

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 January 2015

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 an investigation by the Electoral Commission (EC) from 2010 into donations made by Bearwood Corporate Services (Bearwood) to the Conservative Party. That investigation examined whether the donations were within the rules set out in the Political Parties, Elections and Referendums Act (PPERA). The EC refused the request citing the exemptions provided by section 30(1) – investigations and proceedings, section 31(1)(g) – law enforcement, section 40(2) – personal information, section 41 – information provided in confidence and section 42 – legal professional privilege.
2. The Commissioner's decision is that the EC correctly withheld all the information falling within the scope of the request under section 30(1). He has therefore not gone onto to consider the application of the other exemptions.
3. The EC is not required to take any further action in this matter.

Request and response

4. On 19 July 2014, the complainant wrote to the EC and requested information in the following terms:
 - “1) The full report into donations received by the Conservative Party from Bearwood Corporate Services (BCS)
 - 2) All correspondence relating to these donations and your investigation into its permissibility. For the purpose of this freedom of information request, this includes, but is not limited to, correspondence sent to and received from the Electoral Commission, the Conservative Party, Bearwood Corporate Holdings, Stargate Holdings, Lord Ashcroft, their affiliates, associates, lawyers, subsidiaries, bankers, and any related holding companies. For the purpose of this freedom of information request, the term ‘correspondence’ includes but is not limited to letters, emails, notes from meetings and notes of telephone calls.
 - 3) Any evidence supplied by the Conservative Party that it took ‘All reasonable steps’ within 30 days of receiving donations to ascertain whether BCS was a permissible donor.
 - 4) Any evidence received from any source used to ascertain whether BCS was a permissible donor.”
5. The EC responded on 8 August 2014. It refused to provide the information and cited a number of exemptions as its basis for doing so. It applied the exemption relating to investigations, section 30(1)(a)(i) to all the information captured by the request. To the extent that the Commissioner may find any information was not covered by section 30(1)(a)(i), it applied section 30(1)(g), via section 31(2)(a) to that information. This exempts information the disclosure of which would prejudice functions exercised for the purpose of ascertaining whether any person has failed to comply with the law.
6. The EC applied section 40(2), the exemption relating to personal information, to the personal data contained in the requested information. It applied section 41 – information provided in confidence, to some of the evidence which it had gathered, including correspondence received from both the Conservative Party and Bearwood Corporate Services, together to any references to that information contained in the report of the investigation which was presented to the Board, the Board report. Finally it applied section 42 to certain elements of the Board report on the basis that it quotes or paraphrases the legal advice it obtained during its investigation.

7. Following an internal review the EC wrote to the complainant on 9 September 2014. It maintained that the information was exempt under the provisions set out above.

Scope of the case

8. The complainant contacted the Commissioner on 14 September 2014 to complain about the way his request for information had been handled. He provided a detailed submission in which he pointed out that all the exemptions which had been applied were either qualified by the public interest test or were absolute exemptions which had an inbuilt public interest test. He argued that the public interest favoured disclosure. He drew the Commissioner's attention to a recent report by the Parliamentary and Health Service Ombudsman (PHSO) relating to the EC. The report concerned the EC's investigation into political donations made to the Liberal Democrats by a company called 5th Avenue Partners. The PHSO found that the EC's failure to look in more detail at the checks the Liberal Democrats had made when accepting these donations amounted to maladministration.
9. The complainant argued that this finding raised questions over the EC's performance when investigating the similar issue of donations made by Bearwood to the Conservative Party. He put forward four arguments as to why the public interest favoured disclosure. The first was that disclosing the information would reveal whether the EC had effectively enforced the law. Secondly disclosure would inform a debate over whether the legislation governing the funding of political parties was, essentially, fit for purpose. Thirdly he argued that there was controversy over the extent to which the Conservative Party had cooperated with the EC's investigation and disclosing the information would allow the public to reach its own view on the matter. Finally he argued that because of, what he described as, its unique position in public life the EC should be held to an exceptionally high level of transparency. These arguments will be considered, in detail, later.
10. The Commissioner considers that the matter to be determined is whether the EC is entitled to withhold the requested information under the exemptions cited. As the exemption relating to investigations provided by section 30 has been applied to all the information he will consider its application first, and if it is engaged, the public interest in maintaining the exemption. If that exemption cannot be relied on the Commissioner will go onto to consider the application of the remaining exemptions.

Background

Information relating to the EC's investigation into the donations made by Bearwood was the subject of requests at the time the EC originally reported its conclusions back in 2010. Three of these requests have already resulted in decision notices being issued by the Commissioner in June 2011.

The Bearwood Investigation

11. In October 2008 the public authority began an initial enquiry into donations made to the Conservative Party by Bearwood. In January 2009, following receipt of information from various parties and an assessment of information already in the public domain, the public authority opened an investigation, in order to determine whether these donations had breached PPERA. On concluding its investigation the EC published case summary, accompanied by a press release¹. The case summary explained the relevant requirements of the PPERA,

"...Before accepting a donation, a party must make sure it takes all reasonable steps to verify or ascertain the identity of the donor, and that the donor is 'permissible'. A permissible donor is, in the case of an individual, someone who is registered on the electoral register. In the case of a company a permissible donor must be, among other things, carrying on business in the United Kingdom at the time of the donation.

...Where an individual gives a donation to a party but is passing on that donation on behalf of someone else – in other words acting as an agent – the agent must notify the party that they are an agent and the party must ensure that the donor, rather than the agent, is a permissible donor.

...The party has 30 days from receipt of a donation to ascertain the identity of the donor and check that the donor is permissible. Where the party is unable to do so within 30 days, it cannot accept the donation.

¹ The press release, from which the case summary is linked, can be found on the EC's website [Electoral Commission announces outcome of investigation into donations reported by the Conservative Party from Bearwood Corporate Services Limited](#)

...Where a party has accepted a donation which it was prohibited from accepting, the Commission may seek a court order that an amount equal to the impermissible donation be forfeited."

12. The public authority's investigation focused on:

- whether Bearwood was a permissible donor;
- whether the donations were correctly reported as coming from Bearwood, rather than an agent for someone else, including its parent company Stargate Holdings or Lord Ashcroft; and
- whether the Conservative Party had fulfilled its compliance duties, in particular its duty to be certain who the donor was before accepting the donations.

13. On 4 March 2010 the public authority announced the outcome of this investigation by issuing a press release and a case summary. It stated that:

- in relation to the question of whether Bearwood was a permissible donor, it had concluded that Bearwood met the permissibility requirements for making political donations;
- in relation to the question of whether the donations were correctly reported as coming from Bearwood, it had concluded that, on the evidence before it, there was no basis to conclude that the donor was anyone other than Bearwood; and
- in relation to the question of whether the Conservative Party had fulfilled its compliance duties, it had decided that there was insufficient evidence to conclude, on the balance of probabilities, that the Conservative Party was uncertain as to the identity of the donor when accepting the donations.
- Therefore the public authority concluded that no breach of PPERA had been established and there would be no legal action taken against the Conservative Party.

14. In addition to this the EC explained in its press statement that,

"The Commission's powers are limited, notably that it does not currently have the power to require anyone to attend an interview, and only has the power to require the provision of documents from a party and its officers, but not from reported donors or others. Within the limits of its current powers, the Commission conducted a

thorough investigation. It obtained and considered a large volume of documents, including a substantial quantity of internal documents provided by the Conservative Party. The Commission asked various officers and staff within the party to attend interviews on a voluntary basis, but these requests were not agreed to."

The PHSO Investigation into a complaint about the EC

15. On 20 November 2009 the EC published a case summary² of an investigation it had conducted into donations made by a company called 5th Avenue Partners to the Liberal Democrats. As with the Bearwood case, the EC had investigated whether the company in question was a permissible donor and whether that company was in fact the true donor. The EC concluded that the company was a permissible donor and that there were no reasonable grounds for finding that the donor was anyone other than 5th Avenue Partners.
16. Following a complaint the PHSO considered the thoroughness of the EC's investigation into the donations³. It looked at whether the EC acted with maladministration in considering two issues. Firstly had the EC acted with maladministration when considering whether the donation was in fact permissible. Secondly, was there maladministration in the way the EC investigated whether the Party had taken all reasonable steps to check whether the donation was permissible.
17. The PHSO found that the EC enquiries into the initial permissibility checks carried out by the Liberal Democrats fell significantly short of what was required. It stated that under section 56 of PPERA political parties have a duty to take all reasonable checks to ascertain the true identity of a donor and to determine whether that person is a permissible donor. The EC in turn has a statutory function to monitor whether parties are complying with PPERA. Therefore the PHSO found that by not making thorough enquiries as to what checks the Party had conducted the EC failed to adequately discharge its monitoring function.
18. One of the donations being investigated was to cover the cost of flights. The flights had been paid for by the foreign parent company of 5th

² The case summary can be linked to from the EC's press summary here [Donations by 5th Avenue Partners Limited to the Liberal Democrats: statement](#)

³ The PHSO's report is available from its website here [Investigation into a complaint about the Electoral Commission](#)

Avenue Partners. By way of evidence of the checks it had carried out the Liberal Democrats supplied the EC with an unsigned note saying that the cost of the flights had been recharged to the UK company. That note has been written by the owner of 5th Avenue Partners who, by the time the EC had concluded its investigation, was known to be a convicted fraudster and perjurer. In light of these circumstances the PHSO found the EC had acted with maladministration by not pressing the Liberal Democrats to provide more evidence of the steps it had taken to check who had actually paid for the flights. Again this was a failure by the EC to monitor Liberal Democrats' compliance with the requirement to carry out reasonable checks within 30 days.

19. It should be noted that the EC does not accept these findings, explaining that it based its decisions on a much larger body of evidence than is acknowledged in the PHSO's report. The EC has submitted its response to the PHSO's findings to the Speaker's Committee which oversees the EC's work on behalf of Parliament.

Reasons for decision

Section 30 - investigations

20. The Commissioner will first look at the EC's application of section 30(1)(i)(a). Section 30(1)(i)(a) states that information which has been held by the public authority, at any time, as part of an investigation into whether a person should be charged with an offence, is exempt information.
21. For information to be exempt it simply has to have been held for the purpose of an investigation of the type described; in broad terms, a criminal investigation. There is no need for the disclosure to prejudice such an investigation for the exemption to be engaged. Any harm that would be caused is considered under the public interest test.
22. The requested information was obtained or generated in the course of the EC's investigation into the Bearwood donations. The investigation considered whether offences had been committed under sections 54(7), 56(3) and 61 of the PPERA. Under section 145 of the PPERA the public authority has the function of monitoring compliance with the restrictions imposed under parts III to VII of that Act. Sections 54(7), 56(3) and 61 all fall within part IV. Therefore the public authority has the function of monitoring compliance with sections 54(7), 56(3) and 61 and consequently the investigation was one that the public authority had a duty to conduct.

23. The Commissioner recognises that the EC would not have the authority to charge anyone with an offence itself, this would be for the police or the Crown Prosecution Service. However this does not prevent the EC relying on the exemption. For the exemption to be engaged it is only necessary that the purpose of the investigation is to gather sufficient evidence to determine whether someone should be charged with an offence.
24. The Commissioner is therefore satisfied that the investigation conducted by the EC is of the type described by section 30(1)(a)(i). The exemption is engaged.

Public interest test

25. Section 30 is subject to the public interest test as set out in section 2 of FOIA. Only where the public interest in maintaining the exemption is greater than the public interest in disclosing the information can the exemption be relied on. It is very clear that this investigation was a major case for the EC. The concerns raised by the journalists who first brought the Bearwood donations to the public's attention, relate to important matters on the funding of political parties, the possible influence of overseas donations on UK politics and the integrity of one of the country's main political parties. There is clearly a significant public interest in providing information that would inform the public debate on such issues. It is also important that the mechanisms in place for regulating donations to political parties can operate effectively. It would not be in the public interest to disclose information which would prejudice the EC's ability to carry out those functions.

Public interest in disclosing the information

26. The Commissioner will first look at the public interest in disclosing the information. In doing so he will consider the arguments presented by the complainant in favour of disclosure and the submissions provided the EC. He has also considered the actual information that has been requested.
27. The complainant has considered the conclusions set out in the EC's case summary and compared those findings with other information in the public domain including that revealed by journalists and that contained in Lord Ashcroft's autobiography, 'Dirty Politics Dirty Times'. The complainant's first argument in favour of disclosure concerns the EC's own performance when conducting the investigation. The regulation of political parties and how they are financed is a vital part of the democratic process. It is clearly important that the EC is effective in

performing its regulatory role and the complainant argues that disclosing the requested information would reveal how effective the EC is. The complainant argues that disclosure would show whether the EC met its obligations under section 145 of PPERA to monitor a Party's compliance with the provisions of that Act. In particular whether the Party took all reasonable steps to ascertain whether the donation came from a permissible donor. Such checks are required by section 56(1) of PPERA. The PHSO's recent report on the EC's investigation into donations made to the Liberal Democrats found that the EC had acted with maladministration by not obtaining more detailed information on the checks that had been conducted. The PHSO's finding is based on the particular facts of that case. It is noted that the EC has not accepted the finding, arguing that whether all reasonable steps had been taken to identify the donor did not have any bearing on whether the donation was in fact permissible and that it was that the issue of whether the donation was permissible which formed the focus of its investigation. Nevertheless the PHSO's finding does raise a legitimate issue for public debate. That issue being the priority which the EC should place on investigating the steps political parties are taking to check the source of donations. The Commissioner considers that some of the requested information from the Bearwood investigation would help inform a debate on whether the EC is exercising its discretion appropriately when deciding the compliance issues it should focus on.

28. The complainant has also argued that there are concerns around the actual conclusion that the EC reached regarding the steps taken by the Party to identify the donor. In paragraphs 2.14 - 2.19 of its case summary the EC explained that there was insufficient evidence to conclude that, on the balance of probabilities, the Party was uncertain as to the identity of the donor. The complainant has argued that the correct test under section 56(1) of PPERA is not whether the Party was certain about the identity of the donor but whether it had taken all reasonable steps to satisfy itself as to the donor's identity. Further, he argues, it is not clear how the EC could find that the Party had taken all reasonable steps to verify the identity of the donor.
29. The Commissioner has considered the final paragraphs of the EC's summary which he understands the complainant to be referring to ie paragraphs 2.14 - 2.19. The Commissioner accepts that it is not clear from these paragraphs which provisions the EC is looking at, or the tests it is applying to those provisions. Disclosing the requested information would undoubtedly help the public understand the EC's conclusions and to relate the findings, as set out in its case summary, to the provisions of PPERA. In light of this there is a public interest in disclosing information, for example from full Board Report, that would clarify the EC's position. However the Commissioner is satisfied that the public interest is not as great as the complainant suggests.

30. The complainant's third argument relating to the EC's performance concerns its conclusion that Bearwood was the actual donor and was not acting as an agent for another party. The Commissioner notes the very careful way in which the EC's conclusions on this point are set out. In challenging the EC's finding the complainant has argued that there are clear references to Lord Ashcroft authorising donations and that authorising such donations is incompatible with the role of Lord Ashcroft as the representative of a corporate director of Bearwood. However the Commissioner does not accept this argument. Companies can act as a director in another company. The representative of such corporate directors can exercise decision making powers in the same way as any other director. It is not an honorary role.
31. Nevertheless it is true that both the donations and the EC's conclusions have proved controversial. There has been genuine public debate over the basis on which those conclusions were reached and their robustness. There is a significant public interest in people having confidence in the EC's ability to properly carry out its functions and in the political system it regulates. Disclosure of the requested information would aid people's understanding of how the EC conducted the investigation and help them reached a more informed view of whether the conclusions were correct.
32. The complainant's second argument in favour of disclosure is that there are legitimate questions over the effectiveness of the actual law regulating donations to political parties.
33. Section 54 of PPERA sets out from whom political parties can accept donations. At the time of the Bearwood investigation, under section 54 (2)(b), a company could be a donor so long as it was registered under the Companies Act 2006, incorporated within the UK and was carrying on a business in the UK at the time of the donation.
34. As is made very clear in the EC's published case summary, there is no requirement that either the company is trading at a profit, or that any donation it makes is generated from business carried out in the UK. The EC's investigation found that the donations from Bearwood were not wholly funded from its business in the UK and that funds were passed from a company based in Belize through a number of UK based companies. However this arrangement does not breach PPERA.
35. PPERA was a response to public concern over the funding of political parties and followed a report by the Committee on Standards in Public Life in 1998. The report, called the Neill Report after the committee's chair, set down the principle that only those who live, work and carry on business in the UK should be entitled to provide financial support to the political process in the UK. It recommended that for a company to be an eligible donor it should not only be carrying on a business in the UK, but

that business should generate enough income to support the donation. Obviously these proposals did not make it into the legislation or any subsequent amendments to it. In its case summary the EC drew attention to the fact that the possibility of overseas parent companies donating through UK subsidiaries in this way was considered during PPERA's passage through Parliament.

36. There is very clearly a public debate over whether companies should be required to generate donations from their UK business activities. The complainant argues that the requested information would inform that debate. The Commissioner considers that although disclosing the information may trigger a fresh round of debate, he is not satisfied that disclosing the actual information would inform that debate to any significant extent. The EC has already provided an explanation of what constitutes a permissible donor and made it clear that there is no requirement for the donated money to have been generated within the UK. It has explained the route by which at least part of the donations were made. The size of the donations is also public knowledge. Therefore the Commissioner is not convinced that any additional information that could be gleaned from the specifics of this case would further that debate.
37. The complainant's third argument in favour of disclosure concerns the Party's willingness to cooperate with the EC's investigation. There is a public interest in revealing whether a political party which seeks consent to govern is prepared to comply with the law of the land and to cooperate with those tasked with regulating compliance with the law. The EC's consideration of whether the Party was certain who the donor was before accepting it is not only relevant to whether the Party complied with its duty to make all reasonable checks as to the identity of the donor as required by section 56 of PPERA. It could also be relevant to section 54, as a donation would be impermissible if the Party was unable to ascertain the identity of the donor. The EC's case summary discusses the evidence that it considered before stating the evidence it had assembled was insufficient to conclude that, on the balance of probabilities, the party was uncertain as to the identity of the donor.
38. When discussing the evidence on which that decision was based, the EC commented that it did not have the power to compel anyone to attend interviews (following amendments to PPERA the EC now has the power to compel anyone to provide it with information and to attend interviews⁴. However these amendments did not come into force until December 2010). Nevertheless the EC did ask various officers and staff

⁴ The new powers are contained in Schedule 19B of PPERA. These were inserted by Political Parties and Elections Act 2009, but did not come into force until December 2010.

within the Party to attend interviews on a voluntary basis. According to the EC, these requests were not agreed to. However the complainant has identified press reports in which Party officials denied this. One report available from the Guardian's website⁵ quotes a Party spokesman as describing the suggestion as "absolutely junk and rubbish".

39. The Commissioner accepts that there is a public interest in disclosing information about the extent the Party was willing to cooperate with the EC's investigation. This is increased due to the EC's suggestion that its investigation was hindered by the reluctance of party officials to attend interviews and the Party's rejection of this claim. The fact that both sides have chosen to air this issue in public undermines, at least to some extent, arguments around the confidentiality of the investigation. There is a real value in disclosing information that would allow the public to determine how well the Party cooperated with the investigation. There is also a public interest in revealing whether the EC can substantiate its version of events. If it could not, this would raise serious questions about the integrity of the EC.
40. It should be noted that the argument above would only apply to a limited amount of information. It should also be recognised that as the EC now has the power to compel attendance at interviews, the argument is limited to whether the Party engaged fully with the EC on this occasion. It does not feed into any wider debate on the powers that should be available to the EC in order for it to regulate PPERA effectively.
41. The complainant's final set of arguments in favour of disclosure relate to the need for there to be a particularly high standard of transparency in the EC's work because of what he describes as the EC's unique position in public life. He argues that a high degree of transparency is required because the EC is regulated by those it regulates. In support of this argument he explains that the Electoral Commissioners are appointed by the Crown on the recommendation of the Speaker's Committee and the leaders of all the main political parties must be consulted. In addition the main parties directly appoint four part time commissioners. This arrangement, he argues, can lead to too close a relationship developing between the EC and those it regulates.
42. The EC has explained that even with its new powers it is still more effective to obtain the voluntary cooperation of those it investigates. Due to what he perceives as the close relationship between the EC and the political parties, the complainant questions whether it is appropriate for the EC to continue to rely on voluntary cooperation. The value of

⁵ www.theguardian.com/politics/2010/mar/04/ashcroft-donations-cleared-conservatives-obstructed .

voluntary cooperation is discussed later. However in terms of the potential for their being bias, or the appearance of bias, because of the way in which commissioners are appointed the Commissioner does not accept the complainant's point.

43. The EC may be unique in that its functions focus on the conduct of political parties and therefore those parties must themselves have confidence in those regulators. However there will be a number of public authorities whose senior staff are appointed by the Crown following a similar procedure which have functions capable of scrutinising the performance of politicians or the departments government ministers run. Whilst the Commissioner would agree that the actual work of the EC means that there will always some public interest in disclosing information on how it performs those functions, the Commissioner does not consider this is heightened by how its commissioners are appointed. Furthermore, having reviewed the withheld information there is nothing which would suggest that the investigation was anything other than robust and challenging, within the limits of powers it operated under at that time.
44. The complainant also argues that a higher degree of transparency is required because the EC has been found to have acted with maladministration in respect of a similar investigation. If the EC got it wrong when investigating donations to the Liberal Democrats, why should the public have confidence that the EC got it right when investigating the Bearwood donations? Clearly there is value in the public having confidence in the ability of the EC to regulate political parties effectively. A lack of confidence in the regulator would, in turn, undermine confidence in the political process itself. The PHSO report will affect the public's confidence in the EC. It should be noted though that the PHSO report only finds maladministration in respect of how it investigated whether the Liberal Democrats had carried out all reasonable checks as to the identity of the donor. The EC's investigation was broader and focussed on whether the donation was actually permissible. The EC has rejected the PHSO's finding and is raising the matter with the Speakers Committee which oversees its work on behalf of Parliament, in effect it is appealing the PHSO's finding.
45. So although the PHSO's findings do increase the public interest in understanding more fully how the EC conducted the Bearwood investigation, that report is based on the particular circumstances surrounding the donations made to the Liberal Democrats and concerns only one aspect of the EC's regulatory functions.
46. The complainant also contended that the EC are custodians of elections in the UK and the importance of this function increases the need for transparency. This is a valid argument and the Commissioner has taken

account of this point when considering the public having confidence in how the EC carries out its functions generally. It is however a double edged sword as there is also a public interest in not disclosing information which may prejudice the EC's ability to carry out those important functions.

47. The Commissioner accepts there are some strong public interest arguments in favour of disclosing the requested information. However not all these factors relate to the entire body of information that has been requested. For example arguments regarding the controversy over the extent to which the Party cooperated only concern those exchanges between the EC and the Party on that subject. Similarly arguments relating to the EC's duties in respect of monitoring compliance with a Party's obligations to check a donor's identity within 30 days may be discussed in internal memos. Therefore these factors cannot be simply aggregated and presented as an argument for disclosing all the requested information.

Public interest in maintaining the exemption

48. When considering the public interest in maintaining an exemption it is important to identify the interests which the exemption is designed to protect. Section 30(1)(a)(i) protects the effective investigation of offences. This will include not only the specific investigation for which the information was originally held, in this case the Bearwood donations, but also future investigations which could be prejudiced by the disclosure. This can involve considering whether revealing any investigatory techniques adopted in the Bearwood case would undermine their application in other cases.
49. The EC's investigation into the Bearwood donations was concluded in March 2010 when it published its case summary stating there was not sufficient evidence to show that the donations had breached PPERA. Information relating to the investigation was requested almost immediately and these requests ultimately resulted in decision notices being issued. At that time the EC argued that there was still a possibility of the investigation being reopened. However the Commissioner found that realistically there was little chance of this happening. Nothing in the four years since those requests were made suggests the prospect for reopening the case has increased. Given that the original case has been concluded and that there is no prospect of it being re-opened any public interest arguments in favour of maintaining the exemption will relate to the need to protect future investigations.
50. The EC has argued that the public interest lies in preserving its ability to properly investigate potential offences so that it can make regulatory decisions based on a firm, robust evidence. It believes that disclosing

the information would undermine the willingness of people to cooperate with investigations. Primarily this would be the political party in receipt of the donation, the donor and any other parties connected to the giving and receiving of the donation. Potentially however it could involve other third parties, for example, an external expert providing services to the EC.

51. At the time of the Bearwood investigation the EC only had powers to compel the political parties it regulated to provide it with their records or supply written responses to its enquiries. In effect this was limited to certain office holders within a Party. These very limited powers were highlighted in the case summary it produced. The EC had to rely on the voluntary cooperation of all other parties, including employees of the Party, the donor company and those associated with that donor company, when seeking the evidence it needed. It is very clear from the exchanges of correspondence contained in the requested information that those concerned expected any information they provided would remain private and confidential. The Commissioner can fully understand that disclosing information from the Bearwood investigation would make people very reluctant to cooperate on a voluntary basis in the future.
52. However in December 2010 PPERA was amended and the EC was granted new investigatory powers. These mean that the EC can now compel any person to provide it with the records and written explanations it needs. It can also now require any person to attend an interview. In light of this it could be argued that the value in promoting the voluntary cooperation of the parties under investigation is no longer a relevant public interest factor. This approach may be too simplistic though.
53. The EC has explained that it still prefers to rely on the voluntary cooperation of parties in the first instance, as this is the best way to obtain timely responses. The existence of its new statutory powers serve to encourage that cooperation, but in practice they are not the EC's first option as they can be slower and a less effective method of obtaining information.
54. Regardless of whether the EC is relying on voluntary cooperation, albeit backed up by the existence of statutory powers, or whether it has resorted to using those new powers, the EC is concerned that the information it received would be of a poorer quality if information from the Bearwood investigation was disclosed. It is probable that the parties under investigation would take more time to fully consider their responses, so delaying the investigation, if they thought the information could be made public. More importantly it is likely that they would be a lot less frank when providing explanations in writing or during an interview. The EC has commented that even reliance on its statutory

powers does not guarantee that it will receive the fullest and highest quality information. If those concerned believed the information they provided would be made public they would be more likely to provide only the minimal information required or to challenge both precisely what information was being asked for and the reasons for requesting it.

55. This would have a direct effect on the quality of the information the EC could base its decisions on. It should be remembered that when the EC is considering potential criminal offences the onus is on EC to collect evidence capable of proving beyond all reasonable doubt that an offence has been committed. The EC needs to collect high quality evidence. The Commissioner considers this to be a very significant argument.
56. The EC's need to rely on voluntary cooperation during the Bearwood investigation raises two points. First, although the EC has stressed that it still needs to be able to rely on voluntary cooperation, the Bearwood investigation would seem to suggest that voluntary cooperation is not a reliable means of gathering evidence. But as discussed above, the Commissioner considers the real issue is not so much whether the information is provided on a voluntary basis, but the quality of the information which is ultimately provided.
57. Secondly the Commissioner notes the EC's claim that officers from the Party did not agree to attend interviews on a voluntary basis. This claim has been disputed. It could be argued that disclosing any relevant information would be in the public interest. It would allow the public to form their own view on the level of the Party's cooperation and the validity of the EC's claims. It could also be argued that the disclosure would in fact promote voluntary cooperation. To be successful political parties must secure the trust and confidence of the electorate. That trust would be seriously eroded if they were seen to obstruct the EC's enquiries. Therefore knowledge that information revealing their level of engagement could be made public would prove a strong incentive to cooperate.
58. Nevertheless the Commissioner considers that in practice it is more likely that those required to provide evidence during an investigation would be far more circumspect in their responses. Even where a Party is prepared to cooperate with an investigation, it is more likely that it would wish to take more time producing a carefully considered response. They may also seek clarification as to the precise information being requested.
59. The evidence required by the EC may be contained in documents which are highly sensitive, not in respect of the financial information they contain, but, for example, they could also record political thinking and

strategies. Therefore a political party could have sound reasons for being cautious about what information they allow out of their control.

60. It should also be recognised that some of the other parties to the investigation, for example the donor, may be less motivated to cooperate with an investigation. Although the EC has statutory powers, it would still need to go to court to enforce those powers. Furthermore a recipient of a section 146 notice could still challenge the EC regarding the scope of the information they were being required to provide or the time in which they were expected to respond. Therefore if someone was concerned about potential public disclosure, they could still attempt to frustrate the investigation. Such delays could be extensive when it is considered that initial enquiries often raise further questions.
61. The complainant has drawn the Commissioner's attention to the Tribunal's decision in *Ferguson v Information Commissioner* and the EC (case number EA/2010/0085). That case concerned the EC's investigation into a donation made to Wendy Alexander's campaign to become leader of the Labour party in the Scottish Parliament. The Tribunal found that section 30(1) could not be maintained in the public interest in respect of two elements of the request. In reaching that decision the Tribunal commented at paragraph 81 that the EC's argument that disclosure would inhibit future cooperation was "grossly overstated" and pointed out that politicians and their supporters had an incentive to cooperate with such investigations.
62. However in that case the information under consideration was simply the identity of the individuals who had provided responses to two specific issues raised by the EC. In other words, it was simply the identity of who conveyed the answers to particular questions on behalf of the Labour party. This information can be characterised as relating to the administrative side of the investigation. The Commissioner accepts that disclosing such information may not have a significant impact on the willingness of others to cooperate with similar investigations in the future. It is also important to note that in that case Wendy Alexander's campaign team had acknowledged it had accepted an impermissible donation at an early stage in the investigation.
63. So whilst accepting that politicians do have an incentive to be seen to cooperate with EC investigations, the Commissioner finds that the potential prejudice to the willingness of people to cooperate with future investigations that would be caused by the disclosure of the requested information which is the subject of this notice is far greater than that in the Wendy Alexander case.
64. The EC has commented that it would not be possible to carry out the number of investigations that it does within the constraints of its current

resources if it had to go through the courts to enforce its powers on a regular basis. The Commissioner understands the rationale of this argument. However having considered the EC's annual report for 2013/2014⁶ it is not clear how great a volume of work is represented by consideration of potential offences or what level of resources are available to the EC for such work. Its annual report states that it carried out 36 initial assessments and case reviews over the year, but no actual investigations were conducted. It is understood that initial assessments are carried out to determine whether there are grounds for commencing a full investigation.

65. It is also noted that the annual report explains that the vast majority of these enquiries were completed within the EC's target timescales and that it was able to do so whilst relying on voluntary cooperation, meaning there was no need to fall back on its investigatory powers. This would suggest that reliance on voluntary cooperation is both effective and efficient.
66. The Commissioner accepts that disclosing the requested information would create the perception that information provided in other investigations could also be disclosed. This in turn would impact on the level of cooperation the EC received. This would certainly delay investigations and could ultimately prevent the EC collecting the information it requires.
67. Whilst it can be argued that any disclosure of information would have a negative impact on the willingness to cooperate with an investigation, the extent of that impact will really be determined by the significance and sensitivity of the information disclosed. The information is now over four years old at least. However this does not diminish its sensitivity. A great many of the politicians that were active at the time of the Bearwood investigation still represent the Party. Lord Ashcroft, who was involved in the investigation, is still a Conservative peer. Furthermore, as the EC has pointed out, this period is not a long time in politics and political rivals would inevitably seek to make political capital out of any information that was disclosed. The imminent general election also heightens the sensitivity of the disclosure.
68. Disclosing information that revealed confidential investigatory techniques would harm the effective investigation of criminal offences. It is noted that the complainant has argued that the information is no longer as sensitive as it once was because the investigatory procedures

⁶ [Annual report and accounts 2013-14](#)

followed at the time of the Bearwood investigation are no longer followed. This is based on the complainant's interpretation of EC's response to the PHSO report into the donations made to the Liberal Democrats. Although that investigation was only concluded in November 2009, it had started back in 2005. It was in fact the EC's first high profile case. Following the publication of the PHSO's report into that investigation the EC issued a response⁷. In that response the EC refers to, what it describes as, significant changes to the way in which it regulates and that now its investigative work follows procedures based on good practice.

69. The EC has advised the Commissioner that although it has new powers to require people to provide it with information, these powers in effect simply place it in a stronger position to carry out investigations on a voluntary basis. Although this would seem to contradict the statements in its response to the PHSO report this is not necessarily so. A closer reading of that response would suggest that the EC is commenting on changes since 2005 rather than 2010 and any changes referred to may not be in respect of the techniques used during the Bearwood investigation. Having said that, having looked at the requested information, the Commissioner has failed to identify any particular information which would reveal confidential techniques. The possible exception being the forensic accounting reports. However these were produced by external experts whose methods the EC would have no control over. Therefore the Commissioner finds that no weight should be attributed to the argument that disclosing the withheld information would undermine future investigation by disclosing investigatory techniques.
70. Although some of the requested information could be characterised as relating to the administrative side of the investigation, most of it relates to core issues which were under investigation, the evidence that was obtained, the process through which that evidence was collected and the EC's assessment of that evidence. This includes legal advice and advice from forensic accountants. The requested information also includes the full report submitted to the Board of the EC setting out in detail how the investigation was conducted and what was discovered. The information therefore is very significant. Although this means that its disclosure would be very informative and would address many of the pro disclosure arguments discussed earlier, it also means that its disclosure would signal to many people caught up in future investigations that any information they provided could potentially be released with the subsequent impact on their willingness to cooperate.

⁷ http://www.electoralcommission.org.uk/_data/assets/pdf_file/0005/169835/2014-07-02-Electoral-Commission-response-to-PHSO.pdf

71. The significance of the information is also determined by what it reveals about the probity of the actual investigation. The complainant has drawn the Commissioner's attention to the PHSO's findings that in the Liberal Democrat investigation, which looked at similar investigation issues, the EC had acted with maladministration in failing to look at the steps the Liberal Democrats took to check the identity of the donor in more detail. However that finding relates to a narrow issue and the scope of the EC's investigation rather than on whether the EC had correctly investigated the issues it had identified as being most important. Therefore although there are legitimate questions over the priority the EC should place on monitoring compliance with section 56 of PPERA the Commissioner does not consider there to be any concerns raised in respect of the EC's conduct of the investigation into potential criminal offences under PPERA.
72. It has been established at Tribunal that there will be a higher public interest in disclosing information that would shed light on a potential miscarriage of justice, but there will be no comparable public interest in re-examining acquittals. The Bearwood investigation concluded that there was insufficient evidence that PPERA had been breached and therefore the public interest in disclosure is far less than would have been the case had the EC found that the Party had breached PPERA and this had resulted in prosecutions being pursued against individuals which had since been called into question.
73. If the information from the Bearwood investigation was disclosed this would lead to the press and political rivals re-examining the EC's conclusions. There would, in effect, be trial by media. Since the Party and individuals concerned have already been subjected to the EC's formal investigatory process as established under PPERA, the Commissioner considers there would be an element of unfairness were this to happen. The Tribunal has previously established that there is a public interest in preserving the courts as the sole forum for determining guilt and in the circumstances the Commissioner considers disclosing the requested information would start to undermine that principle. However the Commissioner also recognises that this has to be balanced against the public interest in disclosing information that would allow the public to consider both the effectiveness of the legislation in regulating the funding of political parties and how effectively the EC performs its functions under that legislation. These issues have already been set out under the public interest arguments in favour of disclosure.
74. As well as considering the impact disclosure would have on the parties under investigation, the Commissioner has also considered the potential impact on others who may be required to contribute to an investigation. In the Bearwood investigation the EC obtained legal advice and advice from forensic accountants. If in the future it was anticipated that such

expert advice would be disclosed there is a realistic prospect that the quality of the advice received could be affected. The advice may not be as full and frank as it would otherwise be, or the EC may not be as candid when seeking that advice. The Commissioner considers it likely that investigations into donations will often be complex, raising difficult issues around both the analysis of financial records and novel questions of law. He therefore considers it is important that the EC continues to be free to have confidential discussions with appropriate experts.

75. The EC has previously argued that disclosure would result in its own internal communications becoming more guarded. It has explained that its own officers would be more circumspect when discussing issues for fear that their comments would be scrutinised publicly within the context of political controversy. The Commissioner is normally very sceptical of the so called 'chilling effect'. However having considered the actual requested information, its sensitivity and significance to the investigation, together with the likely reaction to a disclosure of this kind, the Commissioner is satisfied that it would make internal discussions more difficult in the future. This would not be in the public interest.

Balance of the public interest

76. There are very strong public interest arguments in favour of disclosure and it is only if there are weightier arguments in favour of maintaining section 30 that the information can be withheld. There is a value in disclosing information that would reveal how the EC performs its regulatory role. In particular, it has been argued there is concern over the EC's monitoring of whether political parties take the required steps to ascertain the identity of any donor. There is also ambiguity as to what the EC's finding on this matter was in its published case summary. The public interest is heightened by the PHSO's finding of maladministration in respect of a similar investigation the EC conducted into donations made to the Liberal Democrat Party. Although the Commissioner is satisfied that some of the information captured by the request sheds light on this issues, the vast majority of the information is not relevant to that debate.
77. The EC's finding that Bearwood was the actual donor was also controversial. The requested information would explain fully the basis for that conclusion. There is a significant value in the public having confidence in the EC's competence and integrity. However, it is important to note that the Party and the other individuals concerned have been investigated in accordance with the formal procedures for dealing with such matters and it has been found that there was not sufficient evidence to show PPERA had been breached. There would be

some unfairness to those parties if disclosing the requested information would lead to trial by media.

78. Controversy also surrounded the EC's, disputed, claim that officials from the Party did not agree to be interviewed. There is a public interest in revealing the veracity of that claim. It also raises the question of whether at the time of the Bearwood investigation the EC had sufficient regulatory powers. However whether the legislation has been amended since then and the debate about whether the EC has the necessary powers to fulfil its functions has been largely resolved. Nevertheless there is still a genuine public debate over whether the actual legislation is effective in regulating the funding of political parties. In particular there is the issue of whether PPERA does and should prevent the funding of political parties from overseas. Elements of the requested information would inform that debate.
79. However satisfying the public interest issues discussed above would be at a cost. The Commissioner is satisfied that to disclose the information on the Bearwood investigation would seriously jeopardise the ability of the EC to investigate potential criminal offences under PPERA in the future. It would signal to others that any highly sensitive information they provided to the EC could be made public. The ability to compel those under investigation to provide information does not guarantee the EC will be furnished with all the facts and the fullest of explanations required for it to reach robust conclusions. Furthermore this perception that information would be disclosed would also restrict the freedom of the EC's officials to either discuss investigations in a full and frank manner and to seek and receive appropriate expert advice.
80. The very fact that the EC is responsible for the regulation of the political parties creates a public interest in disclosing information on how effectively it performs its functions and how effective the legislation under which it operates is in regulating political parties. However this has to be weighed against the public interest in preserving the ability of the EC to carry out that very important role. The Commissioner is satisfied disclosing the requested information would seriously undermine the ability of the EC to perform its investigatory functions. This outweighs the public interest in disclosing the information.
81. The Commissioner finds that section 30(10)(a)(i) has been correctly applied to the withheld information and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Right of appeal

82. 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

83. 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.
84. 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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