

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 29 June 2011

**Public Authority:** Electoral Commission  
**Address:** 3 Bunhill Row  
London  
EC1Y 8YZ

### Summary

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The complainant requested information relating to an investigation carried out by the Electoral Commission into a large donation made to the Liberal Democrats in 2005. The Electoral Commission refused the request and cited the exemption provided by section 30(1)(a)(i) (information relating to investigations) as well as other exemptions, namely those under sections 31(1)(g) and (2) (law enforcement), 41(1) (information provided in confidence) and 42(1) (legal professional privilege). The Commissioner concludes that the section 30(1)(a)(i) exemption was applied correctly in relation to the entirety of the withheld information and therefore did not consider the Electoral Commission's application of the other exemptions. The Electoral Commission is not required to take any steps. However, the Commissioner also finds it failed to comply with the procedural requirements of section 10(1) in its handling of the request.

### The Commissioner's Role

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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.

### Background

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2. Between 10 February and 3 March 2005, a donation of £2.4 million was made to the Liberal Democrats, the largest donation ever received by that party. The donation was made in the name of a company, 5<sup>th</sup> Avenue Partners Limited, of which Mr Michael Brown was the sole

director. Mr Brown was not domiciled in the United Kingdom and was therefore not eligible to make a donation in his own name.

3. Following allegations that 5<sup>th</sup> Avenue Partners Limited was not a permissible donor, the Electoral Commission began an investigation in May 2005. However this was suspended between March 2007 and November 2008, due to criminal proceedings against Mr Brown, the culmination of which were that he was convicted of theft, furnishing false information and perverting the course of justice.
4. In 2009 the Electoral Commission concluded that 5<sup>th</sup> Avenue Partners Limited met the permissibility requirements under the Political Parties, Elections and Referendums Act 2000 ("PPERA") and was therefore a permissible donor.

## The Request

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5. On 12 December 2009 the complainant submitted the following request to the Electoral Commission:

*"Please could I make a request for information regarding the donations to the Lib Dems from 5<sup>th</sup> Avenue Partners?"*

*I would like:*

*-dates of advice sought by the Liberal Democrats regarding donations from 5<sup>th</sup> Avenue Partners and/or Michael Brown.*

*- dates on which advice was given by the Commission to the Liberal Democrats regarding donations from 5<sup>th</sup> Avenue Partners and/or Michael Brown.*

*- copies of all correspondence between the Commission and Liberal Democrat party officers and representatives regarding donations from 5<sup>th</sup> Avenue Partners and/or Michael Brown to the Liberal Democrats including by letter, email and records of phone conversations*

*- copies of minutes, briefings and supporting documents relating to the investigation by the Commission into the 5<sup>th</sup> Avenue Partners donation and the decision on the permissibility of the donations*

*I look forward to hearing from you."*

6. On 18 January 2010 the Electoral Commission issued a refusal notice to the complainant, citing the exemptions under sections 30(1)(a)(i),

31(1)(g) and 41(1) of the Act as a basis for non-disclosure of some of the requested information. That notice stated that the Electoral Commission held some information relevant to the complainant's request, however it did not specify exactly what part of the requested information it did hold, nor did it specify which information it was withholding under the exemptions as mentioned above.

7. On 27 January 2010 the complainant requested an internal review of the Electoral Commission's decision not to disclose the withheld information. The result of that internal review was communicated to the complainant on 17 April 2010. That internal review upheld the original decision not to disclose the withheld information and added a further exemption, namely that provided by section 42 of the Act, as a further reason not to disclose certain parts of the withheld information. The review went into more detail than the original refusal notice and clarified that the Electoral Commission did not hold information in relation to parts 1 and 2 of the complainant's request and was refusing to disclose the information in parts 3 and 4 of the request ("the withheld information") under the exemptions specified above and the newly applied section 42 exemption.

## The Investigation

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### Scope of the case

8. On 4 July 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - The Electoral Commission's application of the exemptions under sections 30(1)(a)(i), 31(1)(g), 41(1) and 42 of the Act.
  - The way in which the Electoral Commission carried out the public interest test as set out in section 2(2) of the Act.

### Chronology

9. On 13 July 2010 the Commissioner wrote to the Electoral Commission to inform it of the complaint and to request a copy of the withheld information.
10. On 12 January 2011, when the case had been allocated to a member of the Commissioner's staff, the Commissioner again wrote to the Electoral Commission requesting a copy of the withheld information

and detailed submissions regarding its application of the exemptions specified above.

11. On 4 March 2011, having requested further time to fully consider the withheld information in the context of the Commissioner's queries, the Electoral Commission responded to the Commissioner with a copy of the withheld information and its detailed submissions as requested. It stated that it now wished to also rely on the exemption set out in sections 40(2) and 40(3) of the Act in relation to some of the withheld information.

## **Findings of fact**

12. The Electoral Commission is the independent elections and political party finance watchdog, deriving its investigatory and regulatory powers from PPERA. One of its powers under that Act is to investigate and ascertain whether a donation received by a party was from a permissible donor. The criteria for being a permissible donor are set out in PPERA; a company must be registered under the Companies Act 1985, incorporated within the UK or another EU member state, and be carrying on business in the UK. The Electoral Commission has concluded that 5th Avenue Partners Limited met these requirements at the time the donations were made, and was therefore a permissible donor.
13. The Electoral Commission also considered whether there was a basis for concluding that either Michael Brown as an individual, or 5th Avenue Partners GmbH (the parent company of 5th Avenue Partners Limited) was in fact the true donor. Neither of them would have qualified as permissible donors under PPERA. The Electoral Commission has concluded that there is no reasonable basis to conclude that the true donor was someone other than 5th Avenue Partners Limited.

## **Analysis**

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### **Exemptions**

#### **The section 30 exemption**

14. In this case the Electoral Commission relied upon section 30(1)(a)(i) as a basis for non-disclosure of the withheld information. Section 30 is a class-based exemption. Therefore in order for it to be engaged there is no need for a public authority to demonstrate that any level of prejudice would occur should the withheld information be disclosed.

The information only needs to be held for the purposes specified in the relevant part of the exemption.

15. Section 30 (1)(a)(i) states that:

*'Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-*

*(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained -*

*(i) whether a person should be charged with an offence'*

16. This exemption can only be cited by public authorities with the powers to conduct investigations of the kind specified in this subsection. The exemption can only apply to information which is held for a specific or particular investigation, not for investigations in general. The phrase 'at any time' means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose.

17. In this case the Commissioner is satisfied that the investigation in question was an investigation into an allegation that a large donation to a political party had not been made by a permissible donor. As outlined in paragraphs 12 and 13 above, the Commissioner is satisfied that the Electoral Commission has powers under PPERA to conduct investigations of this kind.

18. On the basis of the wording of sections 54(7), 65(3), 65(4) and 145 of PPERA (see Legal Annex), the Commissioner accepts that the investigation carried out by the Electoral Commission and referred to in the request was of the type described in section 30(1)(a)(i). Turning to whether it is accurate to characterise the information in question as having been held for the purposes of those investigations, the Commissioner has considered the content of this information when reaching a conclusion on this point.

19. The information falling within the scope of the request and which is held by the Electoral Commission consists of correspondence between officials within the Electoral Commission and between the Electoral Commission and third parties, and copies of minutes, briefings and supporting documents relation to the investigation. On the basis of the content of this information, the Commissioner considers it clear that it was held by the Electoral Commission for the purpose of its investigations into whether 5<sup>th</sup> Avenue Partners Limited was a permissible donor.

20. The Commissioner has concluded that the investigation carried out by the Electoral Commission is within the class specified in section 30(1)(a)(i). The Commissioner believes that all of the withheld information can be accurately characterised as having been held for the purposes of the investigation.
21. However, section 30(1) is a qualified exemption. Therefore, the Commissioner must consider the public interest test set out at section 2(2)(b) of the Act and 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 arguments in favour of disclosing the requested information**

22. The Commissioner believes that there is a public interest in the Electoral Commission carrying out investigations in an open and transparent manner. The restrictions on donations to registered political parties imposed by PPERA are important and it is in the public interest that they should be properly enforced and seen to be properly enforced. The Electoral Commission recognises the importance of this, especially in this case, as it relates to a very large donation to a major political party.
23. However, the Commissioner notes that the Electoral Commission issued a press release and full summary of the case on 20 November 2009, setting out its detailed conclusions in the matter and how these were reached. The Electoral Commission argues that this would be sufficient to satisfy the public interest in disclosure and very little would be added by disclosure of the withheld information.

### **Public interest arguments in favour of maintaining the exemption**

24. The Electoral Commission has stated to the Commissioner that disclosure of the withheld information may discourage individuals and organisations from co-operating with it, thereby preventing it from carrying out investigations in an effective and efficient manner. It is the Commissioner's view that, whilst section 30(1)(a)(i) is a class-based exemption and so prejudice is not relevant when considering whether it is engaged, consideration should be given to protecting the ability of public authorities to carry out investigations of the kind specified in this exemption. To this end the Commissioner has taken into account the following factors when considering whether the investigatory process may be harmed through disclosure,
  - the stage of the investigation at the time of the request;

- whether and to what extent the information has already been released into the public domain;
  - the significance of the information to the investigation; and
  - the age of the information.
25. On the issue of whether and to what extent the information in question is in the public domain, the Electoral Commission has argued that the public interest has been satisfied through its press release and case summary of 20 November 2009. The complainant, however, argues that significant details of the case are absent from the case summary and press release.
26. The complainant has argued that the event happened over five years ago and that therefore any harm resulting from disclosure of the withheld information would be greatly reduced. However, when considering the age of the withheld information, the relevant date in a case like this is that on which the request was made and its proximity to the conclusion of the investigation. In this case the request was made only 10 days after the investigation was concluded. The information in question had, therefore, been recorded only shortly before the date of the request. The Commissioner does not therefore believe that any harm to the investigatory process that could be said to be likely to result through disclosure of the information in question, would be reduced to any significant extent through the passage of time between the recording of this information and the making of the request.
27. In relation to the significance of the information to the investigation, if it were the case that the withheld information, whilst related to the investigation was of no particular significance to it, this would reduce the likelihood of harm occurring to the investigatory process through the disclosure of the information. The Commissioner has perused the withheld information and considers that it is all of significance to the investigation. He also considers that the likelihood of harm through disclosure of information of significance to the investigation is a public interest argument of substantial weight in relation to the withheld information.
28. Having regard to other factors that suggest that harm relevant to the process described in section 30(1)(a)(i) may result through disclosure, the Electoral Commission can only compel information and cooperation in relation to its investigations from certain organisations and only in certain circumstances. Due to the restrictions on the powers granted to it by PPERA to oblige the subjects of investigations to cooperate with



investigations and to provide information, its ability to carry out its investigative functions therefore relies, at least in part, on being able to secure the cooperation of organisations within the scope of its investigations. The Electoral Commission has argued that disclosure of the information in this case would lead to a concern on the part of those who are within the scope of future investigations by the Electoral Commission that their information will be made available to the public at large. This will make it more difficult for the Electoral Commission to secure cooperation with its investigations which will in turn prejudice the ability of the Electoral Commission to carry out its investigative functions.

29. The complainant has argued that it is very unlikely that a major political party would not cooperate with the Electoral Commission and that therefore this particular public interest argument does not carry any real weight. However, the Electoral Commission has informed the Commissioner that it received information pertinent to the investigation from a number of other third parties and from staff in the Commission who provided information for internal use. That information was as significant to the investigation as that received from the Liberal Democrats itself and the Commissioner accepts that it is a real and significant concern that disclosure of that information to the public may make those parties and individuals reluctant to cooperate in future investigations, thereby impeding the Electoral Commission's ability to effectively carry out its investigative functions.

### **Balance of the public interest arguments**

30. In reaching a conclusion on the balance of the public interest in this case the Commissioner has taken into account the content of the information in question and the arguments advanced by both the complainant and the Electoral Commission, as well as the general public interest in favour of disclosure on the basis of improving the transparency and openness of the Electoral Commission by demonstrating the quality and effectiveness of its investigations.
31. The conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. Whilst the Commissioner recognises significant arguments in favour of disclosure on the basis that the content of the information would add to public knowledge and understanding about this investigation, particularly given that the complainant feels there is a lack of detail provided by the Electoral Commission in explanation for the conclusions to its investigations, the Commissioner considers that these are outweighed by the public interest in protecting the process described in the exemption. It is in the public interest to enable the



Electoral Commission to carry out its functions effectively and the Commissioner is persuaded, particularly by the fact that the powers of the Electoral Commission to compel production of information and cooperation from those it investigates are limited, that disclosure could prejudice the ability of the Electoral Commission to do this.

### **The section 31, 40, 41 and 42 exemptions**

32. Since the Commissioner accepts that the exemption under section 30(1)(a)(i) is engaged in relation to the entirety of the withheld information, and that the public interest in maintaining that exemption outweighs that in disclosure of the withheld information, he has not gone on to consider the Electoral Commission's application of the above exemptions.

### **Procedural Requirements**

#### **Section 10**

33. The Electoral Commission did not comply with the requirements of section 10(1) in failing to confirm within 20 working days of receipt of the request what information it held which was relevant to the request.

### **The Decision**

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34. The Commissioner's decision is that the Electoral Commission dealt with the requests for information in accordance with the Act in that the exemption provided by section 30(1)(a)(i) was applied correctly. However, the Commissioner also finds that the Electoral Commission failed to comply with the requirements of sections 10(1) in its handling of the request.

### **Steps Required**

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35. The Commissioner requires no steps to be taken.

## Right of Appeal

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36. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

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

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 29<sup>th</sup> day of June 2011**

**Signed .....**

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

## Legal Annex

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### General Right of Access

#### **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 2(3) provides that –**

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44"

## **Section 10**

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 30**

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

- (i) whether a person should be charged with an offence, or
- (ii) whether a person charged with an offence is guilty of it”

## Political Parties Elections and Referendums Act 2000

### Section 54

#### Permissible donors

(1) A donation received by a registered party must not be accepted by the party if—

(a) the person by whom the donation would be made is not, at the time of its receipt by the party, a permissible donor; or

(b) the party is (whether because the donation is given anonymously or by reason of any deception or concealment or otherwise) unable to ascertain the identity of that person.

(2) For the purposes of this Part the following are permissible donors—

(a) an individual registered in an electoral register;

(b) a company—

(i) registered under the [1985 c. 6.] Companies Act 1985 or the [S.I. 1986/1032 (N.I. 6).] Companies (Northern Ireland) Order 1986, and

(ii) incorporated within the United Kingdom or another member State, which carries on business in the United Kingdom;

(c) a registered party;

(d) a trade union entered in the list kept under the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992 or the [S.I. 1992/807 (N.I.5).] Industrial Relations (Northern Ireland) Order 1992;

(e) a building society (within the meaning of the [1986 c. 53.] Building Societies Act 1986);

(f) a limited liability partnership registered under the [2000 c. 12.] Limited Liability Partnerships Act 2000, or any corresponding

enactment in force in Northern Ireland, which carries on business in the United Kingdom;

- (g) a friendly society registered under the [1974 c. 46.] Friendly Societies Act 1974 or a society registered (or deemed to be registered) under the [1965 c. 12.] Industrial and Provident Societies Act 1965 or the [1969 c. 24.] Industrial and Provident Societies Act (Northern Ireland) 1969; and
  - (h) any unincorporated association of two or more persons which does not fall within any of the preceding paragraphs but which carries on business or other activities wholly or mainly in the United Kingdom and whose main office is there.
- (3) In relation to a donation in the form of a bequest subsection (2)(a) shall be read as referring to an individual who was, at any time within the period of five years ending with the date of his death, registered in an electoral register.
- (4) Where any person (“the principal donor”) causes an amount (“the principal donation”) to be received by a registered party by way of a donation—
- (a) on behalf of himself and one or more other persons, or
  - (b) on behalf of two or more other persons,
- then for the purposes of this Part each individual contribution by a person falling within paragraph (a) or (b) of more than £200 shall be treated as if it were a separate donation received from that person.
- (5) In relation to each such separate donation, the principal donor must ensure that, at the time when the principal donation is received by the party, the party is given—
- (a) (except in the case of a donation which the principal donor is treated as making) all such details in respect of the person treated as making the donation as are required by virtue of paragraph 2 of Schedule 6 to be given in respect of the donor of a recordable donation; and
  - (b) (in any case) all such details in respect of the donation as are required by virtue of paragraph 4 of Schedule 6 to be given in respect of a recordable donation.
- (6) Where—
- (a) any person (“the agent”) causes an amount to be received by a registered party by way of a donation on behalf of another person (“the donor”), and
  - (b) the amount of that donation is more than £200,

the agent must ensure that, at the time when the donation is received by the party, the party is given all such details in respect of the donor as are required by virtue of paragraph 2 of Schedule 6 to be given in respect of the donor of a recordable donation.

(7) A person commits an offence if, without reasonable excuse, he fails to comply with subsection (5) or (6).

(8) In this section "electoral register" means any of the following—

(a) a register of parliamentary or local government electors maintained under section 9 of the Representation of the [1983 c. 2.] People Act 1983;

(b) a register of relevant citizens of the European Union prepared under Part III of the European Parliamentary Elections (Changes to the [S.I. 1994/342.] Franchise and Qualifications of Representatives) Regulations 1994; or

(c) a register of peers prepared under regulations under section 3 of the Representation of the [1985 c. 50.] People Act 1985."

## **Section 65**

### Submission of donation reports to Commission

(1) A donation report under section 62 shall be delivered to the Commission by the treasurer of the party in question within the period of 30 days beginning with the end of the reporting period to which it relates.

(2) A donation report under section 63 shall be delivered to the Commission by the treasurer of the party in question—

(a) within the period of 7 days beginning with the end of the reporting period to which it relates; or

(b) (if that is not possible in the case of any party to which section 63(1) applies by virtue of section 64(5)) within the period of 7 days beginning with the first day on which the party has a candidate at the election in question.

(3) The treasurer of a registered party commits an offence if he fails to comply with the requirements of subsection (1) or (2) in relation to a donation report.

(4) The treasurer of a registered party also commits an offence if he delivers a donation report to the Commission which does not comply with any requirements of this Part as regards the recording of donations in such a report.



(5) Where a person is charged with an offence under this section, it shall be a defence to prove that he took all reasonable steps, and exercised all due diligence, to ensure that any such requirements were complied with in relation to donations received by the party during the relevant reporting period.

(6) Where the court is satisfied, on an application made by the Commission, that any failure to comply with any such requirements in relation to any donation to a registered party was attributable to an intention on the part of any person to conceal the existence or true amount of the donation, the court may order the forfeiture by the party of an amount equal to the value of the donation.

(7) The following provisions, namely—

(a) subsections (3) to (5) of section 58, and

(b) sections 59 and 60,

shall apply for the purposes, or in connection with the operation, of subsection (6) above as they apply for the purposes, or in connection with the operation, of section 58.

(8) Section 64(9) applies for the purposes of this section.”

## **Section 145**

General function of Commission with respect to monitoring compliance with controls imposed by the Act etc.

(1) The Commission shall have the general function of monitoring compliance with—

(a) the restrictions and other requirements imposed by or by virtue of Parts III to VII; and

(b) the restrictions and other requirements imposed by other enactments in relation to—

(i) election expenses incurred by or on behalf of candidates at elections, or

(ii) donations to such candidates or their election agents.

(2) Subsection (1)(b) does not apply in relation to local government elections in Scotland unless and to the extent that the Scottish Ministers by order so provide.

(3) For the purposes of subsection (2), the reference in subsection (1)(b) to any enactment shall include a reference to any enactment comprised in or in an instrument made under an Act of the Scottish Parliament.

(4) Section 156(5) shall apply to an order made by the Scottish Ministers under subsection (2) as it applies to an order made by the Secretary of State under this Act and the reference in that section to enactments shall include a reference to any enactment comprised in or in an instrument made under an Act of the Scottish Parliament.

(5) The power of the Scottish Ministers to make an order under subsection (2) shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of the Scottish Parliament.

(6) The Scottish Ministers shall reimburse the Commission for any expenditure incurred by them which is attributable to the exercise of any function conferred by virtue of an order made under subsection (2).

(7) In this section and sections 146 and 148—

“election” means a relevant election for the purposes of Part II;

“election agent” includes a sub-agent