

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2017

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

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Electoral Commission for copies of representations it had received from the Conservative Party in relation to the Commission's investigation of its campaign spending returns. The Commission refused to disclose the requested information in reliance on the section 31 (law enforcement) exemption.
2. The Commissioner's decision is that the requested information is exempt under section 31(1)(g) and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 16 March 2016 the complainant made a freedom of information request to the Electoral Commission in which he asked for copies of representations received by the Conservative party in relation to the Commission's investigation of its campaign spending returns.
4. The Commission responded to the request on 11 April 2017 when it explained that the requested information was being withheld under the exemptions in section 30 (Investigations) and section 31 (Law enforcement) of FOIA. In addition it said that the section 40 (Personal information) exemption was being applied to the names and contact details of staff members and sensitive personal data relating to other individuals.

5. The complainant subsequently asked the Commission to carry out an internal review and it presented its findings on 5 May 2017. The review upheld the initial response to the request.

Scope of the case

6. On 5 May 2017 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The Commissioner agreed with the complainant that the scope of her investigation would be to consider whether the requested information is exempt under any of the exemptions relied upon by the Electoral Commission.
8. During the course of the Commissioner's investigation the Commission clarified that it was no longer seeking to rely on the section 30 exemption.

Reasons for decision

Section 31 – Law enforcement

9. The Electoral Commission has said that it is relying on the section 31(1)(g) exemption which provides that information is exempt if disclosure would or would be likely to prejudice:

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection 2,

10. In this case the Commission has said that the relevant subsection is 31(2)(a):

(a) the purpose of ascertaining whether any person has failed to comply with the law,

11. In order to engage this exemption the Commissioner requires the function identified by the public authority for the purposes of section 31(1)(g) to be a function which is:

- i. designed to fulfil one of the purposes specified in section 31(2) and,

- ii. imposed by statute (or in the case of a government department, authorised by the Crown) and,
 - iii. specifically entrusted to the relevant public authority to fulfil (rather than just a general duty imposed on all public authorities).
12. The Commissioner understands that the Electoral Commission has functions under section 145 of the Political Parties, Elections and Referendums Act 2000 (PPERA) of monitoring and taking all reasonable steps to secure compliance with the restrictions relating to campaign spending. This correlates with the purpose set out at section 31(2)(a) – the purpose of ascertaining whether any person has failed to comply with the law. As such the Commissioner is satisfied that the Electoral Commission has a specific statutory duty to investigate restrictions on campaign spending.
13. As to why disclosure would prejudice its functions, the Commission's argument is essentially that disclosure would discourage individuals and organisations from voluntarily providing information and cooperating with its investigations.
14. The withheld information in this case comprises the Conservative and Unionist Party's ("CUP") detailed response to the Commission's investigation and was provided in the expectation that it would not be made public. The Commissioner is satisfied that if it was disclosed the CUP as well as other parties would be likely to be discouraged from cooperating with the Commission's investigation to the fullest extent. In reaching this view the Commissioner is particularly mindful that whilst the Electoral Commission's investigation had concluded at the point the complainant made his request, there was still an ongoing related investigation by the Metropolitan Police and the withheld information may form part of the evidence for that case.
15. The Commissioner has also taken into account the fact that the information was very recent at the time the complainant submitted his request and so disclosure at this point would be likely to have a greater impact on the voluntary disclosure of information.
16. In the circumstances the Commissioner considers that disclosure at this sensitive period would be likely to damage the relationship between the Electoral Commission and the CUP. This would make it harder to secure their full cooperation and they would be discouraged from providing similar levels of information in future cases. Whilst the Commissioner accepts that the Electoral Commission has powers to compel parties to provide it with information, parties and individuals are more likely to provide only the minimum amount of information required and be less

cooperative. The Commissioner's approach accepts that regulators benefit from information being supplied voluntarily. If the Electoral Commission had to rely solely on its statutory powers the Commissioner accepts that the quality and quantity of the information it receives would be reduced and its functions would be prejudiced as a result. For these reasons the Commissioner has decided that the requested information is exempt under section 31(1)(g).

17. The Commissioner has now gone on to consider the public interest, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest test

Public interest arguments in favour of disclosure

18. The complainant argued that the following factors supported the information being disclosed:

a) the health of our democracy,

b) the ability to see how the Electoral Commission handles an investigation,

c) the ability to see how accurately the Electoral Commission summarised the representations in its case summary.

19. For its part, the Commission said that it acknowledged that there is a legitimate public interest in carrying out investigations in an open and transparent way and in promoting public understanding of the decisions it makes as a regulator. It said that it was possible that disclosure would promote public understanding of the decisions it makes as a regulator.

Public interest arguments in favour of maintaining the exemption

20. The Electoral Commission argued that the public interest lies in enabling the Commission to undertake effective inquiries as part of its investigation powers so that it can make regulatory decisions based on all appropriate evidence. It said that it could best do this by maintaining effective relationships with the individuals and bodies it regulates and allowing them the confidence to make voluntary representations as part of a free and frank exchange with their regulator. It said that without this its investigations and its ability to carry out its statutory functions would be seriously compromised.

21. The Electoral Commission also argued that, as the Commissioner has set out above, disclosure of the information would be likely to prejudice the exercise of its functions and its ability to conduct future investigations.
22. The Electoral Commission said that it was in the public interest in terms of speed of resolution and use of public funds that its investigations can be carried out with voluntary cooperation wherever possible.
23. In addition the Electoral Commission said that the CUP continued to have a reasonable expectation that the information provided in the course of the investigation would not be made public. It noted that the information may form part of the evidence of an ongoing criminal investigation and that if it was disclosed it would make both the party and others it regulates reluctant to provide full voluntary disclosure in the future. This would have a detrimental impact on its ability to carry out investigations, it said, and therefore would not be in the public interest.

Balance of the public interest arguments

24. The Commissioner has considered the competing arguments and as regards the public interest in disclosure she accepts that this would promote transparency and accountability. Disclosure would also promote public understanding about the decisions the Electoral Commission reaches. However, the Commissioner considers that this has largely been met by the information the Electoral Commission has already placed in the public domain. The Investigation Report provides a comprehensive summary of the Electoral Commission's investigation, including a summary of the representations received from the CUP and clearly explains why it had reached the decision it had.¹
25. Any public interest in disclosure also has to be balanced against the harm that would be caused to the Commission's ability to undertake its functions. In this particular case there is a significant public interest in ensuring that the Electoral Commission remains able to carry out its regulatory activities effectively, including by building and maintaining relationships with the organisations it regulates. The Commissioner has already accepted that disclosure would be likely to prejudice the way in which it carries out its investigations and this weighs in favour of maintaining the exemption.

¹ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0005/222935/Report-in-respect-of-the-Conservative-and-Unionist-Party.pdf

26. The Commissioner's position is that it is in the public interest for regulators to be able to rely on the voluntary supply of information wherever possible as this allows for more efficient and quicker investigations. This serves the public interest as it involves less resources and ultimately public funds. The Commissioner's approach is reflected in her guidance on the section 31 exemption which makes it clear that the public interest is served by the voluntary supply of information.

*"Co-operation between those being regulated and the regulator is important. Organisations are often encouraged to report problems they have had. Investigations take less time when those under investigation co-operate. This can be true even where a regulator has the power to compel a party to supply information as reliance on such powers often involves bureaucratic procedures which can cause delays. There is clearly a public interest in not deterring the voluntary supply of information."*²

27. On balance, given the information already in the public domain, the fact that the information was very recent and there was a related live investigation the Commissioner has reached the view that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Other exemptions

28. The Commissioner is satisfied that all of the information is exempt under section 31(1)(g) and that the public interest favours maintaining the exemption. Therefore she has not gone on to consider whether the section 40 exemption might also apply.

² <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

Right of appeal

29. 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

30. 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.
31. 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

Paul Warbrick
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