

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 2017

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

Decision (including any steps ordered)

1. The complainant has requested information relating to a donation to the Democratic Unionist Party (DUP) from the Constitutional Research Council (CRC).
2. The Electoral Commission (EC) stated that the information, if held, would be exempt under section 44(1)(a) of the FOIA and that the duty to confirm or deny whether the information is held does not arise under section 44(2) of the FOIA.
3. The Commissioner's decision is that the EC was correct to refuse to confirm or deny if it held the requested information under section 44(2).
4. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

5. On 11 July 2017, the complainant wrote to the EC and requested information in the following terms:

"In an interview with Channel 4 news it would appear that the Constitutional Research Council informed the Electoral Commission of who donated £425,000 to Constitutional Research Council which was then donated to the Democratic Unionist Party.

Can you confirm or deny if the Electoral Commission holds details regarding the source of the donation to CRC which was then passed to the DUP.

As this entity did not donate directly to a NI political party can you confirm the source of the donation the CRC."

6. The EC responded on 31 July 2017 and refused to confirm or deny if it held the requested information citing section 44(1)(a) of the FOIA as its basis for doing so.
7. Following an internal review the EC wrote to the complainant on 15 August 2017 and maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 27 September 2017 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to determine if the EC has correctly dealt with the request in accordance with section 44 of the FOIA.

Reasons for decision

Section 44 – Prohibitions on disclosure

10. Any disclosure under the FOIA is to the world at large and not restricted to the requester.
11. Section 44(1)(a) of the FOIA provides that information is exempt information if its disclosure is prohibited by or under any enactment. This is commonly known as a statutory bar to disclosure. Section 44(2) of the FOIA states that the duty to confirm or deny does not arise if the confirmation or denial is likewise prohibited by any enactment.
12. In this case, EC argues that section 71E of the Political Parties, Elections and Referendums Act 2000 (PPERA) prohibits confirming or denying if the information is held.
13. It is an absolute exemption, which means that if information is covered by any of the subsections in section 44 it is exempt from disclosure. It is not subject to a public interest test.
14. The EC explained that since 2001, PPERA has required political parties in Great Britain to report certain political donations to the EC; the EC then publishes information about the sources and values of those donations.

15. The Northern Ireland (Miscellaneous Provisions) Act 2006 (NIMPA 2006) applied similar donation reporting requirements to Northern Ireland recipients.
16. Due to the security situation in Northern Ireland, NIMPA 2006 inserted section 71E into PPERA. The Commissioner accepts the EC's view that the enactment that applies in this case is PPERA. Section 71E of PPERA places EC employees under a duty not to disclose the contents of Northern Ireland donation reports.
17. The Explanatory Notes to NIMPA 2006 explain that the intention of this provision is '*to guard against intimidation of legitimate donors*' to Northern Ireland recipients. An EC employee who discloses any information to which section 71E applies commits a criminal offence
18. The EC has applied its approach to the section 71E confidentiality provisions to the Northern Ireland donations register and related casework since the provisions came into force in 2007 without contradiction or challenge from Parliament, Government, political parties or others. The EC's approach to the confidentiality of donations to Northern Ireland recipients is not specific to the information requested by the complainant.
19. Section 71E PPERA provides:
 - (1) *A person who is or has been a member or employee of the Commission must not disclose any information which—*
 - (a) *relates to a donation received by a Northern Ireland recipient, and*
 - (b) *has been obtained by the Commission in the exercise of their functions under this Part [Part 4 PPERA], except in the following cases.*
 - (2) *Such information may be disclosed, for the purpose of verifying information given in a Northern Ireland report,—*
 - (a) *to a member or employee of the Commission, or*
 - (b) *to such bodies as may be prescribed.*
 - (3) *Such information may be disclosed for the purposes of any criminal or civil proceedings.*
 - (4) *Such information may be disclosed in accordance with any prescribed requirements if it relates to a donation which the Commission believe, on reasonable grounds, was a donation required to be dealt with in accordance with section 56(2) (donations from impermissible and unidentifiable donors).*
 - (4A) *Such information may be disclosed if the Commission believe, on reasonable grounds, that—*
 - (a) *the relevant person has consented to the disclosure, and*

(b) the consent was given in accordance with any prescribed requirements.

(4B) "The relevant person" means the person who made the donation to which the information relates.

(5) A person who contravenes subsection (1) is guilty of an offence.

20. The complainant requests that the EC:

- (i) confirm or deny if it holds details regarding the source of a donation to the CRC which was then allegedly passed to the DUP, and
- (ii) confirm the source of the donation to the CRC.

Section 44(2)

21. The Commissioner asked the EC to explain how it considers that to confirm or deny that it holds the information (as per part 1 of the request) would be prohibited under section 71E.

22. Section 44(2) provides:

The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

23. In the EC's view, to confirm or deny whether it holds the information requested would itself likely breach section 71E. Taking into account the scope of section 71E to prohibit the disclosure of 'any information', confirming or denying whether the EC holds such information about an alleged donation to a Northern Ireland recipient, would, in its view, be disclosing 'information' and therefore breach the section 71E prohibition.

24. Further, as a general example, were the EC to be required to confirm that it holds information that an individual or body has submitted information in accordance with statutory reporting requirements contained in Part 4 PPERA, but that corresponding information had not been published by the EC as being connected to a Great Britain party, it could be inferred that the absence of publication means that the donor is likely to be a donor to a Northern Ireland recipient; thus potentially disclosing information protected by section 71E.

25. In the EC's view, therefore, in line with section 44(2), the duty to confirm or deny whether it holds the information does not arise in respect of information to which section 71E applies as, to do so, would be '*prohibited by or under any enactment*' – i.e. section 71E PPERA.

26. The EC explained that section 71E is a wide prohibition which places EC employees under a duty not to disclose '**any information**' which

'relates to' a donation received by a Northern Ireland recipient which the EC obtained in the exercise of its functions under Part 4 PPERA.

27. The information requested in both parts of the request would require the EC to disclose information, should it hold it, which forms part of an alleged chain of events which 'relate to' a donation which may have been made to the DUP - a Northern Ireland recipient. Taking into account the wide scope of the section 71E prohibition, it is the EC's view that, because the information ultimately 'relates to' a donation that may have been made to a Northern Ireland recipient, it is subject to the section 71E statutory duty not to disclose 'any information'.
28. The potential seriousness of the consequences of breaches of section 71E are reflected in the fact that Parliament attached personal criminal sanctions to EC employees who disclose information to which section 71E applies.
29. It is the EC's view, therefore, that the information requested, if held, would be '*exempt information*' by virtue of section 44(1)(a).
30. The Commissioner sought clarification about the relationship between the CRC and the DUP if held. The EC explained that as a general point the section 71E duty of non-disclosure applies irrespective of the relationship between donors and recipients, as long as the statutory test that the information 'relates to' a donation made to a Northern Ireland recipient is met.
31. The Commissioner further asked the Commission how it considers that details of a donation to a non-Northern Ireland recipient are covered by section 71E. It explained that as discussed above, section 71E is a wide prohibition which places Commission employees under a duty not to disclose '**any information**' which '**relates to**' a donation received by a Northern Ireland recipient. It is the EC's view, that, depending on the circumstances, the scope of the section 71E prohibition necessarily extends to information about a chain of events, including, where appropriate, information relating to non-Northern Ireland recipients, to the extent that the information ultimately 'relates to' a donation received by a Northern Ireland recipient. This ensures that the intended statutory protection afforded to donors to Northern Ireland recipients is not easily circumvented.
32. The complainant has argued that the CRC has publicly admitted donating to the DUP for the Brexit campaign via a media interview with Channel 4. He therefore maintains that there is no issue with regard to the identity of the donation to the DUP - which would be a 'Northern Ireland Recipient' and covered under 71E of PPERA.

33. The Political Parties Elections and Referendum Act, also states in 71E (4A);

Such information may be disclosed if the Commission believes, on reasonable grounds, that (a) the relevant person has consented to the disclosure, and (b) the consent was given in accordance with any prescribed requirements.

34. The complainant considered that the purpose of the exemption on the publication of the list of donors to Northern Ireland political parties was for security reasons. As the identity of the donor - namely the CRC (which is not a Northern Ireland Recipient) has been publicly given in the media and confirmed by the director of that organisation - these security concerns are not of concern.
35. It was the complainant's view that despite being fully aware of the identity of the donor to the DUP - the legislation is being used to prevent the disclosure of other information which the Electoral Commission hold. In the interview with Channel 4 the director of the CRC stated that the Electoral Commission held the name of the donor to the CRC.
36. The complainant therefore believes that the EC should have reasonable grounds to conclude consent as they have disclosed their details to the media as the organisation responsible for the donation.
37. Furthermore, the complainant stated he believes there are further issues with this as if the EC are happy to accept donations via third-party intermediaries this opens up questions to whether the information published in donation reports is even accurate as donors to any political party across the UK may circumvent publication of their name by setting up unincorporated organisation with a "business" function to funnel funds to political parties."
38. The EC argued that the only permitted disclosure is in connection with verifying information given in a Northern Ireland report (section 71E(2)), criminal or civil proceedings (section 71E(3)) or in prescribed circumstances in relation to donations from impermissible and unidentifiable donors (section 71E(4)). In the EC's view, were it to hold the information requested, none of the statutory gateways to disclosure or exceptions to the prohibition contained within PPERA would be engaged in respect of the request.
39. It further explained that although the complainant submits that by publicly admitting to donating to the DUP, CRC has waived its protection under section 71E by effectively consenting to disclosure, there is no statutory provision which dis-applies the section 71E prohibition on EC employees disclosing information in circumstances where information

about a donor to a Northern Ireland recipient may already be in the public domain.

40. In respect of the complainant's submission that section 71E(4A) applies in this case, section 71E(4A) was inserted into PPERA by the Northern Ireland (Miscellaneous Provisions) Act 2014. This section came into force on 13 March 2014, but only for the purpose of prescribing requirements; otherwise this section is not yet in force.

The Commissioner's decision

41. The key phrase here is '**any information**' which '**relates to**'. If the EC held the information requested it would be information relating to a donation to a Northern Ireland recipient. Regardless of the fact that the request is for the donor to the CRC it is clear that, if held, this would be part of a chain of a donation to a Northern Ireland recipient
42. Therefore the Commissioner finds that, for the EC to confirm or deny whether it holds the requested information would itself reveal information, if it existed, that would be considered exempt from disclosure on the basis of section 44(1)(a).
43. Accordingly, the EC was entitled in the circumstances of this case to rely on the exemption under section 44(2) of the FOIA - by virtue of section 71E of PPERA - to refuse to confirm or deny whether the requested information is held.

Right of appeal

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

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

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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