

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 24 March 2010**

**Public Authority:** The Electoral Commission  
**Address:** Trevelyan House  
Great Peter Street  
London  
SW1P 2HW

### Summary

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The complainant made a request to the Electoral Commission for information regarding its investigation into allegations that Wendy Alexander MSP's campaign for leadership of the Labour Party in Scotland had received an illegal donation. The public authority disclosed a quantity of information in response to the request but withheld information relating to the content of its investigation. The public authority subsequently disclosed some further information during the course of the Commissioner's investigation but continued to withhold information by relying on the exemptions in section 30(1)(a)(i) (investigations and proceedings), section 30(1) (Law enforcement) and section 40(2) (Personal information). The Commissioner has investigated the complaint and has found that the information is exempt under section 30(1)(a)(i) but that the public interest favours disclosure. However the Commissioner also found that the information is exempt on the basis of section 40(2), an absolute exemption, and that therefore the public authority was correct not to disclose it. The Commissioner found that in its handling of the request the public authority breached section 10(1) (Time for compliance with request) and section 17(1) (Refusal of a request) but requires no steps to be taken.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. On 25 January 2008 the complainant wrote to the public authority to request information regarding the public authority's investigation into allegations that Wendy Alexander MSP's campaign for leadership of the Labour Party in Scotland had received an illegal donation. The complainant separated his requests into 26 questions on the investigation in general, the evidential rules of the investigation and the content of the investigation. A full list of these questions is included in an annex to this decision notice.
3. The public authority acknowledged receipt of the request on 22 February 2008. It explained that it was still considering the public interest test in response to the request and aimed to respond by 29 February 2008.
4. On 29 February 2008 the public authority contacted the complainant again to say that it was still considering the public interest but would send a full response shortly. At this point the public authority had not yet confirmed or denied if it held the requested information.
5. The public authority responded to the complainant substantively on 10 March 2008. It said that it aimed to respond to all requests promptly and 'within the statutory timeframe of 20 working days, extendable under the public interest test'. It thanked the complainant for his patience whilst it considered the public interest test in relation to his request. The public authority now explained that it had completed its investigation in relation to the allegations against Wendy Alexander MSP. It provided the complainant with a link to a recent press statement it had issued in relation to this matter.
6. The public authority now responded to a number of the complainant's questions, specifically questions 1 to 16. At this stage the public authority refused to disclose the information it held falling within the scope of questions 17 to 26 relating to the content of its investigation. The public authority explained that this information was exempt from disclosure under section 30(1)(a). It explained that section 30(1)(a) provides that information is exempt if it has been held at any time by a public authority for the purpose of any investigation which the authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence. It went on to explain why the exemption applied in this particular case.
7. The public authority also cited section 30(2)(b) of the Act which provides for an exemption for information which relates to the obtaining of information from a confidential source. It explained that

much of the information held as part of its investigation was obtained in this manner. The public authority also outlined its reasons for concluding that the public interest in maintaining each exemption outweighed the public interest in disclosure.

8. Finally, the public authority suggested that section 44 of the Act would also apply to some of the requested information. Section 44 provides that information is exempt where disclosure is prohibited under any other law or enactment and the public authority said that disclosure may breach article 6 of the European convention on Human Rights, the right to a fair trial.
9. On 14 May 2008 the complainant asked the public authority to carry out an internal review of its handling of his request. The complainant set out in detail the reasons why he believed the public authority was wrong to refuse to disclose the remaining requested information.
10. The public authority presented the findings of its internal review on 20 June 2008 at which point it upheld its decision to refuse to disclose the information it held falling within the scope of questions 17 to 26 of the request. The public authority clarified that it was applying section 30(1)(a) to all of the information it held in respect of the Wendy Alexander investigation (and therefore all of the complainant's remaining questions) but that section 30(2)(b) and section 44 would also apply to some of the information.
11. The public authority responded to the complainant's arguments and elaborated on its reasons for concluding that the public interest favoured withholding the information.

## **The Investigation**

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### **Scope of the case**

12. On 23 June 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
13. On 13 August 2008 the complainant provided the Commissioner with a detailed submission challenging the public authority's decision to refuse to disclose the information it held in response to questions 17 to 26 by relying on the exemptions: section 30(1)(a), 30(2)(b) and section 44(1).
14. During the course of the Commissioner's investigation the public authority answered a number of the complainant's other questions,

specifically questions 17 to 20, 23 and 24. Therefore the Commissioner does not intend to undertake any further analysis of the public authority's handling of these particular requests.

## **Chronology**

15. On 17 March 2009 the Commissioner wrote to the public authority with details of the complaint. The Commissioner now asked the public authority to clarify what its position was in respect of each of the questions in parts 17 to 26 of the request. The Commissioner also highlighted what appeared to be a failure on the part of the public authority to respond to the complainant's request within 20 working days.
16. The public authority responded to the Commissioner on 16 April 2009. In response to the Commissioner's enquiries it confirmed that it held information falling within the scope of questions 17 to 26. It also said that it was satisfied that it had applied the exemptions within section 30 of the Act appropriately. However it went on to say that given 'the passage of time and in light of public statements made by some of the individuals involved' it could now disclose additional information. It now confirmed that the answer to questions 17, 18, 19, 20, 23 and 24 is 'yes' and the Commissioner subsequently communicated this information to the complainant. As regards its handling of the complainant's request the public authority acknowledged that whilst it had responded to the request within 20 working days it had failed to cite which exemptions it was relying on until its substantive response of 10 March 2008, in breach of section 17(1) of the Act.
17. On 1 June 2009 the Commissioner wrote back to the public authority to ask it to confirm which exemptions it was relying on for each of the remaining unanswered questions. In doing so the Commissioner asked the public authority to fully explain why the exemption applied and, in the case of the qualified exemptions, why the public interest in maintaining each exemption outweighed the public interest in disclosure. As regards the qualified exemptions, the Commissioner asked the public authority what consideration it had given to the timing of the request and the fact that the investigation had been completed by the time the request was received.
18. The Commissioner noted that questions 21, 22, and 25 were requests for the names of certain individuals who provided information to the Commission. At this stage the Commissioner did not require the names of these individuals but asked the public authority why the individuals concerned would have had an expectation of confidence in their dealings with the public authority. The Commissioner asked for a copy of the information falling within the scope of question 26.

19. The public authority responded to the Commissioner on 17 July 2009. It now confirmed that for all of the withheld information it was seeking to rely on section 30(1)(a)(i) in the first instance. For clarity, it confirmed that section 30(2) was not being applied. To the extent that any information fell outside the scope of section 30(1)(a)(i) the public authority explained that it would seek to rely, in the alternative, on section 31(1)(g), read in conjunction with section 31(2)(a). This provides that information is exempt if disclosure would, or would be likely to prejudice, the exercise by any public authority of its functions for the purpose of ascertaining whether any person has failed to comply with the law.
20. If necessary the public authority said that it would also seek to rely on section 40(2) on the grounds that the withheld information constituted the personal data of a third party and disclosure would breach the first data protection principle, which requires that personal data shall be processed fairly and lawfully. The public authority no longer sought to rely on section 44 of the Act, by virtue of article 6 of the European Convention on Human Rights.
21. The public authority explained that those interviewed as part of the investigation were read a statement prior to being interviewed and several were given assurances that the information they provided would be treated in confidence unless subject to disclosure under statutory obligations. The Commissioner was provided with copies of the relevant statements. As regards question 26, the public authority provided an answer to the question – why was the source of the donation recorded as Combined Property Services – in the form of a digest of information obtained during the course of its investigation. The public authority informed the Commissioner that it had notes of all the interviews conducted and would make this information available to the Commissioner if necessary.
22. On 7 September 2009 the Commissioner contacted the public authority to request copies of those portions of its interview notes which fell within the scope of question 26 of the request.
23. On 14 October 2009 the public authority provided the Commissioner with copies of the interview notes.

### **Findings of fact**

24. On 29 November 2007 Charlie Gordon MSP, a member of Wendy Alexander's Campaign team, announced that he was resigning as the Labour Party's Transport spokesman in the Scottish Parliament in the wake of allegations that the campaign had received an impermissible

- donation from Mr Paul Green, an individual not registered to vote in the UK. In announcing his decision to resign he explained that he was responsible for procuring the impermissible donation. At the same time Wendy Alexander's campaign manager Tom McCabe MSP acknowledged that there had been a breach of the law and that the campaign team would be co-operating with the public authority.<sup>1</sup> On 7 December 2007 Mr Gordon issued a statement in which he confirmed that he was 'in dialogue' with the public authority.<sup>2</sup>
25. On 29 November 2007 Mr Paul Green issued a statement setting out the circumstances in which he made his donation to the Wendy Alexander campaign and the role of Charlie Gordon MSP in securing that donation.<sup>3</sup>
  26. By 5 December 2007 Wendy Alexander's office had confirmed that it was co-operating with the public authority and was quoted as saying that it had supplied a 'huge amount' of documents to help the public authority's inquiry.<sup>4</sup>
  27. On 7 February 2008 the public authority issued a press statement regarding its investigation into the allegation that Wendy Alexander MSP's campaign for the leadership of the Scottish Labour Party had accepted an illegal donation. This statement confirmed that the public authority had completed its investigation and that it had established that an impermissible donation had been accepted from Paul Green, an individual not registered to vote in the UK, and the donation had been recorded as having been received from a UK registered company. The public authority explained that it had considered whether criminal offences may have been committed under section 56 and 61 of the Political Parties, Elections and Referendums Act 2000. Under section 56 of this Act there is an offence of accepting and retaining a donation from anyone who is not registered on an electoral register in the UK at the time of the donation. It added that it was also relevant to consider whether all reasonable steps were taken to avoid this. Under section 61 of this Act there is an offence of knowingly facilitating, concealing or disguising an impermissible donation and/or knowingly giving false information or withholding information in relation to an impermissible donation.
  28. As regards possible section 56 offences, the public authority said that whilst Wendy Alexander did not take all reasonable steps in seeking to comply with the relevant legislation, she did take significant steps. It said that in the circumstances it considered that it was not appropriate

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

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

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

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

nor in the public interest to report the matter to the Procurator Fiscal to pursue a prosecution. As regards possible section 61 offences, it said that there was insufficient evidence to establish if an offence had been committed. A full text of the statement is available on the public authority's website.

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

29. The Commissioner understands that there has been some criticism of the robustness of the public authority's investigation and the decision not to refer the matter to the Procurator Fiscal. The Scottish First Minister, Alex Salmond, was quoted as saying that the public authority's findings amounted to what was, in effect, a 'not proven' verdict.<sup>5</sup>

## Analysis

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30. A full text of the relevant statutes referred to in this section is included within the legal annex.

## Exemptions

### **Section 30(1)(a)(i) – Investigations and proceedings conducted by public authorities**

31. The public authority has explained that section 30(1)(a)(i) applies to all of the outstanding information, namely the information it holds in respect of questions 21, 22, 25 and 26. Questions 21 and 22 are requests for the names of individuals who gave particular answers to the public authority in the course of its investigation. Question 25 is a request for the name of the individual who recorded the impermissible donation as coming from Combined Property Services whereas question 26 is a request for the answer the public authority received to the question – why was the source of the donation recorded as a Combined Property Services. The information is held in the form of notes of interviews conducted with various individuals.
32. Section 30(1)(a)(i) provides that information is exempt if it has been held at any time for the purposes of any investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence.

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

33. Section 30 is a class based exemption. Where a class based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage it. In this case the requested information was held for the purposes of the investigation into the donation made to Wendy Alexander's campaign.
34. The public authority has stated that in this case it was considering whether offences had been committed under section 56 and section 61 of the Political Parties, Elections and Referendums Act 2000 (PPERA). Under section 145 of the PERA the public authority has the function of monitoring compliance with the restrictions imposed under parts III to VII of this legislation. Sections 56 and 61 of the PERA both fall within part IV of the Act. Therefore the public authority has the function of monitoring compliance with sections 56 and 61 and consequently the investigation was one that the public authority had the duty to conduct.
35. The public authority has also advised that the investigation falls under section 30(1)(a)(i) of the Act because the investigation was conducted with a view to deciding whether to report the matter to the Procurator Fiscal for consideration of whether Ms Alexander, or anyone else, should be charged with an offence. The public authority contends that when applying section 30(1)(a)(i) it does not matter whether it has charged any individuals with an offence as the exemption is broad enough to cover situations where an investigation is carried out by one public body in order to inform a decision by a second public body over whether a person should be charged. The Commissioner agrees with the public authority, and is satisfied that the investigation in this case is of the type covered by this particular exemption. The withheld information was obtained as part of interviews with individuals involved in the Wendy Alexander campaign and so was held as part of that investigation.

### **Public interest test**

36. Section 30(1)(a)(i) is a qualified exemption and therefore is subject to a public interest test under section 2(2)(b) of the Act. Section 2(2)(b) provides that information to which a qualified exemption applies may not be disclosed only where the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Public interest arguments in favour of disclosing the requested information**

37. The complainant provided the Commissioner with a detailed submission setting his arguments in favour of disclosing the requested information. The Commissioner has summarised the main arguments as follows:



- There should be transparency in order to show that 'justice is being done'.
  - People who are subject to an investigation by the public authority are not ordinary members of the public but are instead individuals who put themselves up for election to public office. The public are therefore entitled to expect the highest levels of probity from such people.
  - The complainant suggested that the explanation given by the Wendy Alexander campaign team as to why the donation was incorrectly recorded as coming from a permissible source would either be a 'plausible and innocent explanation' or it would not. The complainant contends that if the explanation was indeed plausible and innocent then there could be no prejudice caused by revealing this information. If, on the other hand, the explanation was not 'plausible and innocent' then, the complainant argues, the public interest would be served by disclosing the information and thereby shedding further light on the extent to which the public authority is meeting its duty to monitor compliance with the PPERA.
38. The Commissioner accepts that these arguments are pertinent to the public interest in disclosing the requested information

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

39. The public authority has argued that the restrictions in part IV of the PPERA in relation to political donations are an important part of the legal framework governing elections and political campaigning and that in order to maintain public trust and confidence in the political system it is important that they are upheld. Therefore the public authority argues that there is a very strong public interest in upholding the practical effectiveness of section 145 of the PPERA.
40. However, the public authority has explained that its powers of investigation are limited. Under section 146(1) of the PPERA the public authority has the power to require the 'relevant person' of a 'supervised organisation or individual' to provide it with information and explanations for the purposes of its investigations. The public authority explained that a 'supervised organisation or person' as defined under section 146(9) of the PPERA means:
- I. a registered party, or (in the case of such a party with accounting units) the central organisation of the party or any of its accounting units;

- II. a recognised third party (within the meaning of Part VI of the Act);
  - III. a permitted participant (within the meaning of part VII).
41. In this case the public authority has claimed that its investigation was not an investigation into a supervised person because the donation was made to Wendy Alexander's leadership campaign rather than the Labour Party itself and Ms Alexander was neither a recognised third party nor a permitted applicant as defined in the PPERA. However Ms Alexander was a regulated donee and therefore someone to whom section 56 of the PPERA applied which in turn meant that an offence under section 61 of the PPERA could be committed in connection with her campaign.
42. The public authority has argued that two points follow from the above. Firstly, offences could be committed in connection with donations made to Wendy Alexander's campaign. Secondly, in investigating these offences the public authority could not use its powers under section 146 of the PPERA. As a result the public authority's ability to carry out an effective investigation is, it argues, 'entirely dependent on being able to secure the co-operation of those from whom it seeks information'. The public authority contends that if the information in this case were disclosed it would prejudice its ability to obtain co-operation in future cases as individuals would be discouraged from co-operating if there was the prospect that information they supply could be disclosed.
43. The public authority went on to say that similar arguments would apply in cases where it is investigating a supervised organisation or individual as it may still need to rely on the voluntary co-operation of individuals who are not current or former officers of a supervised organisation or, in the case of a supervised individual, it may need to obtain information from persons other than that individual.
44. Another argument advanced by the public authority was that disclosure could have prejudiced any future investigation as it was still possible, at the time it responded to the request, that the investigation could have been re-opened if additional information came to light.
45. The Commissioner would also add that, in principle, there is an inherent public interest in protecting information obtained in the course of investigations. The Information Tribunal in *Toms V the Information Commissioner* suggested that it recognised that there is a public interest in the protection of investigations by noting that in considering the public interest test it had had regard to the white paper which

preceded the introduction of the 2000 Act.<sup>6</sup> It highlighted the following extract:

"[freedom of information] should not undermine the investigation, prosecution or prevention of crime, or the bringing of civil or criminal proceedings by public bodies. The investigation and prosecution of crime involve a number of essential requirements. These include the need to avoid prejudicing effective law enforcement, the need to protect witnesses and informers, the need to maintain the independence of the judicial and prosecution processes, and the need to preserve the criminal court as the sole forum for determining guilt."<sup>7</sup>

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

46. The public authority has argued that the public interest in greater transparency and accountability is reduced because it had already placed information in the public domain in the form of the press release referred to at paragraphs 27 and 28 above. The public authority has suggested that the withheld information would add little to public understanding of its investigation or of its work generally. The Commissioner does not accept this argument. On the contrary, the Commissioner considers that there is a strong public interest in greater transparency in this case especially considering the wording of the press release.
47. There is clearly a degree of ambiguity surrounding the public authority's decision not to refer the Wendy Alexander case to the Procurator Fiscal especially with regard to section 56 of the PPERA. The public authority said that its investigation had established that an impermissible donation had been accepted by the campaign but had decided not to refer the matter to the Procurator Fiscal because it was not appropriate or in the public interest. However the public authority has not explained why it was not appropriate or in the public interest to refer the matter to the Procurator Fiscal. As a result, in the circumstances of this case, the Commissioner has given particular weight to the arguments in favour of greater transparency and increasing public understanding of decisions made by public authorities.
48. The Commissioner is also persuaded by arguments in favour of greater transparency because disclosure of this particular information would help to demonstrate the effectiveness of the public authority and the extent to which it is meeting its obligations under section 145 PPERA. The public authority has argued that there is a public interest in maintaining the practical effectiveness of section 145 of the PPERA as

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<sup>6</sup> Patrick Toms v The Information Commissioner, [EA/2205/0027]

<sup>7</sup> Your Right To Know: The Government's Proposals for a FOI Act (Cm.3818, 11 December 1997), para. 7

the restrictions within the PPERA are part of a legal framework by which public trust and confidence in the political system is maintained. This is undoubtedly true, but at the same time there can only be public trust and confidence in the public authority if its decisions are adequately explained and sufficiently transparent.

49. The public authority has also suggested that the public interest in disclosure is reduced because it had released information to the complainant both at the time of his request and during the course of the Commissioner's investigation. Whilst the Commissioner will judge compliance with a request at the internal review stage, when reaching his decision on the balance of the public interest the Commissioner can only take into account the facts as they were at the time the request was received or at least by the deadline for statutory compliance.
50. Therefore, the Commissioner can take into account the public authority's press statement as this was released within 20 working days of it receiving the complainant's request. However, the Commissioner cannot take into account the additional disclosure of information made during the Commissioner's investigation. Indeed the public authority itself explained that this disclosure was made on a discretionary basis, outside of the scope of the Act, and that it maintained that it was correct to withhold this information at the time the request was received.
51. The Commissioner can consider whether the information initially released by the public authority affected the balance of the public interest. However this information relates mainly to the general workings of the public authority and its approach to investigations rather than the Wendy Alexander investigation and therefore there is still a strong public interest in disclosing the remaining withheld information.
52. The Commissioner has gone on to consider the public interest in withholding the information and recognises that in this case and in future cases the public authority's investigation may be dependent on the voluntary co-operation of those people being investigated as well as other individuals. The Commissioner accepts that there is a risk that disclosure would discourage individuals in future cases from co-operating with the public authority which would in turn prejudice its ability to conduct its investigations and that this would not be in the public interest. However, the Commissioner also believes that the extent of any prejudice caused to the public authority's future investigations is likely to be reduced because the public authority would still be able to use its statutory powers in investigations into supervised organisations or persons.

53. In considering what weight to give to the arguments in favour of withholding the information the Commissioner has also looked at the stage which the investigation had reached at the time of the request. The investigation had been completed by the time the request was received although the public authority has claimed that there was a possibility that the investigation could have been re-opened had new information come to light. The Commissioner considers that the possibility of this occurring was slight as the public authority had already conducted a thorough investigation during which it had interviewed a number of individuals. Moreover, the Commissioner is of the view that because of the Act's assumption in favour of disclosure a public authority would need to demonstrate that there is a real possibility of a case being re-opened in order for this argument to carry any real weight.
54. Nevertheless, the Commissioner is mindful of the principle of the inherent public interest in protecting information obtained in the course of an investigation and in this case considers that there is a strong public interest in avoiding prejudicing the public authority's ability to conduct future investigations. At the same time the Commissioner considers that the lack of a clear and definitive explanation for the public authority's decision not to refer the case to the Procurator Fiscal is the most compelling factor in this case. Had such a statement been made by the public authority the Commissioner may have reached a different decision in this case. As it stands, the Commissioner has decided that on balance the public interest favours further disclosure in this case.
55. Of the remaining unanswered requests question 21 was for the name(s) of individual(s) who provided an answer to the question – who recorded the donation as coming from combined Property Services? Similarly, question 25 was for the name(s) of individual(s) who provided an answer to the question – why was the donation recorded as coming from combined Property Services? Questions 22 was a request for the name of the individual who recorded the source of the donation as Combined Property Services and question 26 was a request for the response the public authority received to the question – why was the donation recorded as coming from combined Property Services?
56. In deciding the level of information which ought to be released the Commissioner has compared the withheld information against the public statements made by individuals involved in the case. Given the fact that when the request was received it was already public knowledge that Wendy Alexander's office and campaign team were co-operating with the public authority the Commissioner has decided that the prejudice caused by answering questions 21 and 25 does not

outweigh the public interest in disclosure. The information held in respect of question 26 constitutes the notes of interviews conducted with various individuals during the course of the investigation. The Commissioner has decided that the public interest would be served by disclosure of further information and in light of statements referred to above and in view of the public interest in accountability the Commissioner has decided that the notes of interviews conducted with two particular individuals should be disclosed. Disclosure of these interview notes would also involve the disclosure of information in respect of question 22. The Commissioner is informing the public authority of the names of the individuals whose interview notes the public interest favours disclosure in a confidential schedule.

### **Section 31(1) – Law enforcement**

57. The public authority had also said that if the Commissioner were to conclude that section 30(1)(a)(i) did not apply it would seek to rely, in the alternative, on section 31(1)(g) read in conjunction with section 31(2)(a). Section 31(1)(g) provides that information, which is not exempt information by virtue of section 30 is exempt if disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2). The relevant purposes under section 31(2)(a) is the purpose of ascertaining whether any person has failed to comply with the law.
58. The Commissioner has already decided that the remaining withheld information is exempt under section 30(1)(a)(i) but that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. In these circumstances the section 31 cannot be engaged as the exemption only applies to information which is not exempt by virtue of section 30.

### **Section 40(2) – Personal Information**

59. The public authority has also claimed that section 40(2) applies to the withheld information. Therefore the Commissioner has gone on to consider whether section 40(2) would apply to any of the information in relation to which he has decided that the public interest in maintaining the section 30(1)(a)(i) exemption does not outweigh the public interest in disclosure. In deciding to consider the public authority's late application of section 40 the public authority is mindful of his obligations as a public authority under the Human Rights Act 1998, which prevent him from acting incompatibly with rights protected by the HRA.
60. Section 40(2) provides that information is exempt if it constitutes personal data of which the applicant is not the data subject and

satisfies one of the conditions in section 40(3) or section 40(4). In this case the relevant condition is contained within section 40(3)(a)(i) which applies where the disclosure of personal data would contravene any of the data protection principles.

Is the information personal data?

61. In investigating the application of the exemption it is first necessary to establish if the information is personal data. Personal data is defined in the Data Protection Act 1998 (DPA 1998) as:

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

(a) from those data, or

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

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

62. In this case the information withheld under section 40(2) constitutes the names of individuals who were interviewed during the course of the investigation and the notes of those interviews detailing their and others involvement in the events leading up to the acceptance of the donation from Mr Paul Green and that donation being recorded as originating from Combined Property Services. The Commissioner is satisfied that this constitutes personal data.

The first data protection principle

63. In this case the public authority has said that it believes that disclosure would contravene the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> data protection principles, however, the Commissioner considers that it is the 1<sup>st</sup> data protection principle which is most relevant in this case. The first data protection principle provides that:

‘Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.’

64. In this case the withheld information constitutes the personal data of Wendy Alexander and other individuals interviewed during the course of its investigation. The information was held as part of the public authority's investigation into potential offences committed under section 56 and 61 of the PPERA. As such the information falls within the definition of sensitive personal data under section 2(g) of the DPA 1998 because it consists of information as to the commission or alleged commission by the data subject of any offence.
65. The Commissioner's approach is that where information constitutes sensitive personal data disclosure of that information will in most circumstances be unfair. By its very nature, sensitive personal data has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner considers that it would be unfair to disclose the requested information.
66. The Commissioner has also taken into account the particular circumstances of this case and in doing so has considered the expectations of the individuals concerned. The public authority has explained that the individuals interviewed during the course of its investigation were each cautioned during which it was made clear that they were attending the interview on a voluntary basis. The public authority also explained that several of the witnesses were informed by its staff to the following effect:

"The [Electoral] Commissioner will treat this interview as confidential and would not voluntarily disclose information obtained in the interview. However, there may be circumstances where there is a statutory requirement to disclose the content of the interview (for instance, court proceedings) where it would be necessary to do so."
67. This would suggest that those individuals who were interviewed during the course of the investigation would have a reasonable expectation that the content of their interviews would not be disclosed.
68. Given that the information constitutes sensitive personal data, and in light of the particular circumstances of the case, the Commissioner has decided that information which is not exempt by virtue of section 30(1)(a)(i) is in any event exempt under section 40(2) of the Act.

### **Procedural Requirements**

69. The public authority initially responded to the request on 22 February 2008. However, at this point the public authority did not confirm or deny if it held the requested information. Therefore, by failing to



comply with section 1(1)(a) within 20 working days the public authority breached section 10(1) of the Act.

70. In its response of 22 February 2008 the public authority stated that it needed further time to consider the public interest test but cited no exemption. Where a public authority is relying on a claim that a qualified exemption applies to a request for information it may provide the complainant with a separate notice under section 17(3) of the Act, within such time as is reasonable in the circumstances, setting out its public interest determination.
71. However, a public authority must still provide the complainant with a notice under section 17(1) within the time for complying with section 1(1). This notice must state that the requested information is exempt, state which exemption(s) applies and state why the exemption(s) applies. By failing to issue an adequate refusal notice within 20 working days the public authority breached section 17(1) of the Act.
72. The public authority cited the section 40(2) exemption for the first time during the course of the Commissioner investigation. By failing to introduce this exemption within 20 working days of receiving the request the public authority breached section 17(1) for a second time.

## **The Decision**

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73. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
  - The public authority dealt with the request in accordance with the Act to the extent that it correctly withheld information under section 40(2) of the Act.
74. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
  - The Commissioner has decided that whilst section 30(1)(a)(i) of the Act was engaged the public interest in maintaining the exemption did not outweigh the public interest in disclosure of some of the requested information.
  - The public authority breached section 10(1) of the Act by failing to confirm or deny if it held the requested information within 20 working days of receiving the request.

- The public authority breached section 17(1) of the Act by failing to issue an adequate refusal notice within 20 working days of receiving the request.
- The public authority breached section 17(1) of the Act by failing to cite the section 40(2) exemption within 20 working days of receiving the request.

## Steps Required

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75. The Commissioner requires no steps to be taken.

## Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 24<sup>th</sup> day of March 2010**

**Signed .....**

**Graham Smith  
Deputy Commissioner and Director of Freedom of Information**

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

## Annex A – The requests

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### General questions on an investigation:

1. Is the Electoral Commission currently conducting an investigation into donations to Ms Wendy Alexander's campaign to become leader of the Labour Party in Scotland?
2. If so, who in the Commission is in charge of the investigation?
3. Is Mr Andy O'Neill, the Head of the Electoral Commission Scotland Office, a current or past member of the Labour Party?
4. Has Mr O'Neill disqualified himself from any involvement in this investigation?
5. Has Lord Murray Elder disqualified himself from any involvement in the investigation?
6. Does Lord Murray Elder have any involvement in the investigation?
7. Has any information about the investigation been made available by the investigation team to Lord Murray Elder?
8. Does a specific set of rules, processes or procedures exist for the investigation?
9. If so, who defined this set of rules, processes or procedures?
10. Is it possible to obtain a copy of this set of rules, processes or procedures?
11. Will any interim report of the investigation be made available to the public?
12. When will the final report of the investigation be made available to the public?

### Questions on the evidential rules of the investigation:

13. Under the rules of the investigation, can the Labour Party, or named individuals, be compelled to give evidence to the investigation?
14. Who is responsible for the definition of any specific questions to be asked by the investigation?
15. Can the Labour Party, or named individuals, be compelled to answer specific questions?
16. If the Labour Party, or named individuals, refuse to give evidence to the Commission, or refuse to answer specific questions to the Commission, will this fact be recorded and documented in any public report into the findings of the investigation?

### Questions on the content of the investigation:

17. Is it the case that a document was submitted to the Electoral Commission by Ms Wendy Alexander's Campaign Team, stating

- that a donation had been made to the campaign by a company called Combined Property Services?
18. Has the investigation established that the source of this donation was in fact an individual called Mr Paul Green, a resident of The Channel Islands?
  19. Has the investigation asked the Labour Party, or any individual, who recorded the source of the above donation as Combined Property Services?
  20. Has the investigation received a reply to this question?
  21. Who provided the answer to the question?
  22. Who on behalf of Ms Alexander's campaign did record the source of the donation as Combined Property Services?
  23. Has the investigation asked the Labour Party, or any individual, why the source of the above donation was recorded as Combined Property Services?
  24. Has the investigation received a reply to this question?
  25. Who provided the answer to the question?
  26. What was the reply to the question?

## **Annex B – Sections of the Act**

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**Section 1(1)** provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

**Section 2(2)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

**Section 17(1)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

**Section 17(3)** provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

**Section 30(1)** provides that –

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence,  
or  
(ii) whether a person charged with an offence is guilty of  
it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct."

**Section 31(1)** provides that –

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime,  
(b) the apprehension or prosecution of offenders,  
(c) the administration of justice,

- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

**Section 31(2)** provides that –

"The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."



**Section 40(2)** provides that –

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

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

**Section 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”