

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

The complainant made a freedom of information request to the Electoral Commission for information it held in relation to an investigation it carried out into allegations that Wendy Alexander MSP had received an impermissible donation to her campaign to become the leader of the Labour Party in Scotland in 2007. The Electoral Commission refused the request by relying on the exemptions in section 30(1)(a) (Investigations) and section 40(2) (Personal information). The Commissioner has investigated the complaint and has found that the requested information is exempt under section 40(2). However, the Commissioner also found that in its handling of the request the Electoral Commission breached section 17(1) (Refusal of a request) but requires no steps to be taken.

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. On 30 August 2009 the complainant contacted the public authority to request information in relation to the public authority's investigation into Wendy Alexander MSP regarding the acceptance of an

impermissible donation as part of her campaign to become the leader of the Labour Party in Scotland. The request read as follows:

- i). On receipt by the EC of the explanation provided by the Alexander Team for the misreporting of the illegal donation, did any discussions take place within the EC as to whether the information provided constituted a plausible and innocent explanation for the misreporting?
 - ii). If such discussions took place, were their contents recorded in any way?
 - iii). If their contents were not recorded, why were they not recorded?
 - iv). Has any recorded material, in any form, from the Alexander Investigation been destroyed or in any other way disposed of?
 - v). If any such recorded material has been destroyed or in any other way disposed of, on whose authority was this done?
 - vi). Did any such material contain information pertaining to the question of whether the explanation provided by the Alexander Team for the misreporting of the illegal donation was plausible and innocent?
3. The complainant received no response to his request and so contacted the public authority again and resubmitted his request on 20 November 2009.
 4. The public authority acknowledged receipt of the request on 2 December 2009 when it informed the complainant that it had not received the earlier email of 30 August 2009, although it confirmed that the email address used by the complainant was correct.
 5. The public authority contacted the complainant again on 16 December 2009 to advise that it was currently considering the public interest test in relation to the request and that therefore its response may take longer than 20 working days.
 6. The public authority responded to the request substantively on 26 January 2010 at which point it confirmed that it held some information relevant to questions 1, 2 and 3 of the request. However it said that the Act does not require it to answer questions generally only to disclose information if it is held in recorded form. It then explained that as regards the Wendy Alexander investigation it had considered all information and explanations provided by her team in relation to its

investigation. Its case files contained records of discussions between its staff in relation to relevant facts, evidence and law, it said. It also added that further details about the nature of oral discussions and legal analysis by the public authority and its staff had been recorded as part of its investigation but that these documents were exempt from disclosure under the exemptions in section 30(1)(a) (Investigations and proceedings conducted by public authorities), section 31(1)(g) (Law enforcement), section 41(1) (Information provided in confidence) and section 42 (Legal professional privilege). In the case of the qualified exemptions the public authority concluded that the public interest in maintaining each exemption outweighed the public interest in disclosure.

7. As regards parts 3 to 6 of the request the Commission said that all recorded information relevant to the investigation was placed on the case file and none of the information had been destroyed or otherwise disposed of.
8. On 23 February 2010 the complainant contacted the public authority and confirmed that he wanted to see the recorded information it held and therefore asked it to conduct an internal review of its handling of his request. In doing so the complainant presented a detailed submission on why the public interest favoured releasing the requested information it held in relation to parts 1 – 3 of the request.
9. The public authority presented the findings of its review on 30 April 2010. In explaining how it had interpreted the request it said that it held recorded information relating to discussions about the plausibility for the manner in which the donation was recorded and that it had considered the disclosure of this information under the Act. The public authority said that it had interpreted the questions asked by the complainant as a request for information contained in its records and that in doing so it had taken a wide interpretation of the request in line with its duty to provide advice and assistance under section 16 of the Act.
10. When considering the application of the different exemptions the public authority informed the complainant that it was now only seeking to rely on section 30(1)(a) and section 42. For each exemption it outlined what factors it had taken into account when balancing the public interest and informed the complainant that it was upholding the decision to refuse to disclose the information.

The Investigation

Scope of the case

11. On 5 May 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's decision to refuse to disclose the information it held in respect of the first three parts of the request by relying on the exemptions in section 30(1)(a)(i) and section 42 of the Act.
12. The complainant also asked the Commissioner to consider the delay in the public authority's handling of his request.

Chronology

13. The Commissioner contacted the public authority with details of the complaint on 3 November 2010. The Commissioner now asked to be provided with copies of the withheld information clearly marked to show where any exemptions were being applied. The Commissioner also asked for further details on why the exemptions in section 30(1)(a)(i) and section 42 applied and asked the public authority to elaborate on its reasons for concluding that the public interest in maintaining each exemption outweighed the public interest in disclosure.
14. The public authority responded to the Commissioner on 10 December 2010 and said that it was prepared to release the requested information by way of responding to each of the complainant's original 6 questions with either a 'yes' or 'no' answer.
15. The Commissioner contacted the public authority again on 16 December 2010 to query its response as it appeared to him that it was now interpreting the request in a different way to how it had responded initially. The Commissioner reminded the public authority that it had informed the complainant that it was interpreting his request as a request for the recorded information it held. Given that the complainant had made it clear in his internal review that he wished to see this recorded information the Commissioner said that he thought that its initial approach of taking a broad interpretation of the request was the correct approach in the circumstances. The Commissioner now asked the public authority to provide him with a full response to his letter of 3 November 2010 within the next 10 working days.
16. The public authority responded to the Commissioner on 18 February 2011 and provided copies of the recorded information it held in relation

to the complainant's request. It confirmed that as well as the section 30(1)(a)(i) exemption, the information was also being withheld under section 40(2) which provides for an exemption for personal information. The public authority also confirmed that it was no longer seeking to rely on the section 42 exemption.

Findings of fact

17. On 29 November 2007 Charlie Gordon MSP, a member of Wendy Alexander's Campaign team, announced that he was resigning as the Labour Party's Transport spokesman in the Scottish Parliament in the wake of allegations that the campaign had received an impermissible donation from Mr Paul Green, an individual not registered to vote in the UK. In announcing his decision to resign he explained that he was responsible for procuring the impermissible donation. At the same time Wendy Alexander's campaign manager Tom McCabe MSP acknowledged that there had been a breach of the law and that the campaign team would be co-operating with the public authority.¹ On 7 December 2007 Mr Gordon issued a statement in which he confirmed that he was 'in dialogue' with the public authority.²
18. On 29 November 2007 Mr Paul Green issued a statement setting out the circumstances in which he made his donation to the Wendy Alexander campaign and the role of Charlie Gordon MSP in securing that donation.³
19. By 5 December 2007 Wendy Alexander's office had confirmed that it was co-operating with the public authority and was quoted as saying that it had supplied a 'huge amount' of documents to help the public authority's inquiry.⁴
20. On 7 February 2008 the public authority issued a press statement regarding its investigation into the allegation that Wendy Alexander MSP's campaign for the leadership of the Scottish Labour Party had accepted an illegal donation. This statement confirmed that the public authority had completed its investigation and that it had established that an impermissible donation had been accepted from Paul Green, an individual not registered to vote in the UK, and the donation had been recorded as having been received from a UK registered company. The public authority explained that it had considered whether criminal

¹ <http://news.bbc.co.uk/1/hi/scotland/7119230.stm>

² <http://www.charlesgordonmsp.com/charlie%20gordon%20statement%207%20dec%202007.html>

³ <http://news.bbc.co.uk/1/hi/scotland/7119698.stm>

⁴ <http://news.bbc.co.uk/1/hi/scotland/7128320.stm>

offences may have been committed under section 56 and 61 of the Political Parties, Elections and Referendums Act 2000. Under section 56 of this Act there is an offence of accepting and retaining a donation from anyone who is not registered on an electoral register in the UK at the time of the donation. It added that it was also relevant to consider whether all reasonable steps were taken to avoid this. Under section 61 of this Act there is an offence of knowingly facilitating, concealing or disguising an impermissible donation and/or knowingly giving false information or withholding information in relation to an impermissible donation.

21. As regards possible section 56 offences, the public authority said that whilst Wendy Alexander did not take all reasonable steps in seeking to comply with the relevant legislation, she did take significant steps. It said that in the circumstances it considered that it was not appropriate nor in the public interest to report the matter to the Procurator Fiscal to pursue a prosecution. As regards possible section 61 offences, it said that there was insufficient evidence to establish if an offence had been committed. A full text of the statement is available on the public authority's website.

<http://www.electoralcommission.org.uk/news-and-media/news-releases/electoral-commission-media-centre/news-releases-donations/statement-by-the-electoral-commission>

22. The Commissioner understands that there has been some criticism of the robustness of the public authority's investigation and the decision not to refer the matter to the Procurator Fiscal. The Scottish First Minister, Alex Salmond, was quoted as saying that the public authority's findings amounted to what was, in effect, a 'not proven' verdict.⁵
23. The Commissioner has previously issued a decision notice in relation to a freedom of information request for copies of witness statements made during the course of the public authority's investigation.⁶ The decision was subsequently appealed to the Information Tribunal which confirmed the Commissioner's decision that the content of the witness statements was exempt under section 40(2) of the Act.⁷

⁵ <http://news.bbc.co.uk/1/hi/scotland/7232516.stm>

⁶ http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS_50205418.ashx

⁷ Ferguson v Information Commissioner and Electoral Commission [EA/2010/0085]

Analysis

24. A full text of the relevant statutory provisions referred to in this section is contained within the legal annex.

Exemptions

Section 40(2) – Personal information

25. Section 40(2) of the Act provides that information is exempt from disclosure if it constitutes the personal data of someone other than the applicant and disclosure would satisfy one of two conditions. In this case the relevant condition is the first condition which is that disclosure would contravene any of the data protection principles. The public authority has argued that disclosure would prejudice the first data protection principle which requires that data be processed fairly and lawfully.

Is the information personal data?

26. In deciding whether the exemption applies it is first necessary to consider whether the withheld information constitutes personal data. Personal data is defined in the Data Protection Act as:

“...data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

27. The public authority has said that the information forms part of an investigation relating to whether Wendy Alexander accepted an impermissible donation from Paul Green during which it interviewed several individuals. The withheld information analyses and comments upon the witness testimony gathered during the investigation and draws conclusions as to whether any of the individuals have committed a criminal offence. These individuals can be identified from the withheld information and the information is personal and of significance to them. Therefore the Commissioner is satisfied that the information is personal data.

The first data protection principle

28. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure would contravene the first data protection principle. The first data protection principle states that:

'1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.'

Fairness

29. In considering the fairness of disclosure the Commissioner has taken into account the following factors:

- The expectations of the individuals
- The possible consequences of disclosure
- Nature and content of the information

30. In this case the withheld information constitutes the personal data of Wendy Alexander and other individuals interviewed during the course of its investigation. The information was held as part of the public authority's investigation into potential offences committed under section 56 and 61 of the PPERA and includes an analysis of statements made by the individuals in relation to possible criminal offences. As such the information falls within the definition of sensitive personal data under section 2(g) of the DPA 1998 because it consists of information as to the commission or alleged commission by the data subject of any offence.

31. The Commissioner's approach is that where information constitutes sensitive personal data disclosure of that information will in most circumstances be unfair. By its very nature, sensitive personal data has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner considers that it would be unfair to disclose the requested information.

32. The Commissioner has also taken into account the particular circumstances of this case and in doing so has considered the expectations of the particular individuals concerned and whether any of

the withheld information has been placed in the public domain to the extent that disclosure would no longer be considered unfair.

33. The public authority has explained that the individuals interviewed during the course of its investigation were each cautioned during which it was made clear that they were attending the interview on a voluntary basis but the information could be disclosed to the Procurator Fiscal. The Commissioner's view is that when giving statements under caution although one would recognise that the statement may ultimately enter the public domain by being heard in open court, an individual's reasonable expectation would be that until that eventuality, if it ever arose, the information provided would remain confidential. This is important in order to preserve an individual's ability to provide honest and candid statements to the authorities; otherwise the course of justice could be undermined. Therefore the Commissioner is of the view that the individuals featured in the withheld information would have a reasonable expectation that the information they gave under caution and related information such as the public authority's analysis of their statements would not be disclosed except through court proceedings.
34. The public authority also explained that some of the individuals were informed that although it may be necessary to pass the information to the procurator fiscal, the information would otherwise be treated as confidential. However, the public authority was unable to confirm exactly who was given these assurances and therefore, whilst he considers that this points to the sensitivity of the information and the likely expectations of the individuals, the Commissioner has given this factor only limited weight.
35. The Commissioner is aware that the fact that an impermissible donation had been accepted from Paul Green by the Wendy Alexander team was already public knowledge at the time the individuals were interviewed by the public authority. Furthermore, as noted in paragraphs 17 – 19, both Wendy Alexander and Charlie Gordon had made public statements confirming that they were co-operating with the public authority. Therefore it could be argued that they had in effect revealed that they were being investigated in relation to the possible commission of a criminal offence under section 56 and/or section 61 of the PPERA and so the information was no longer sensitive. However, the information in question is much more detailed than the brief statements in the public domain and includes a thorough analysis of the involvement of various individuals within the Wendy Alexander campaign team with the Paul Green donation. At the time they were interviewed the individuals concerned would still have expected that the information would not be disclosed and in the

Commissioner's view disclosure would still be distressing to those individuals.

36. The public authority has also suggested that disclosure would be unfair to the individuals who were the subject of the investigation as it would lead to speculation about potential criminal actions without the safeguard of a trial in which that evidence would be tested. The individuals would not have the opportunity to defend themselves at a criminal trial which is particularly the case, the public authority suggests, where the information relates to the commission of an offence under section 61 of the PPERA where it reached no definite conclusion. The Commissioner accepts that disclosure would be unfair for these reasons in respect of both section 56 and section 61 offences. In the previous case considered by the Commissioner the Tribunal found that disclosing the information would 'risk placing the data subjects under a cloud of suspicion, in circumstances where there might be no definitive termination of speculation and where, as a result, undue stress would be likely to ensue'.⁸
37. However, the Commissioner's view is that, notwithstanding the data subject's reasonable expectations or any damage or distress caused to him or her by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in releasing the information. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.
38. It is important to note that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the Act. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure; that is to say any public interest in disclosure must outweigh the public interest in protecting the rights and freedoms of the data subject.
39. The Commissioner considers that in this case there is a strong public interest in knowing more about the reasons why the public authority did not pass its investigation to the Procurator Fiscal. As the complainant noted, section 56 is a strict liability offence whereby an offence is committed when an impermissible donation is accepted and not returned within 30 days. The public authority's statement on conclusion of the investigation is somewhat ambiguous because whilst

⁸ Ferguson, para. 77.

it implicitly acknowledges that an offence has taken place it said that it was not appropriate nor in the public interest to refer the matter to the procurator fiscal. It did not explain why it was not appropriate or in the public interest and therefore the Commissioner considers that the public interest would be served by greater transparency with regard to the public authority's investigation.

40. As regards a possible offence under section 61 of the PPERA the public authority's statement said that there was not sufficient evidence to pass the matter to the procurator fiscal. In this instance the public interest would be served by knowing more about the public authority's investigation and why it was not felt appropriate to request further investigation by the police or further consideration by the procurator fiscal service.
41. Whilst the Commissioner recognises that there are compelling arguments in favour of disclosure he is also mindful of his duties under the DPA 1998. As he has already noted, the information is sensitive personal data, information which is the most personal to an individual and which he or she would not normally expect to be disclosed, and which would likely be distressing to the individuals concerned if it was disclosed. Therefore, the Commissioner's view is that there would have to be an overwhelming public interest in favour of disclosure to warrant this level of intrusion into the private lives of the individuals. Whilst the Commissioner accepts that there are compelling public interest arguments in favour of disclosure he is not satisfied that they are sufficiently strong as to weigh the public interest in favour of disclosure in the particular circumstances of this case.

Other exemptions

42. The Commissioner is satisfied that all of the requested information is exempt under section 40(2) and therefore he has not gone on to consider whether the exemption in section 30(1)(a)(i) of the Act would also apply. However, he draws attention to two decisions issued in relation to the same public authority concerning requests for similar information about investigations into donations to political parties (FS50314970 and FS50315507). In both those cases the Commissioner upheld the application of the exemption in section 30(1)(a)(i) to the withheld information and found that the public interest in maintaining the exemption outweighed that in disclosure.

Procedural Requirements

43. The complainant originally submitted his request on 30 August 2009. However he received no response and so submitted his request again

on 20 November 2009. At this point the public authority informed the complainant that it had not received the earlier request but acknowledged that the email had been sent to a correct email address. Where a complainant is able to show that a request was sent to a correct email address at a public authority then the Commissioner would normally accept the request as having been received by the public authority. Therefore in this case the Commissioner must find the public authority in breach of section 17(1) by failing to issue the complainant with a refusal notice within 20 working days of receiving the request. In any event, the issue of whether the request was received on 30 August 2009 or 20 November 2009 is somewhat academic because the public authority also failed to respond to the resubmitted request within 20 working days because it did not issue its substantive response until 26 January 2010. When acknowledging the request the public authority had indicated to the complainant that it needed to extend the deadline for responding to the request in order to consider the public interest test. However, whilst the Act allows a public authority to extend the deadline for responding to a request where a qualified exemption applies, it is still required to issue a refusal notice in accordance with section 17(1) within 20 working days of the request being received.

44. The public authority only introduced its reliance on section 40(2) during the course of the Commissioner's investigation. Therefore the public authority breached section 17(1) of the Act for a second time by failing to inform the complainant within 20 working days of receiving the request that it was applying the section 40(2) exemption.

The Decision

45. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - The public authority dealt with the request in accordance with the Act to the extent that it correctly withheld the requested information under section 40(2) of the Act.
46. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The public authority breached section 17(1) of the Act by failing to respond to the request within 20 working days.

- The public authority breached section 17(1) of the Act by failing to inform the complainant that it was relying on the section 40(2) exemption within 20 working days of receiving the request.

Steps Required

47. The Commissioner requires no steps to be taken.

Other matters

48. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the complainant asked the public authority to carry out an internal review of his request on 23 February 2010. The Public authority did not respond to the request until 30 April 2010. The Commissioner considers this a significant failure to conform to the Code of Practice.

Right of Appeal

49. 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.

Website: www.informationtribunal.gov.uk

50. 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.
51. 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 29th day of June 2011

Signed

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

Legal annex

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 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-
 - 1. whether a person should be charged with an offence, or
 - 2. whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct."

Section 40(2) provides that –

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

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

Section 40(3) provides that –

“The first condition is-

(f) 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-

1. any of the data protection principles, or
2. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(g) 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.”