

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 January 2013

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

#### **Decision (including any steps ordered)**

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1. The complainant submitted a number of requests to the Electoral Commission about its guidance on the use of commonly used names on election nomination papers. The Electoral Commission provided some information but also withheld further information on the basis of section 42 of the FOIA, the legal professional privilege exemption. The Commissioner has concluded that the Electoral Commission was entitled to rely on this exemption and furthermore that it does not hold any further information detailing internal discussions about this guidance other than that already located. However, the Commissioner has concluded that the Electoral Commission breached sections 10(1) and 17(1) of FOIA by failing to respond to the complainant's requests within 20 working days.

#### **Request and response**

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2. On 8 March 2012 the complainant wrote to the Electoral Commission and requested information concerning the use of commonly used names on election papers in the following terms (the Commissioner has numbered these requests for ease of reference):
  1. *Can you tell me please, did you reply to Clackmannanshire Council in respect of communications last September, and if you did, can I please have a copy of your response?*
  2. *You confirmed that counsel's opinion was to be sought in an effort to provide some sound background to a rational view on the matter. Could I please have a copy of the memorandum statement of request*

*to counsel? And can you tell me please, what was the outcome of the Commission's deliberations over the response, and may I have a copy of both the opinion and the Commission's comments, discussion documents, or related guidance issued to staff as a consequence?*

- 3. The published 2012 election guidance for candidates (and for practitioners) relating to nomination procedures and the use of a prefix is certainly a little more open than was the case in 2011. Given the change, could you please let me have a copy of all information that in any way relates to internal discussions, opinions, directions, or guidance that will help me understand how the Commission arrived at the wording of the 2012 election guidance as published?*

*From copies of Commission correspondence I have from last year it would seem that some points raised were not responded to at the time so I thought that it may assist if I present these afresh:*

- 4. There are some fairly standard steps that are usually taken when assessing the meaning of terms used in the context of legislation. The Commission had been asked for details of its interpretation (prior to the 2011 elections) of the terms 'name' and 'forename' and how that definition was arrived at.*
- 5. You were also asked if you could confirm whether or not legal advice was taken at the time the Commission adopted its position on the acceptance of a prefix as part of a name prior to the 2011 elections. If advice was requested, I would ask for a copy of that as it might aid understanding of the Commission's adopted position.*
- 6. Within past correspondence I have noted that in supporting the Commission's position you initially placed an emphasis on points raised by R v An Election Court, Ex parte Sheppard [1975]. It was suggested that as this case predates the existence of the Commission, it predates any of the guidance issued for any election: "The direct relevance of the case specifically to an EC decision to completely reverse their guidance around 2009 is not, therefore, at all clear. It would have been reasonable, for example, to expect Returning Officers to have regard to this case in 2007, and no less reasonable to expect they would do likewise, in consistent manner, in 2010. It does, however, appear unreasonable to expect different conclusions to be drawn where there has been no material change in fact or circumstance. Perhaps you could comment on the related inferences, including the desire for consistency of approach. I am not aware of any response to that, and hence present the request afresh for your attention.*
- 3. In the period that followed the Commissioner understands that there was a failure on the part of the Electoral Commission to recognise the*

complainant's email of 8 March 2012 as a communication that contained a number of valid FOI requests. This was despite the attempts of the complainant to draw the Electoral Commission's attention to this in subsequent correspondence.

4. Therefore it was not until 18 May 2012 that the Electoral Commission provided the complainant with a response to these requests. In relation to request 1 the Electoral Commission provided him with a copy of its response to Clackmannanshire Council. In relation to request 2 it explained that it was withholding the information falling within the scope of this request on the basis of section 42(1) of FOIA. It described the information as consisting of legal advice received from counsel, communications between counsel and a lawyer in the Commission and communications between Electoral Commission lawyers and other members of Electoral Commission staff. However, the Electoral Commission did provide an extract from counsel's advice which it believed summarised the remainder of the opinion. In relation to request 3 the Electoral Commission provided the complainant with the relevant sections from various drafts of its guidance. These drafts included tracked changes to the text of the guidance and also two tracked comments made to the guidance, one of which was redacted. In relation to the remaining requests the Electoral Commission explained that it did not hold any further written legal advice, albeit that it did comment on some of the points the complainant had made in these later requests.
5. The complainant contacted the Electoral Commission on 7 June 2012 and asked it to conduct an internal review of its decision to withhold the information falling within the scope of request 2 on the basis of section 42(1) of FOIA and the decision to redact a tracked comment from one of the draft guidance documents provided to him in response to request 3. He also asked the Electoral Commission to clarify the basis upon which the tracked comment had been redacted and to ensure that the name of the individual who had made the comment was disclosed.
6. The Electoral Commission informed the complainant of the outcome of the internal review on 5 July 2012. The Electoral Commission explained that it remained of the view that the information falling within the scope of request 2 was exempt from disclosure on the basis of section 42(1). It also explained that the content of the redacted tracked comment was exempt from disclosure on the basis of section 42(1) and that the name of the lawyer who had made the comment was exempt from disclosure on the basis of section 40(2).

## Scope of the case

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7. The complainant contacted the Commissioner on 25 July 2012 to complain about the way his requests for information had been handled. The complainant asked the Commissioner to consider the following issues:
  1. In relation to request 2 the complainant disagreed with the Electoral Commission's decision to withhold its correspondence with counsel - both the request for advice and the advice itself - and the internal discussions involving Electoral Commission lawyers, on the basis of section 42(1) of FOIA. He argued that section 42(1) did not provide a basis to withhold such information and even if it did then the public interest favoured disclosing the information.
  2. For similar reasons the complainant also disputed the Electoral Commission's decision to redact the content of the tracked comment on the draft guidance on the basis of section 42(1).
  3. In relation to request 3 the complainant disputed the decision to redact the name of the lawyer who made the tracked comment on the basis of section 40(2).
  4. Furthermore, in relation to request 3 the complainant noted that the only information regarding internal discussions about the 2012 election guidance that had been identified by the Electoral Commission involved legal staff (and thus had been withheld on the basis of section 42(1)). He argued that it is hard to accept that the only discussions that took place were with legal staff and he therefore queried whether the Electoral Commission may hold further information regarding these internal discussions.
  5. The Electoral Commission's general mishandling of these requests, i.e. its apparent failure to recognise the requests of 8 March 2012 as valid FOI requests and its failure to rectify this error despite the complainant's subsequent attempts to ask it to properly respond to the requests. The complainant argued that both failings had clearly resulted in the response to his requests of 8 March 2012 being issued outside the 20 working day limit required by FOIA.
  6. The complainant also argued that the Electoral Commission breached the procedural requirements of FOIA by failing to explain on what basis it had redacted the tracked comment in question in its refusal notice of 18 May 2012.

8. The scope of the Commissioner's investigation has therefore focused on these six separate points of complaint, albeit with the following qualifications.
9. With regard to the first point of complaint, during the course of his investigation the Commissioner established that the Electoral Commission's request for advice to counsel included a number of attachments. The Electoral Commission has now provided these attachments to the complainant albeit that it maintained its position that the actual request for advice, and the advice itself (with the exemption of the extract it disclosed), remained exempt from disclosure on the basis of section 42(1) of FOIA. The Commissioner has not therefore considered the Electoral Commission's decision to withhold the attachments to the advice on the basis of section 42(1).
10. With regard to the second point of complaint, the Commissioner has established that the information falling within the scope request 2 which the Electoral Commission described as the internal discussions involving Electoral Commission lawyers and other members of Commission staff actually only comprises the tracked comment that was redacted from the guidance on the basis of section 42(1).
11. With regard to the third point of complaint, during the course of the Commissioner's investigation the Electoral Commission provided the complainant with the name of the lawyer who had made the tracked comment. Therefore the Commissioner has not considered the Electoral Commission's original decision to withhold the name of this individual on the basis of section 40(2).

## **Reasons for decision**

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### **Complaints 1 and 2**

#### Section 42 – legal professional privilege

12. Section 42(1) of FOIA 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.
13. There are two categories of legal professional privilege: advice privilege and litigation privilege.
14. In this case the category of privilege the Electoral Commission is relying on is advice privilege. This privilege is attached to confidential 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. 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 and the answer can usually be found by inspecting the documents themselves.

15. The information which the Electoral Commission continues to withhold on the basis of section 42(1) consists of the request for counsel's advice; counsel's advice and a redacted comment made by an in-house Electoral Commission lawyer on the draft guidance document that has been disclosed. The Electoral Commission argued that this information was clearly exempt by virtue of section 42(1) because they constituted legal advice and communications between lawyers and clients and the dominant purpose of all the communications was the request for, or provision of, legal advice.
16. The complainant queried whether the Electoral Commission was in fact correct to argue that the withheld information attracted legal professional privilege. The complainant argued that the advice centred on the interpretation of the meaning of terms used in particular legislation with the Electoral Commission's purpose thereafter being that of providing accurate guidance to the electoral community. In the complainant's view the withheld information was therefore strategic or operational in nature. The complainant also argued that the Electoral Commission had failed to demonstrate that all of the advice received had been provided in circumstances that actually imposed an obligation of confidence and thus queried whether the claim to legal professional privilege could actually be maintained in legal proceedings. Moreover the complainant suggested that given the purpose of the advice was ultimately to provide guidance to the entire electoral community, in the circumstances of this case the boundaries as to who is actually the client are blurred and thus the client could be considered to be the Electoral Commission *and* the wider electoral community. The complainant argued that, in such circumstances there could be no reason for not sharing all of the advice with the wider community.
17. The Commissioner has reviewed the withheld information and taken the comments of both the complainant and Electoral Commission into account. The Commissioner is satisfied that legal advice privilege applies to all of the withheld information. In the Commissioner's opinion the dominant purpose of the documents is clearly the request for, or provision of, legal advice focusing on, as it does, the possible

interpretations of the particular parts of legislation. Whilst the Commissioner accepts that there may have been implications for the Electoral Commission regarding strategic and operational matters as a result of this advice, this does not mean the purpose of the advice itself becomes administrative, rather than legal, in nature.

18. Furthermore, the Commissioner is satisfied that the advice – both that provided by external counsel and that provided by an Electoral Commission lawyer to his colleagues was given with the implicit expectation that it would be treated confidentially. The Commissioner is therefore satisfied that any claim to legal professional privilege could be maintained in formal legal proceedings. It follows that the Commissioner does not accept the complainant's line of argument that the electoral community could be said to be the 'client' in this particular scenario. In the Commissioner's opinion simply because a regulatory body seeks legal advice in order to inform its understanding of particular aspects of the law so it can offer guidance to the community it regulates, it does not follow that the wider community then becomes the client for the purposes of that advice.
19. The Commissioner recognises that in this case the Electoral Commission disclosed an extract from the advice it received from counsel. In the Commissioner's view if only part of a piece of legal advice is disclosed outside litigation, and without restrictions, it is possible for the remaining information to still attract legal professional privilege if the disclosure did not reveal the content or substance of the remaining information. The Commissioner has examined both the disclosed part of the advice and remaining withheld information carefully. He is satisfied that although the disclosed extract is relatively detailed it does not reveal the complete content, or indeed reveal the total substance, of the remaining information. Therefore, the Commissioner is satisfied that the withheld information has not lost its quality of confidence as a result of the disclosure made by the Electoral Commission.

### **Public interest test**

20. However section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of FOIA 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 in favour of disclosing the information**

21. The withheld information in question relates to the use of commonly used names on election nomination papers, particular the use of titles, prefixes and suffixes. The complainant argued there was a compelling

interest in the public being able to understand what the Electoral Commission had asked counsel to do in respect of this aspect of election law, and then subsequently what the Electoral Commission did with the response.

22. The complainant believed that such a weighty interest was present given the large number of people potentially affected by this matter, namely every Returning Officer in the UK, every candidate, election agent, and political party involved in a statutory election. In fact, the complainant emphasised that the role of the Electoral Commission in issuing its guidance on this subject matter was specifically for the wider benefit of electoral community, and thus it followed that the community would also benefit from the sight of the advice, in addition to the guidance itself.
23. The complainant also argued that disclosure of the withheld information would assist those interested in this subject to legitimately assess the Electoral Commission's performance with regard to the application of this area of election law given the concerns that had been raised with them about issues of interpretation. The purpose of its guidance was to provide consistent and high quality advice to the electoral community as a whole. However, in the complainant's opinion it was difficult to assess whether the advice contained in the Electoral Commission's guidance met this aim without sight of legal advice itself.
24. The complainant also argued that there have been a number of examples of public bodies releasing the full text of both the request for legal opinion and the actual legal opinion that was provided. Consequently, the complainant argued that the Electoral Commission's ability to obtain free and frank advice in the future would not be greatly affected by release of the information requested.
25. The complainant also noted the passage of time that had elapsed since the date of the advice, the absence of the opportunity for litigation and crucially in his opinion, the lack of transparency in the Electoral Commission's actions as additional factors to support his view that the public interest favoured disclosure of the information.

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

26. The Electoral Commission argued that it was clearly in the public interest to safeguard the confidential nature of legally privileged communications and advice so as to allow openness in all communications between clients and lawyers. This ensures access to full and frank legal advice which in turn is fundamental to the administration of justice and indeed the effective undertaking of public policy. The Electoral Commission highlighted the fact that the Information Tribunal had considered this interest to attract significant weight. The Electoral Commission argued



that the disclosing a full copy of the instructions and counsel's advice as well as internal legal advice communications, would prejudice its ability to seek and obtain free and frank legal advice in the future on important matters such as this.

27. The Electoral Commission also argued that the public interest in interested parties being able to understand its position and decision making on this issue was already satisfied by it making publicly available an extract of legal advice which summarised the remainder of the opinion.

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

28. 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 than those in favour of maintaining the exemption'. (Para 41).*

29. 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 were disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

30. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:

- the number of people affected by the decision to which the advice relates;
- the amount of money involved; and
- the transparency of the public authority's actions.

31. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal 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 likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
32. 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.
33. In the circumstances of this case the withheld information dates from late 2011 and the complainant's request was submitted in March 2012. At the point the request was issued the 2012 guidance for the Scottish elections that were held in May 2012 had recently been issued. The legal advice in question had been used to inform the guidance in question. Therefore in the Commissioner's opinion not only was the advice still relatively recent at the time of the request it could also be said to be live in the sense that it had informed the Electoral Commission's current guidance. Moreover, it seems likely that the withheld information in question would inform any future discussions the Electoral Commission may have in relation to this particular aspect of electoral law. In the Commissioner's opinion the age of this particular advice, and the fact that it was still live at the time of the request, add considerable weight to the public interest in withholding this information.
34. In reaching this finding, the Commissioner wishes to make it clear that he would agree with the complainant's suggestion that it is difficult to envisage any litigation arising in relation to this particular issue and thus disclosure of the withheld material would not, indeed could not, undermine that litigation. However, in the Commissioner's opinion ensuring the openness in all communications between client and lawyer to ensure full and frank legal advice is fundamental to the administration of justice, regardless of whether litigation is contemplated or not.
35. Furthermore, the Commissioner does not agree with the complainant's suggestion that the withheld information in this case could be disclosed without materially affecting the Electoral Commission's ability to seek free and frank legal advice in the future. The advice was clearly sought and provided in circumstances where an expectation of confidentiality was expected and such confidentiality ensured that the discussions were free and frank in nature. The Commissioner sees no reason not to conclude that the underlying rationale behind legal professional privilege

attracts considerable weight in this particular case. Whilst the Commissioner accepts that some bodies may have chosen to release legal advice they have received, he does not believe that this impacts his decision in relation to this particular case given that each request has to be considered on its merits. In addition, for the reasons discussed above in the circumstances of this case the Commissioner accepts that disclosure of the withheld information is likely to undermine the Electoral Commission's ability to secure free and frank legal advice in the future. In reaching this view the Commissioner has taken into account the fact that the Electoral Commission disclosed an extract from the advice it received. However as discussed above in the Commissioner's view disclosure of the remaining information would reveal further details about the nature of the advice sought and the advice received. The Commissioner therefore accepts that disclosure of this information is likely to impact upon the Electoral Commission's ability to seek free and frank legal advice in the future.

36. With regard to the public interest arguments in favour of disclosure, the Commissioner agrees with the complainant that there is a legitimate interest in the public, or more specifically the electoral community (i.e. electoral administrators, political parties, agents and candidates), being able to properly understand the Electoral Commission's position and indeed rationale, in relation to this aspect of electoral law. Disclosure of the withheld information could go some way to serving this interest and provide some further insight into the Electoral Commission's position, and its considerations, in relation to the use of commonly used names. Furthermore, the Commissioner recognises that there are a wide range and number of individuals and organisations with an interest in this particular topic which adds weight to the case for disclosure. However, in the Commissioner's opinion the extent to which the withheld information would actually aid this genuine aim of transparency - beyond the information which has already been disclosed, i.e. the extract of the advice, the draft guidance and the final version of the guidance - is limited. Furthermore, in the Commissioner's opinion disclosures by the Electoral Commission of the extract of counsel's advice and the draft guidance can be seen as reasonable attempts by the Electoral Commission's to be transparent in relation to its position on this aspect of election law.
37. In conclusion, the Commissioner does not dispute the public interest arguments put forward by the complainant: disclosure of this withheld information could provide the electoral community with some further understanding as to how the Electoral Commission reached its view on commonly held names as reflected in its published guidance. The Commissioner recognises that if the information was disclosed at the time request this would have been prior to the Scottish Elections of 2012 and thus, as the complainant has argued, could have been of use to

those involved in those elections. However, in the Commissioner's view the extent to which disclosure of the withheld information would be genuinely informative is limited when the other disclosures of the Electoral Commission are taken into account. In contrast, the Commissioner believes that significant weight should be attributed to maintaining the exemption given that the legal advice was recent and remained live at the time of the request. Therefore, the Commissioner has found that the public interest in maintaining the exemption outweighs the public interest in disclosure.

## **Complaint 4**

### Section 1 – right of access to information

38. In request 3 the complainant requested that the Electoral Commission provided him with *'a copy of all information that in any way relates to internal discussions, opinions, directions, or guidance that will help me understand how the Commission arrived at the wording of the 2012 election guidance as published?'*
39. In its response the Electoral Commission provided copies of the draft versions of the guidance in question. The Commissioner understands that these drafts contained two tracked comments made by Electoral Commission staff, one of which had been redacted on the basis of section 42(1) of FOIA. The Commissioner has already found that this comment is in fact exempt on this basis.
40. In his fourth point of complaint, the complainant argued that it was hard to accept that the only internal discussions that took place regarding the guidance were with legal staff (and thus withheld on the basis of section 42(1) of FOIA) and he therefore queried whether the Electoral Commission may hold further information regarding these internal discussions.
41. The Commissioner understands that the tracked comment contained on the guidance which has not been redacted was not made by a lawyer. Nevertheless, in respect of complaint four the Commissioner has considered whether the Electoral Commission holds any further recorded information relating to the internal discussions about the guidance in question, i.e. any information beyond the drafts versions of the guidance (including the tracked changes and tracked comments) already located and provided to the complainant or, in the case of one comment, withheld on the basis of section 42(1)
42. In scenarios such as this where there is some dispute between the public authority and a requester as to whether any further information is in fact held, the Commissioner, following the lead of a number of

Information Tribunal decisions, applies the civil standard of on the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.

43. In order to investigate this point of complaint the Commissioner asked the Electoral Commission a number of questions about the searches that it had carried out to locate any information relevant to request 3. The Commissioner has replicated these questions below and summarised the Electoral Commission's response to each.

- *What searches were carried out to ensure that all of the information falling within the scope of this request was located and why would these searches have been likely to retrieve all relevant information?*
- The Electoral Commission explained that the searches were undertaken of the relevant individuals' email inboxes and subfolders. These searches were carried out using key word terms 'commonly used name', 'common' and 'name' and a review of the emails for the relevant period when the guidance was being produced was conducted. Furthermore, searches of the team members' personal drives using the same search terms were also used. Searches of the Electoral Commission's shared network drive and case management system were also carried out. The Electoral Commission explained that the only relevant information located were the draft and final guidance documents provided to the complainant in response to his request.
- *If further information were held would it be held as manual or electronic records?*
- The Electoral Commission explained that if further information has been held it would have held as electronic rather than paper records as the Guidance and Events team does not create or retain papers records.
- *If searches included electronic data, please explain whether the search included information held locally on personal computers used by key officials (including laptop computers) and on networked resources and emails.*
- The Electoral Commission explained that the searches were carried out in relation to the electronic data held on its own servers and contained in personal drives, shared drives and case management system. It confirmed that whilst some staff do work from home on personal computers, it operates a remote virtual PC system allowing staff to log

into the Electoral Commission's server from home. Therefore, no information is held separately on personal computers.

- *If searches included electronic data, which search terms were used?*
  - The Electoral Commission referred the Commissioner to its previous answer. It noted that since receiving this complaint it had re-run these searches and no information, beyond that previously identified and disclosed to the complainant, had been located.
  - *Was any recorded information ever held relevant to the scope of the complainant's request but deleted/destroyed? If recorded information was held but is no longer held, when did the Electoral Commission cease to retain this information? Does the Electoral Commission have a record of the document's destruction?*
  - The Electoral Commission explained that it does not have any automated processes to delete electronic records once they reach the end of their retention period in its shared network or personal drives. In any event, it explained that the documents relevant to this request would not have reached their minimum retention period.
  - The Electoral Commission explained that there are no automatic deletion controls in emails in staff mailboxes and staff are advised to save emails into the shared network drive if they constitute records of business decisions. Therefore the Electoral Commission believed that the searches carried out would have found all of the relevant material and it is unlikely that any information relevant to this request has been deleted or destroyed.
  - *Is there a business purpose for which the requested information should be held? If so what is this purpose?*
  - The Electoral Commission explained that it kept draft guidance and related legal advice as a matter of good record keeping practice and that these are retained for a reasonable amount of time which is set out in its Retention Policy.
44. As part its submissions to the Commissioner, the Electoral Commission also explained that in developing guidance, in addition to discussions with lawyers, the Guidance and Events team may discuss issues on more technical or challenging aspects but these discussions would always be informal and not minuted. The guidance documents go through stages which are recorded through different drafts of the guidance and these drafts are held on the shared drive and would not typically be recorded in any other way. The Electoral Commission explained that, as far as the relevant staff members can recall, the

guidance which is the focus of this request was developed in this way and the relevant parts of the guidance demonstrating how it developed during the drafting process were found in the search and disclosed to the complainant with the exemption of the one comment redacted on the basis of section 42(1).

45. On the basis of the Electoral Commission's submissions the Commissioner is satisfied that on the balance of probabilities that no further information falling within the scope of request 3 is held beyond that which has previously been located. This is on the basis that given the manner in which the Electoral Commission develops guidance, it is the draft versions of the guidance itself that are used as a record of any amendments or revisions to, or discussions about the guidance, beyond of course any separate legal advice such as the external advice with counsel falling within the scope of request 2. The draft versions of the guidance relevant to this complaint have of course been located and disclosed. Therefore in the Commissioner's opinion it is reasonable to conclude that the Electoral Commission would not hold any written evidence of internal discussions about the content of the guidance beyond the comments / revisions contained in the draft guidance itself. In any event, if in the unlikely event that the Electoral Commission did in fact hold information relating to internal discussions about this guidance in another format, e.g. internal emails between colleagues, the Commissioner is satisfied that the focused and logical nature of the Electoral Commission's searches for such information would mean that if any such information was in fact held, then it would have been located. The Commissioner also notes that these searches have been undertaken not only when the request was first dealt with but also again during the course of the Commissioner's investigation.

## **Complaint 5 and complaint 6**

### Section 10 and 17 – time for compliance

46. Section 10(1) of FOIA requires a public authority to respond a request within 20 working days. If public authority is seeking to rely on an exemption to refuse to comply with a request then in line with section 17(1) it must provide the requestor with a refusal notice, within 20 working days, stating which exemption(s) is being relied upon.
47. As the complainant argued in point 5 of his complaint, although he submitted his requests on 8 March 2012 the Electoral Commission did not provide him with a substantive response to his requests until 18 May 2012, some 49 working days later. Furthermore, as the complainant argued in point 6 of his complaint, the Electoral Commission did not cite section 42(1) as a basis to withhold the redacted comment until the internal review.

48. The Electoral Commission's failure to respond to the requests within 20 working days resulted in it breaching both section 10(1) and section 17(1) of FOIA. The breach of section 10(1) relates to the parts of the requested information which the Electoral Commission did not seek to withhold but failed to provide within 20 working days. The breach of section 17(1) relates to the parts of the withheld information which the Electoral Commission sought to withhold from disclosure but failed to issue a refusal notice for specifying the exemptions in question within 20 working days. There was also a breach of section 17(1) in relation to its reliance on section 42(1) of FOIA to redact one of the tracked comments on the guidance because the Electoral Commission did not clearly specify that it was relying on this exemption until the internal review.
49. The Commissioner has commented further on the Electoral Commission's delays in responding to these requests in the Other Matters section of the Notice.

### **Other matters**

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50. Based upon the correspondence the Commissioner has seen, it would appear that the Electoral Commission failed to recognise the complainant's email of 8 March 2012 as containing a number of valid FOI requests. The Commissioner notes that this apparent failure occurred despite the complainant contacting the Electoral Commission on a number of occasions to highlight the fact that he had not received a response to his requests of 8 March 2012. The complainant, in the Commissioner's opinion not at all unreasonably, was left with a sense of some frustration at the Electoral Commission's failure, until its response of 18 May 2012, to recognise and respond to his requests.
51. The Commissioner understands that the Electoral Commission has already taken the opportunity to remind its staff how to handle information requests. The Commissioner welcomes this step. However, the Commissioner wishes to use this notice to emphasise to all public authorities, not least the Electoral Commission, of the importance of ensuring that all staff are aware of their organisation's obligations under FOIA and in particular how to identify valid FOI requests. Further details on this topic are covered in the Commissioner's publication 'The Guide to



Freedom of Information' in particular the part of this guidance entitled 'What should we do when we receive a request?'<sup>1</sup>

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[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/guide\\_to\\_freedom\\_of\\_information.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/guide_to_freedom_of_information.ashx)

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

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

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

53. 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.
54. 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 .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**