. The Charity Commission has explained that they believe that the likelihood of prejudice occurring is one that is likely to occur, rather than one that would occur, following disclosure; i.e. they are relying on the lower threshold.
80. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' be a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
81. The Commissioner recognises the fact that the arguments relied upon by the Charity Commission focus upon a theme which is not unique to this case; namely prejudice which may occur to a regulator's functions if there is a disruption to the flow of information it receives on a voluntarily basis following disclosure of such information under the Act.

82. In such cases the Commissioner believes that the following criteria should be considered in such cases when deciding whether disclosure of requested information would affect the flow of information to the regulator who received the request:
1. What stage had the investigation reached when the request was submitted? Is it still live or was it completed?
 2. Does the regulator have powers to compel engagement in the regulatory process?
 3. Does the regulator have strong powers in relation to sanctions for non-compliance that may drive engagement?
 4. What are the other risks that the regulated organisations will consider when assessing whether their engagement will change?
 5. Is there any evidence to demonstrate that levels of engagement with the regulator have fallen since the introduction of the Act?
 6. Is there a statutory bar that the regulator can rely on in order to prevent disclosure of information provided in confidence?
83. And if there is evidence which demonstrates that there is a potential loss of engagement with the regulator and/or the regulator receiving less information:
7. What would the impact of the disengagement and/or loss of information be?
84. In relation to the first criterion, the Commissioner believes that if an investigation was ongoing at the time of the request then the likelihood of that disclosure affecting the regulators ability to gather information from those organisations which it regulates would be high. In this case, the investigation in question had been concluded but only relatively recently: the Charity Commission confirmed it was not taking any further action in November 2006 and the complainant submitted his request in June 2007. Therefore in the Commissioner's opinion the likelihood of disclosure impacting on the Charity Commission's regulatory functions remained relatively high.
85. With regard to the second and third criteria, the Commissioner notes that although the Charity Commission does have some powers to compel trustees to provide it with information, these powers are relatively limited, particularly when compared to other regulators.
86. Turning to the fourth criterion, in the Commissioner's opinion the trustees of charities, and their advisors, have an in-built incentive to communicate with the Charity Commission in a free and frank manner. This is because it is the trustees of charities who are ultimately responsible for ensuring that their charity complies with the legal requirements of charity law. In order to ensure that they meet such requirements they often need to discuss such issues openly with the Charity Commission. The Charity Commission's document 'Vicarious Liability Of A Charity Or Its Trustees' explains that becoming a trustee of a charity brings with it the following duties and responsibilities:

- be liable to the charity for breach of their trust or fiduciary obligations under trust or company law;
 - additionally be responsible generally for any breaches of the criminal law they commit;
 - also sometimes be liable under civil law to third parties either for breaches of contract or for infringement of another's rights.⁴
87. Furthermore, and with reference to the fifth criterion, the Commissioner has not been provided with any evidence from the Charity Commission which demonstrates that charities have been less willing to provide it with information since the Act came into full force in January 2005.
88. In relation to the sixth criterion the Commissioner has considered the comments of the Information Tribunal in a case involving a request for information which the Financial Services Authority (FSA) had received voluntarily during the course of an investigation.⁵ The Tribunal's decision upheld the FSA's position that the requested information was exempt from disclosure on the basis of section 43(2) of the Act and as such did not need to reach a formal decision on the application of section 31 of the Act. However, the Tribunal did make a number of comments in relation to the interaction of section 31 and the voluntary provision and potential disclosure of information by regulators which the Commissioner considers useful for this case.
89. In setting out the background to its decision the Tribunal noted that the role of the FSA was to regulate the financial services industry in the UK and it was provided with a number of functions under the Financial Services and Markets Act 2000 (FSMA). Crucially, the Tribunal noted that section 348 of the FSMA was designed to assist this process as this section, subject to a number of gateways, provided that the FSA must not disclose 'confidential information' without the consent of the person who supplied it, and if different, the person who it relates to. In short, in conjunction with section 44 of the Act, section 348 of the FSMA provided a statutory bar to the disclosure of certain types of information that the FSA received during the course of carrying out its functions.
90. The Tribunal, taking into account a number of factors, including the statutory bar described above, ultimately concluded that disclosure of this particular information at the time of this request was submitted would not result in a sufficient likelihood of prejudice for section 31 to be engaged. In relation to the affect of the statutory bar, the Tribunal commented that:

'Any information that firms were going to supply about themselves would always remain protected by section 348 of the FSMA and, as we have stated above in paragraph 17, any internal FSA views based on it not coming within section 348 and involving prejudice to their commercial interests would rarely fall to be disclosed under the Act by reason of section 43'.

⁴ <http://www.charity-commission.gov.uk/supportingcharities/vicarious.asp#10>

⁵ *Financial Services Authority v Information Commissioner*, EA/2008/0061

91. Therefore, one of the cumulative reasons In the Commissioner's opinion, of significance is the fact one of the cumulative reasons that led the Tribunal refuse to accept that section 31 was engaged in EA/2008/0061 was because the FSMA, in conjunction with section 44 of the Act, provided a statutory prohibition for confidential information firms had provided to the FSA. Given the existence of this statutory bar, the Tribunal argued that firms would feel sufficiently protected to continue to voluntarily provide information confident that such information would not be disclosed in response to a freedom of information request.
92. The Commissioner believes that this finding is important because the Charity Commission does not have a statutory bar which is equivalent to the bar contained in the FSMA. Therefore disclosure of information which is the focus of this request is not prohibited by section 44 and the implication for the engagement of section 31 following the logic of the Tribunal is clear; the lack of such protection offered by a statutory prohibition on disclosure increases the likelihood of prejudice occurring following disclosure of information that was provided voluntarily. The Commissioner therefore believes that the position of the Charity Commission can be distinguished from the findings of the Information Tribunal in EA/2008/0061 in relation to the FSA in this crucial respect.
93. On the basis of the cumulative weight of the above factors, the Commissioner is prepared to accept that disclosure of information could result in a real and significant level of prejudice occurring to the Charity Commission's functions as described at sections 31(2)(f) to (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.
94. In reaching this conclusion the Commissioner recognises that the Charity Commission's argument is more sophisticated than suggesting that the disclosure of information in response to this request will result in trustees refusing to communicate with the Charity Commission at all. Rather it is the nature of these communications that will change and thus both the Charity Commission's formal and informal methods will be affected, as well as it ability to gather/receive wider intelligence.
95. In terms of likelihood of this prejudice occurring, the Commissioner has considered the number of charities which the Charity Commission regulates: at the end of 2007 there were 167,297 'main' charities registered with the Charity Commission.⁶ The Commissioner has also established that the Charity Commission provides advice and guidance to around 24,000 of these charities each year in addition to dealing with 250,000 enquires at its contact centre. Therefore, in the Commissioner's opinion given the significant number of charities regulated by the Charity Commission, even if a relatively small percentage of these charities altered their behaviour following disclosure of this information this could still have a real and significant effect on the Charity Commissioner's ability to carry out its functions. For example, if just 3 percent of the charities changed

⁶ Figure taken from Charity Commission's website, <http://www.charitycommission.gov.uk/registeredcharities/factfigures.asp>

- their behaviour then this would equate to over 5,000 charities and their representatives being less likely to provide information to Charity Commission.
96. On the basis of the above, the Commissioner accepts that disclosure of information which was provided to the Charity Commission on a voluntary basis would be likely to have a prejudicial effect on the Commission's ability to undertake its functions set out at section 1(3) of the Charities Act 1993, section 7 of the Charities Act 2006 and by implication the functions described at sections 31(2)(f) to (g) of the Act.
97. However, despite reaching this conclusion the Commissioner is conscious of the logical conclusion that complete acceptance of this argument could result in – there is the danger of creating a class based (and potentially absolute) exemption for any information that the Charity Commission has been provided with on a voluntary basis. Therefore, the Commissioner has to consider the particular circumstances of this request, including the nature of the information that the Charity Commission has argued is exempt from disclosure on the basis of section 31.
98. As the attached annex demonstrates the Charity Commission has withheld a significant number of documents on the basis of section 31 of the Act; these documents include both those provided to the Charity Commission by either the trustees or their representatives and internally created documents which reflect the content of these communications. However, as the annex also demonstrates during the course of the Commissioner's investigation the Charity Commission also agreed to disclose a significant number of documents; again these documents comprise both those provided to the Charity Commission and those created by it which discuss the content of information that was provided to the Charity Commission.
99. The Commissioner has therefore used the documents that the Charity Commission has now disclosed as a 'benchmark' against which he has judged whether other still withheld documents could be disclosed without significant prejudice to the Charity Commission's functions as set out at sections 31(2)(f) to (h) occurring. The Commissioner has also taken into account the content of the Charity Commission's closing letter to the individuals who had complained about the closure of Parsons Mead School. Although the Commissioner accepts that this letter has not been disclosed under the Act, the Charity Commission obviously sent it knowing that its contents would receive relatively wide dissemination amongst the parents of pupils who had attended Parsons Mead School and other interested parties. As a general principle the Commissioner's approach has been that if information contained in documents that have been withheld on the basis of section 31 is in fact repeated in either information that has already been disclosed or is in the letter provided to the parents then the Commissioner has not accepted that disclosure of such information would be likely to result in any real or significant prejudice.
100. Using this logic the Commissioner does not accept that disclosure of the following documents would be likely to result in prejudice occurring:

- Documents 1, 5, 6, 19 and 82.
101. However, the Commissioner believes that the remainder of the documents that the Charity Commission has argued are exempt from disclosure on the basis of section 31 contain substantial and sensitive information which was provided to the Charity Commission during the course of its investigation. Given the substantive nature of this information for the reasoning set out above the Commissioner accepts that disclosure would be likely to result in the prejudicial effects to the Charity Commission's purposes as described at sections 31(2)(f) to (h) of the Act.
102. However, section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

Arguments in favour of disclosing the information

103. In the Commissioner's opinion the public interest arguments in disclosing the information which is exempt on the basis of section 31 are broadly similar to the public interest arguments set above in relation to the exemption contained at section 42.
104. That is to say, there is an inherent public interest in disclosure of information which would promote accountability and transparency by public authorities for decisions taken by them. As noted above in the particular circumstances of this case the withheld information broadly relates to three decisions taken by the Charity Commission: its decision not to launch a formal investigation into the affairs of the PMET and VET; the decision in October 2006 to issue section 26 Order authorising the transfer of assets from PMET to VET; and the Charity Commission's general regulation of the PMET and VET over the period set out in the findings of fact section.
105. Although the Commissioner has argued above that the Charity Commission has been relatively transparent about the decisions it made in relation to this case, he accepts that disclosure of the information exempt on the basis of section 31 could go some way to addressing the arguments that the complainant has raised. Namely that, further disclosure is needed so that those involved and interested can have a greater understanding of the decisions taken by the Charity Commission. In particular the complainant argued that such a point is key, given the fact that VET received a significant amount of money following the sale of the site of Parsons Mead School and the difficult consequences that the closure of the school at such short notice had. Furthermore, the complainant has suggested that the Charity Commission should not have issued a section 26 Order because it was not in the interests of the PMET, albeit that it may have been in the interests of VET. Rather the complainant has argued that the Charity Commission should have used section 19 of the Charities Act 1993.

106. The Commissioner believes that it could be in the public interest to disclose the information to re-assure the public that the Charity Commission did follow appropriate procedures when taking the decisions set out above and properly carried out its functions related to the purposes set out at sections 31(2)(f) to (h).
107. Equally, the complainant has argued that the Charity Commission has failed as a regulator; 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.

Arguments in favour of withholding the information

108. There is a public interest in the Charity Commission being able to investigate charities, provide advice to charities and deal with issues of charities' compliance with charity law as quickly as possible and at the least cost to the taxpayer. Essentially it is in the public interest that public sector regulators can operate effectively and efficiently.
109. More widely, 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.

Balance of public interest arguments

110. In the Commissioner's opinion the arguments in favour of maintaining the exemption need to be given particular weight; it is strongly in the public interest that the charity sector is regulated by an efficient and effective body so potential abuses of charitable funds can be prevented and detected. At a broader level, it is in the public interest that all charities are provided with advice that maximises the benefits of the charitable donations.
111. The Commissioner recognises the weight that accountability and transparency must be given in balancing the public interest test. In particular the Commissioner does accept the level of concern that both parents and those in the local community have voiced in relation to specific issues in this case, especially concerning the amount of money the VET received following sale of the Parsons Mead site. Moreover, the Commissioner accepts that disclosure of the information that has been withheld on the basis of section 31 would provide some background information used by the Charity Commission and could potentially be of benefit in order to set the decisions its has taken into context.
112. However, as set out above in the balance of the public interest under section 42, in the Commissioner's opinion in the particular circumstances of this case he believes that the Charity Commission has been relatively clear about the decisions it has reached and its reasoning behind these decisions. In particular the Commissioner wishes to stress that in dealing with the complaints it received about this issue the Charity Commission has always been expressly clear about the limits of its role; i.e. it cannot interfere with policies pursued or courses of action taken by trustees that are within the law and are within the discretionary powers provided to trustees by a charity's governing document.

113. Whilst the Commissioner is sympathetic to the concerns raised by the complainant (and indeed other parents of pupils at Parsons Mead School) in relation to the decision of the Charity Commission to issue a section 26 authorising the transfer of assets despite the fact that the trustees of the PMET and the VET were very similar, from what he has been able to establish there is no evidence that the Charity Commission acted in a manner which could be described as untoward. In making this point, the Commissioner wishes make it clear that in determining complaints under section 50 of the Act it is not his role to review decisions taken by other public authorities. However, the Tribunal in considering the case EA/2008/0061 which is discussed above made it clear that in balancing the public interest test if 'the disputed information [i.e. the withheld information] had disclosed something untoward in the FSA's response to the information it had received about the matters reported in the Sunday Times the result [i.e. where the balance of the public interest lay] may have been different'. (Tribunal at paragraph 17).
114. In these circumstances whilst the Commissioner acknowledges that the disclosure of the information exempt on the basis of section 31 may assist those in understanding further the decisions taken by the Charity Commission, he believes that that this is outweighed by the stronger public interest in Charity Commission being an effective and efficient regulator and the damage to which disclosure would bring. Consequently, Commissioner has concluded that the public interest in maintaining the exemptions contained at sections 31(2)(f) to (h) are outweighed the public interest in disclosing the information.

Section 41 – Information Provided in Confidence

115. Although the Charity Commission has argued that a number of documents are exempt from disclosure on the basis of section 41 of the Act it has also argued that these documents are also exempt from disclosure on the basis of section 31. As the Commissioner has concluded that the vast majority of these documents are exempt from disclosure on the basis of section 31 he has not gone on to consider whether these documents are also exempt from disclosure by virtue of section 41.
116. However in respect of a number of documents, i.e. those numbered 1, 5, 6, 82 the Commissioner has concluded that these documents are not exempt from disclosure on the basis of section 31. Therefore the Commissioner has gone on to consider whether section 41 provides a basis upon which the Charity Commission was correct to withhold these documents.
117. Section 41(1) states that:

“Information is exempt information if -

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would

constitute a breach of confidence actionable by that or any other person.”

118. To meet the requirements of section 41(1)(a) the information has to have been passed to the Charity Commission by a third party.
119. With regard to interpreting section 41(1)(b), the Commissioner considers the following criteria must be met if breach is going to be actionable:
 - the information has the necessary quality of confidence;
 - the information was imparted in circumstances importing an obligation of confidence; and
 - there was an unauthorised use of the information to the detriment of the confider (the element of detriment is not always necessary).
120. In the Commissioner's opinion the information contained within document 1 was not obtained by the Charity Commission from another person because it is simply a record of the thoughts or actions of Charity Commission staff, in other words it is information created by the Charity Commission.
121. Although the Commissioner accepts that some of the information contained within documents 5, 6 and 82 was provided to the Charity Commission by a third party and fulfils the requirements of section 41(1)(a), the Commissioner is not satisfied that this information has the necessary quality of confidence.
122. The Commissioner believes that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as being generally accessible, though it will be if it has been disseminated to the general public.
123. In the Commissioner's opinion the information contained within documents 5, 6 and 82 has been repeated in either the closing letter which the Charity Commission sent to the individuals who complained to it about the closure of Parsons Mead School, and as noted above this letter has been placed on the internet, or is information which has previously been disseminated to the parents of Parsons Mead School.
124. On the basis of the reasoning outlined above the Commissioner is not satisfied that documents 1, 5, 6 and 82 are exempt from disclosure by virtue of section 41.

Section 43 – Commercial Interests

125. Although the Charity Commission has argued that a number of documents are exempt from disclosure on the basis of section 43(2) of the Act as the Commissioner has concluded that such documents are exempt by virtue of section 31 he has not gone to consider whether such documents are also exempt by virtue of section 43(2).

Procedural matters

126. Section 1(1) of the Act states that:

‘Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.’

127. Section 10(1) of the Act requires that a public authority must comply with the requirements of section 1(1) promptly and no later than the twentieth day following the date of receipt.

128. By failing to provide the complainant with the information that the Commissioner has decided should be disclosed (see the ‘Steps required’ section below) the Commissioner considers that the Charity Commissioner has breached section 1(1)(b) of the Act by failing to disclose this information and section 10(1) by failing to disclose this information within 20 working days following the date of the request.

129. Section 17 of the Act requires a public authority to provide an applicant with refusal notice stating the basis upon which it has refused a request for information. In particular section 17(1)(b) requires a public authority to state the exemption or exemptions upon which it is relying. Where multiple limb exemptions are cited the Commissioner believes that public authorities should cite the relevant subsection of the exemption in question. In this case although the Charity Commission explained in its refusal notice of 17 August 2007 that it was relying on section 43 of the Act it failed to specify that it was actually relying on section 43(2). The Commissioner considers this to be a breach of section 17(1)(b).

The Decision

130. The Commissioner’s decision is that the Charity Commission dealt with the following elements of the request in accordance with the requirements of the Act:

- The Charity Commission was correct to withhold the following documents on the basis of section 42(1):
 - 93 to 100; 101 and 102 with the exceptions of the emails noted in the annex below; 103 to 118 (excluding documents 106 and 117 which are not in the scope of the request).
- The Charity Commission was correct to withhold the following documents on the basis of section 31(2)(f) to (g):

- 3; 4; 7 to 9; 12; 16; 20; the redacted paragraphs of 25; 26 to 37; the redacted paragraphs of 38 to 43; 62; 63; 77; 79; 85 to 87; 121; 124 to 152.
131. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- Documents 1, 5, 6, 19, 82 and the five oldest emails in the chain comprising document 101 beginning with the enquiry email dated 19 October 2006 at 17:05 up to and including the further enquiry email dated 26 October 2006 at 10.35 are not exempt from disclosure by virtue of any exemption cited by the Charity Commission.
 - By failing to disclose the information listed in the previous paragraph the Commissioner has decided that the Charity Commission breached sections 1(1)(b) and 10(1) of the Act.
 - By failing to cite the specific subsection of section 43 which it was seeking to rely on the Charity Commission breached 17(1)(b).

Steps Required

132. The Commissioner requires the public authority to disclose the following documents in order to ensure compliance with the Act:
- Document 1;
 - Document 5;
 - Document 6;
 - Document 19;
 - Document 82; and
 - The five oldest emails in the chain comprising document 101 beginning with the enquiry email dated 19 October 2006 at 17:05 up to and including the further enquiry email dated 26 October 2006 at 10.35.

Failure to comply

133. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

134. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 13th day of October 2009

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Document Number	Title/description	Disclosed during course of investigation?	Exemptions applied by Charity Commission	ICO's position on application of exemption/ outcome.	Should document be disclosed?
1	File note.		S31, s41	Section 31 not engaged. Section 41 not engaged.	Yes
2	Briefing paper.	Yes			
3	Meeting note.		S31, s41	Section 31 engaged – public interest favours maintaining exemption.	No
4	Memorandum re: PMET.		S31, s41	Section 31 engaged – public interest favours maintaining exemption.	No
5	Case discussion re: PMET		S31, s41	Section 31 not engaged. Section 41 not engaged.	Yes
6	Email.		S31, s41	Section 31 not engaged. Section 41 not engaged.	Yes
7	Email string.		S31, s41	Section 31 engaged – public interest favours maintaining exemption.	No.
8	Hand written note of meeting.		S31, s41	Section 31 engaged – public interest favours maintaining exemption.	No.

9	Documents supplied to Charity Commission.		S31, s41	Section 31 engaged – public interest favours maintaining exemption.	No.
10	Email.		Not in scope of request.		
11	File note.		Not in scope of request.		
12	Email string.		s31, s41	Section 31 engaged – public interest favours maintaining exemption.	No.
13	Memo re: PMET	Yes			
14	Email.	Yes			
15	Email.	Yes			
16	Email string..		S31, s41, s42 (in parts) and S43 (in parts).	Section 31 engaged – public interest favours maintaining exemption.	No.
17	Email string.	Yes			
18	Email.	Yes			
19	Email.	The Charity Commission indicated to the Commissioner that it would be prepared to disclose this document to the complainant but to date has not done so.			Yes
20	Email string.		s31, s41 and (s42	Section 31 engaged	No.

			in part)	– public interest favours maintaining exemption.	
21	Email string.	Yes			
22	Email string.	Yes			
23	Email string.	Yes (some names redacted). Redacted names not in scope of complaint.			
24	Email string..	Yes – the attachment described is doc 2 (i.e. the briefing note).			
25	Email string.	Yes – but a number of paragraphs redacted.	S31, s41	For the redacted paragraphs section 31 is engaged and the public interest favours maintaining the exemption.	Redacted paragraphs do not need to be disclosed.
26	Email.		S31, s41, s43	Section 31 engaged – public interest favours maintaining exemption.	No.
27	Email.		S31, s41, s43	Section 31 engaged – public interest favours maintaining exemption.	No.
28	Memo of telephone call..		S31, s41	Section 31 engaged – public interest favours maintaining exemption.	No.

29	Notes of Telephone case conference.		S31, s41, s43	Section 31 engaged – public interest favours maintaining exemption.	No.
30	Email.		S31, s41	Section 31 engaged – public interest favours maintaining exemption.	No.
31	Letter.		S31, s41	Section 31 engaged – public interest favours maintaining exemption.	No.
32	Email.		S31, s41	Section 31 engaged – public interest favours maintaining exemption.	No.
33	Memo of telephone call.		S31, s41	Section 31 engaged – public interest favours maintaining exemption.	No.
34	Email.		s31, s41 and (s42 in part)	Section 31 engaged – public interest favours maintaining exemption.	No.
35	Letter.		S31, S41 and s42 for parts that contain legal advice provided to charity.	Section 31 engaged – public interest favours maintaining exemption.	No.
36	Email string.		S31, S41 and s42 for parts that contain legal advice provided to charity.	Section 31 engaged – public interest favours maintaining exemption.	No.
37	Email.		S31, S41 and s42	Section 31 engaged	No.



			for parts that contain legal advice provided to charity.	– public interest favours maintaining exemption.	
38	Email string.	Yes – but number of paragraphs redacted.	S31, S41 and s42 for parts that contain legal advice provided to charity.	For the redacted paragraphs section 31 is engaged and the public interest favours maintaining the exemption.	Redacted paragraphs do not need to be disclosed.
39	Email string.	Yes – but number of paragraphs redacted.	S31, S41 and s42 for parts that contain legal advice provided to charity.	For the redacted paragraphs section 31 is engaged and the public interest favours maintaining the exemption.	Redacted paragraphs do not need to be disclosed.
40	Email string.	Yes – but number of paragraphs redacted though these are the same as those removed from docs 38/39.	S31, S41 and s42 for parts that contain legal advice provided to charity.	For the redacted paragraphs section 31 is engaged and the public interest favours maintaining the exemption.	Redacted paragraphs do not need to be disclosed.
41	Email string.	Yes – but number of paragraphs redacted though these are the same as those removed from docs 38/39.	S31, S41 and s42 for parts that contain legal advice provided to charity.	For the redacted paragraphs section 31 is engaged and the public interest favours maintaining the exemption.	Redacted paragraphs do not need to be disclosed.
42	Email string.	Yes – but number of paragraphs redacted though these are the same as those removed	S31, S41 and s42 for parts that contain legal advice provided to charity.	For the redacted paragraphs section 31 is engaged and the public interest favours maintaining	Redacted paragraphs do not need to be disclosed.

		from docs 38/39.		the exemption.	
43	Email.	Yes – but with paragraphs redacted.	S31, S41 and s42 for parts that contain legal advice provided to charity.	For the redacted paragraphs section 31 is engaged and the public interest favours maintaining the exemption.	Redacted paragraphs do not need to be disclosed.
44	Email string.	Yes			
45	Email string.	Yes			
46	Email.	Yes			
47	Memo of telephone call.	Yes			
48	Memo of telephone call.	Yes			
49	Memo of telephone call.	Yes			
50	Email string.	Yes			
51	Memo of telephone call.	Yes			
52	Email string.	Yes			
53	Email string.	Yes			
54	Email string.	Yes			
55	Email string.	Yes			
56	Email string.	Yes			
57	Email.	Yes			
58	Email string.	Yes			
59	Email string.	Yes – attachments not disclosed – they are documents 126 & 133.			
60	Email.	Yes			
61	Memo of telephone call.	Yes			

62	Email.		S31, S41 and s42 for parts that contain legal advice provided to charity.	Section 31 engaged – public interest favours maintaining exemption.	No.
63	Email string.		S31, S41 and s42 for parts that contain legal advice provided to charity.	Section 31 engaged – public interest favours maintaining exemption.	No.
64	Memo of telephone call.	Yes			
65	Email.	Yes			
66	Memo of telephone call.	Yes			
67	Email.	Yes			
68	Email.	Yes			
69	Email string.	Yes			
70	Email string.	Yes			
71	Email.	Yes			
72	Memo of telephone call.	Yes			
73	Email string.	Yes			
74	Email string.	Yes			
75	Email.	Yes			
76	Memo of telephone call.	Yes			
77	Letter.		S31, S41 and s42 for parts that contain legal advice provided to charity.	Section 31 engaged – public interest favours maintaining exemption.	No.
78	Email.	This document has been disclosed by default because it contains the same			

		information as document number 74 which has now been disclosed.			
79	Covering email and letter.		S31, S41 and s42 for parts that contain legal advice provided to charity.	Section 31 engaged – public interest favours maintaining exemption.	No.
80	Memo of telephone call.	Yes			
81	Email string.	Yes			
82	Memo of telephone call.	The Charity Commission indicated to the Commissioner that it would be prepared to disclose this document to the complainant but to date has not done so.			Yes.
83	Memo of telephone call.	Yes			
84	Letter.	Yes (same content as doc 83)			
85	Email.		S31, S41 and s42 for parts that contain legal advice provided to charity.	Section 31 engaged – public interest favours maintaining exemption.	No.
86	Letter		S31, S41 and s42 for parts that contain legal advice	Section 31 engaged – public interest favours maintaining	No.

			provided to charity.	exemption.	
87	Email string.		S31, S41 and s42 for parts that contain legal advice provided to charity.	Section 31 engaged – public interest favours maintaining exemption.	No.
88	Email string.		Not in scope of request – included in file in error.		
89	File note		Not in scope of request as relates to legal advice on possible FOI disclosures/privacy issues.		
90	Email string.		Not in scope of request as relates to legal advice on possible FOI disclosures/privacy issues.		
91	Email string.		Not in scope of request as relates to legal advice on possible FOI disclosures/privacy issues.		
92	Email string.		Not in scope of request as relates to legal advice on possible FOI disclosures/privacy issues.		
93	Email		S42	Section 42(1) is	No.

				engaged and public interest favours maintaining the exemption.	
94	Email string.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
95	Email.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
96	Email string.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
97	Email string.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
98	Email string.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
99	File note.		S42	Section 42(1) is engaged and public interest favours maintaining the	No.



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				exemption.	
100	File note.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
101	Email string.		S42	<p>Section 42(1) is engaged and public interest favours maintaining the exemption for some of the emails contained with this chain.</p> <p>The exceptions are the five oldest emails in the chain beginning with the enquiry email dated 19 October 2006 at 17:05 up to and including the further enquiry email dated 26 October 2006 at 10.35.</p> <p>These five emails do not fall within scope of section 42(1).</p>	The five oldest emails in the chain beginning with the enquiry email dated 19 October 2006 at 17:05 up to and including the further enquiry email dated 26 October 2006 at 10.35 need to be disclosed.
102	Email string.		S42	Section 42(1) is engaged and public	No – the one email which is not exempt

				interest favours maintaining the exemption for all emails except one which is fact a copy of one of the emails identified within document 101 as not falling within the scope of document 101.	will be disclosed by virtue of the five emails within document 101 being disclosed.
103	File note.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
104	File note.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
105	Memo of telephone call.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
106	Email.		S42	Not in scope of request as relates to legal advice on possible FOI disclosures/privacy issues.	No.
107	Email.		S42	Section 42(1) is	No.

				engaged and public interest favours maintaining the exemption.	
108	Legal advice.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
109	File note.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
110	Legal advice.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
111	Email.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
112	File note.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
113	Email string.		S42	Section 42(1) is engaged and public interest favours maintaining the	No.

				exemption.	
114	File note.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
115	Legal advice.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
116	Draft order with legal advice annotated.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
117	Legal advice.		S42	Not in scope of request – contains legal advice about complainant's FOI request.	No.
118	File note.		S42	Section 42(1) is engaged and public interest favours maintaining the exemption.	No.
119	Certificate of registration of a mortgage or charge		S21	Not in scope of investigation.	No.
120	Reports and Financial Statements of PMET dated 31		S21	Not in scope of investigation.	

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121	Letter.		S31, s41, s43	Section 31 engaged – public interest favours maintaining exemption.	No.
122	List of Parsons Mead Communications to all parents	Yes			
123	List of individuals who complained to Charity Commission		S40	Not in scope of complaint.	
124	Minutes of PMET Governing body.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
126	Minutes of PMET AGM.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
127	Minutes of PMET Governing.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
128	Minutes of PMET Governing body.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.

129	Minutes of PMET Governing body.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
130	Minutes of PMET Governing body.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
131	Minutes of Vernon Education Trust Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
132	Minutes of (Council) meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
133	Minutes of Vernon Education Trust Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
134	Minutes of Vernon Education Trust Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
135	Minutes of Vernon Education Trust Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours	No.

				maintaining the exemption.	
136	Minutes of Vernon Education Trust.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
137	Minutes of Vernon Education Trust.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
138	Minutes of Vernon Education Trust.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
139	Minutes of PMET Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
140	Minutes of PMET Ltd.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
141	Minutes of PMET Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.

142	Minutes of PMET Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
143	Minutes of PMET Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
144	Minutes of PMET Ltd (Council).		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
145	Minutes of PMET Ltd meeting (AGM).		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
146	Minutes of PMET Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
147	Minutes of PMET Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
148	Minutes of PMET Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public	No.

				interest favours maintaining the exemption.	
149	Minutes of PMET Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
150	Minutes of PMET Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
151	Minutes of PMET Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.
152	Minutes of PMET Ltd meeting.		S31 and s41	Section 31(1)(g) engaged and public interest favours maintaining the exemption.	No.

Legal Annex

Freedom of Information Act 2000

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

Section 31(2) provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and

- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”