

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 June 2011

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

Summary

The complainant made a freedom of information request to the Electoral Commission for information related to its investigation into donations made to the Liberal Democratic Party by the company 5th Avenue Partners Ltd. Most of the request was dealt with to the complainant's satisfaction, however, some of the requested information was withheld under the exemption in section 42(1) of the Act (Legal professional privilege). The Commissioner has investigated the complaint and has found that section 42(1) was correctly engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosure. The Commissioner also found that in its handling of the request the Electoral Commission breached section 17(1) of the Act (Refusal of a request) but requires no steps to be taken.

The Commissioner's Role

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

2. On 23 May 2010 the complainant wrote to the public authority to request information regarding its investigation into allegations surrounding donations made by 5th Avenue Partners Ltd to the Liberal

Democratic Party. The request was numbered from 1 – 12 and read as follows:

- In reaching its decision that the corporate veil could not be lifted, did the Electoral Commission refer to any specific legal precedents on the circumstances in which the corporate veil could or could not be lifted and if so please name the cases?
- Does the Electoral Commission hold any information whatsoever, indicating that at the time of incorporation or subsequent to incorporation, 5th Avenue Partners was *used* as a vehicle for impropriety: namely facilitating theft or fraud or otherwise acquiring, retaining or controlling money obtained through dishonesty?
- Does the Electoral Commission hold any information whatsoever indicating that 5th Avenue Partners Ltd was corporately a party to theft or fraud?
- Does the Electoral Commission hold any information whatsoever indicating that Michael Brown was the sole director of 5th Avenue Partners Ltd?
- Does the Electoral Commission hold any information whatsoever indicating that Michael Brown had ultimate control of 5th Avenue Partners Ltd; through his control of the parent company, 5th Avenue Partners GmbH, or was otherwise the controlling mind behind 5th Avenue Partners Ltd?
- Does the Electoral Commission hold any information whatsoever indicating that Michael Brown was personally involved in stealing or fraudulently obtaining money controlled by 5th Avenue Partners Ltd?
- Does the Electoral Commission hold any information whatsoever indicating that Michael Brown was personally involved in directly stealing from or directly defrauding any named private individual(s) as opposed to 5th Avenue Partners Ltd or any other corporate body?
- Does the Electoral Commission hold any information whatsoever indicating that Michael Brown was personally involved in dishonestly obtaining money from a corporate body other than 5th Avenue Partners Ltd or its parent company?
- Detective Sergeant Nigel Howard of the City of London Police's Economic Crime Unit told the Times Newspaper of 29/11/2008 that 5th Avenue Partners Ltd was "*just a sham*". In paragraph 3.2 of its judgement, the Electoral Commission gives examples to allegedly demonstrate that 5th Avenue Partners Ltd was carrying on a business. Does the Electoral Commission hold any information whatsoever indicating that while 5th Avenue Partners Ltd may have had the appearance or even the process to operate as a genuine business, office, bank account etc, it fundamentally failed to operate as a legitimate business because its *raison d'être* was to facilitate theft or fraud?

- Does the Electoral Commission hold any information whatsoever indicating that 5th Avenue Partners Ltd received any substantial income, which was not later stolen or was in the course of being stolen or obtained fraudulently when it came under the control of the company?
 - Does the Electoral Commission hold any information whatsoever indicating that 5th Avenue Partners Ltd made its donations to the Liberal Democratic Party from monies it generated lawfully and not from criminal activity?
 - Does the Electoral Commission hold any information whatsoever indicating that under the PPERA, a company used primarily to facilitate theft or fraud can be described as carrying on a business?
3. The Electoral Commission acknowledged the request on 26 May 2010 but a substantive response was not issued until 5 July 2010. Given that most of the complainant's requests only asked it to confirm whether it held particular information the public authority responded to each question by informing the complainant whether or not it held relevant information. Where information was held the public authority went on to inform the complainant that it was exempt from disclosure under one or more of the following exemptions: section 21 (Information accessible by other means), section 30 (Investigations), section 31 (Law enforcement) and section 41 (Information provided in confidence).
4. As regards the first request, where the complainant had asked for recorded information, the public authority confirmed that it held the information but that it was being withheld under the exemption in section 42 (Legal professional privilege). The public authority explained that the list of cases was examined as part of the legal advice it had obtained in relation to its investigation and was legally privileged as it constituted communications and advice between the public authority and its legal advisors. It confirmed that the information had been kept confidential and had not been released into the public domain or to another third party which would waive the privilege. As section 42 is a qualified exemption the public authority carried out a public interest test and set out the factors it had taken into consideration. It concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
5. On 10 July 2010 the complainant contacted the public authority and asked it to carry out an internal review of its handling of his request. In particular the complainant asked the public authority to reconsider its response to the first request and pointed out that he was only seeking the names of precedent cases referred to by the public authority as part of its investigation, rather than the legal advice itself. As regards

the remaining requests the complainant asked the public authority to state 'unequivocally' that it held the information he had referred to. The complainant also asked the public authority to review the length of time it took to respond to his request.

6. The public authority presented the findings of the internal review on 2 September 2010. For the first part of the request it upheld its decision to refuse to disclose the requested information under the section 42 exemption. For the remaining parts of the request the public authority said that it was satisfied that its original response had stated whether or not it held information in relation to each of the complainant's request. Where information was held the public authority upheld its application of the exemptions.

The Investigation

Scope of the case

7. On 3 September 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority's response to his first request. The complainant confirmed that he was satisfied that the other 11 requests were answered satisfactorily.
8. The complainant also asked the Commissioner to consider the delay in the public authority responding to the request and the time taken to carry out the internal review.

Chronology

9. The Commissioner contacted the public authority with details of the complaint on 13 January 2011. The Commissioner now asked the public authority to provide him with copies of the information falling within the scope of the first request. The Commissioner said that as the complainant had indicated that he was not interested in the content of any legal advice his view was that a correct interpretation of the request is that only the names of any relevant cases would fall within the scope of the request. The Commissioner also asked the public authority to fully explain why this information attracted legal professional privilege and to elaborate on its reasons for concluding that the public interest in maintaining the section 42 exemption outweighed the public interest in disclosure.

10. The public authority responded to the Commissioner on 8 February 2011 and provided a copy of the information falling within the scope of the first request. It also provided further submissions as to why the information was considered to be exempt under section 42 and why it believed the public interest favoured maintaining the exemption. In doing so it explained that as part of its investigation into the donations made by 5th Avenue Partners Ltd it had obtained legal advice from both its internal legal team as well as external counsel. In considering this advice it said that it had had regard to relevant case law on 'lifting the corporate veil'.
11. Having considered the public authority's response the Commissioner decided that he would need to see copies of the legal advice in which the precedent cases had been considered or discussed. Therefore on 22 March 2011 the Commissioner contacted the public authority to request copies of any documents which contained the references to the withheld information (the list of precedent cases). The Commissioner said that this would presumably include the actual legal advice itself and any relevant instructions. The Commissioner asked that the public authority respond within 10 working days.
12. Unfortunately, due to problems in arranging for the information to be securely passed to the Commissioner, the Commissioner was not able to obtain copies of this information until 17 May 2011.

Findings of fact

13. The public authority conducted an investigation into donations made by the company 5th Avenue Partners Ltd to the Liberal Democrats in 2005 which totalled over £2.4m. As part of its investigation the public authority considered whether 5th Avenue Partners Ltd was a permissible donor under the Political Parties, Elections and Referendums Act 2000 (PPERA) and whether this company was in fact the true donor. Under the PERPA it is an offence to accept and retain an impermissible donation.
14. The public authority presented the findings of its investigation on 20 November 2009 when it confirmed that 5th Avenue Partners Ltd was a permissible donor and that there was 'no reasonable basis to conclude that the true donor was someone other than 5th Avenue Partners Ltd'. In investigating whether 5th Avenue Partners Ltd was the true donor the public authority said that it had considered whether company law allowed the actions of 5th Avenue Partners Ltd to be treated as the actions of the company's sole director, Mr Michael Brown, or its parent company 5th Avenue Partners GmbH. However it said that it considered that 'there was no reasonable likelihood that a court would remove the

usual protection provided by the veil of incorporation'. A summary of the public authority's investigation is publicly available on its website:

http://www.electoralcommission.org.uk/_media/executive-summary/5th-avenue-statement-case-summary-11-09.pdf

Analysis

15. A full text of the relevant statutory provisions referred to in this section is contained within the legal annex.

Exemptions

Section 42 – Legal professional privilege

16. Section 42(1) provides that information is exempt if it constitutes information to which a claim for legal professional privilege could be maintained in legal proceedings. Legal Professional Privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Information Commissioner and the DTI*) as:

*"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and third parties if such communication or exchanges come into being for the purpose of preparing for litigation."*¹

17. There are two types of legal professional privilege. Litigation privilege will apply where litigation is in prospect or contemplated and legal advice privilege will apply where no litigation is in prospect or contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
18. In this case the withheld information constitutes a list of precedent cases on the legal concept of lifting the corporate veil that were considered as part of legal advice obtained by the public authority as

¹ *Bellamy v The Information Commissioner and the Secretary of State for Trade & Industry* [EA/2005/0023], para. 9.

part of its investigation into the donations made by 5th Avenue Partners Ltd. The public authority has explained that its investigation was conducted to determine whether a breach of PPERA had been committed and if so whether litigation should be undertaken. It was in this context, it said, that the legal advice was sought to assess whether, in the case of a breach of the PPERA, it could undertake court proceedings for forfeiture of any impermissible donation. Therefore the public authority contends that the information is subject to litigation privilege.

19. The complainant had suggested that the information was not covered by any kind of legal professional privilege because it was only a list of cases the public authority had considered as part of its investigation rather than any legal advice itself. The Commissioner has considered this point but does not agree with the complainant's interpretation. Having reviewed the list of cases falling within the scope of the first request the Commissioner has found that they are referenced within the legal advice obtained by the public authority. That is to say, the names of the cases would have to be extracted from the legal advice in order to answer the request. Given that the advice which refers to the precedent cases are communications between a client and a legal adviser acting in a professional capacity the Commissioner's view is that the requested information is covered by the section 42 exemption as it is contained within legally privileged communications. Moreover, the principles behind the precedent cases were discussed in the content of the legal advice and therefore releasing the list of cases could reveal some of the rationale contained within the legal advice.
20. The principle of legal professional privilege will only apply to communications that are confidential to the world at large. Where legal advice has been placed in the public domain or has been disclosed without any restrictions placed on its further use, privilege will have been lost.
21. The Commissioner has considered the publicly available information regarding the public authority's investigation into the donation by 5th Avenue Partners Ltd and has seen nothing to suggest that the withheld information has been placed in the public domain or otherwise disclosed to the extent that it can no longer be said to be confidential. Therefore the Commissioner has decided that the information in the first request is subject to legal professional privilege and consequently is exempt under section 42(1) of the Act.

Public interest test

22. Section 42 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 where a qualified exemption applies, information shall only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

23. The complainant has argued that the public interest favours disclosure because the public authority's investigation findings regarding the likelihood of a court lifting the corporate veil surrounding 5th Avenue Partners Ltd was not, he argues, based on proper and sound legal advice. The complainant fundamentally disagreed with the outcome of the public authority's investigation which he found 'perverse'. Disclosure would reveal the extent to which the public authority relied on the appropriate case law when reaching its decision.
24. In addition, the complainant suggested that the case summary published by the public authority was misleading and therefore the public interest favoured disclosure to give a fuller picture of the public authority's investigation. Disclosure would aid understanding of the public authority's conclusion that there was no reasonable basis to conclude that the true donor was any person other than 5th Avenue Partners Ltd.
25. The public authority has itself acknowledged the general public interest in allowing the public access to information and in carrying out investigations in an open and transparent way.

Public interest arguments in favour of maintaining the exemption

26. The public authority argued that there was an inherent and strong public interest in maintaining privilege to ensure openness between public bodies and their legal providers in order to ensure access to fully informed, realistic and frank legal advice. It suggested that disclosure could inhibit it from obtaining legal advice in the future as it would have reason to question the confidentiality of any advice it obtained. This could lead to future decisions not having the benefit of full legal advice.
27. The public authority also said that it did not think that releasing the names of precedent cases would materially enhance the public's understanding of how it makes decisions as the legal advice was

obtained in relation to particular facts and circumstances of the case rather than for the purpose of general guidelines. Furthermore, it suggested that disclosure could lead to a misunderstanding or a misinterpretation of its decision.

Balance of the public interest arguments

28. When considering the public interest in maintaining the exemption under section 42 of the Act the Commissioner will take into account the general public interest in protecting legal professional privilege. The Commissioner's view is that there will always be a strong public interest inbuilt into the section 42 exemption. In reaching this view the Commissioner has taken into account the findings of the Information Tribunal in the case of *Bellamy v Information Commissioner & Secretary of State for Trade and Industry* in which it states:

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case..."²

29. In that case legal professional privilege was described as "a fundamental condition" of justice and "a fundamental human right". In light of this the Commissioner's approach is to adduce an initial weighting in favour of maintaining the exemption due to the importance of the concept behind legal professional privilege, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. Therefore the Commissioner finds that the public authority's arguments regarding the importance of it being able to obtain quality legal advice in confidence are strong.
30. When considering the particular weight to be given to the arguments in favour of disclosure or maintaining the exemption the Commissioner will also have regard to the particular circumstances of the case such as the age of the information or if the legal advice is still 'live'.
31. The Commissioner considers that the public interest in maintaining privilege will be stronger for legal advice which is recent. This is based on the principle that where legal advice is recent it is likely to be used in a variety of decision making processes which would be likely to be affected by disclosure. In this case the legal advice dated from

² *Bellamy*, para. 35.

September 2009 and so was still very recent at the time of the complainant's request. The public authority has explained that the advice still has significance in relation to other similar cases it may have to consider and therefore it is important to protect the advice to ensure its ability to use the advice in future in relation to its regulatory powers. Therefore the Commissioner considers that as well as the general public interest in protecting legal professional privilege there is also a public interest in maintaining the exemption in the particular circumstances of the case.

32. As regards the arguments in favour of disclosure, the Commissioner accepts that there is a public interest in disclosure insofar as it would go some way towards helping public understanding of the public authority's decision. He is also mindful of the fact that the information only constitutes a list of precedent cases rather than the full legal advice and therefore any unfairness to the public authority's legal position is likely to be less than if the actual legal advice itself were to be disclosed. However this argument works both ways because, as the public authority noted, the list of cases will be of only limited value in helping the public understand how it makes decisions.
33. Where a public authority has issued misleading information or there is evidence of impropriety, as the complainant suggests, the Commissioner's view is that there will be a strong public interest in disclosure to ensure greater transparency of its actions. However, the Commissioner has reviewed the contents of the legal advice and has seen nothing to suggest that the public authority failed to obtain proper and sound legal advice or that it misrepresented the advice it received in the information it released following the end of its investigation. Therefore the Commissioner has not given any weight to these arguments except in the general sense that the principles of transparency and accountability are served by the disclosure of official information.
34. The Commissioner finds that there are relatively strong arguments in favour of disclosure in terms of providing reassurance that the public authority consulted appropriate case law when coming to its decision. However, he finds that such arguments are not sufficient to weigh the public interest in favour of disclosure given the importance of the concept behind legal professional privilege and in light of the fact that the legal advice is recent and remains relevant for future cases. Consequently the Commissioner has decided that in all the circumstances of the case the public interest in maintaining the exemption under section 42(1) outweighs the public interest in disclosure.

Procedural Requirements

Section 17(1) – Refusal of a request

35. The complainant made his request to the public authority on 23 May 2010 but the public authority did not issue its refusal notice until 5 July 2010. Section 17(1) provides that where a public authority refuses a request it shall, within the time for complying with section 1(1) provide the applicant with a refusal notice. Therefore by failing to respond to the request within 20 working days the public authority breached section 17(1) of the Act.

The Decision

36. 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 the section 42(1) exemption.
37. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority breached section 17(1) of the Act by failing to issue the complainant with a refusal notice within 20 working days of receiving the request.

Steps Required

38. The Commissioner requires no steps to be taken.

Other matters

39. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern: Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, published in

February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the complainant asked the public authority to carry out an internal review of his request on 10 July 2010. The Public authority did not respond to the request until 2 September 2010. The Commissioner has not seen anything to suggest that there were exceptional circumstances which would have prevented the public authority from responding within 20 working days. Indeed, the internal review merely seemed to reiterate the points made in the refusal notice. Rather, it appears that the public authority, instead of aiming to complete the internal review within 20 working days, viewed the 40 working day guideline for exceptional circumstances as a formal deadline that could be applied in all cases. The Commissioner finds that in this case the failure to complete the internal review within 20 working days constitutes a failure to conform to the section 45 Code of Practice.

Right of Appeal

40. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 21st day of June 2011

Signed

**Pamela Clements,
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal annex

Refusal of Request

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,

(a) specifies the exemption in question, and

(b) states (if that would not otherwise be apparent) why the exemption applies."

Legal Professional Privilege

Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

Section 42(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings."