Neutral Citation Number: [2010] UKFTT 499 (GRC)

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2010/0085

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50205418

Dated: 24 March 2010

Appellant: David Ferguson

Respondent: Information Commissioner

Additional Party: The Electoral Commission

Heard at: Bedford Square, London

Date of hearing: 14 October 2010

Date of decision: 4 November 2010

Before

Andrew Bartlett QC (Judge)

Malcolm Clarke

Jacqueline Blake

Attendances:

For the Appellant: In person

For the Respondent: Anneliese Blackwood

For the Additional Party: Timothy Pitt-Payne QC

Subject matter:

Exemption under FOIA s40(2) – whether first data protection principle would be contravened by disclosure
DPA s1 personal data – DPA s2 sensitive personal data – DPA Schedule 1 paragraph 1, first data protection principle – whether fair processing
Whether conditions for processing met - DPA Schedule 3 condition 6
Exemption under FOIA s30(1)(a) – balance of public interest

Cases:

Durant v Financial Services Authority [2003] EWCA Civ 1746

Johnson v MDU [2007] EWCA Civ 262

Common Services Agency v Scottish Information Commissioner [2008] UKHL 47

Blake v IC EA/2009/0026, 16 September 2009

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 25 March 2010.

SUBSTITUTED DECISION NOTICE

Dated: **4 November 2010**

Public authority: **The Electoral Commission**

Address of Public authority: **Trevelyan House**
Great Peter Street
London SW1P 2HW

Name of Complainant: **David Ferguson**

The Substituted Decision

For the reasons set out in the Tribunal's determination, while the Electoral Commission was entitled to withhold the answers to questions 22 and 26 on the ground that they fell within the exemption in Freedom of Information Act s40(2), the Electoral Commission was not entitled to withhold the answers to question 21 and question 25, whether under s40(2) or under s30(1)(a).

Action Required

Within 20 working days the Electoral Commission shall provide to Mr Ferguson the answers to his questions numbered 21 and 25.

Signed:

Andrew Bartlett QC

Tribunal Judge Date: 4 November 2010

REASONS FOR DECISION

Introduction

1. Wendy Alexander MSP became leader of the Labour Party group in the Scottish Parliament in September 2007. In the course of her leadership election campaign she accepted an illegal donation. This appeal is concerned with a freedom of information request relating to the Electoral Commission's investigation into the circumstances of the donation.

2. The questions for consideration relate to the Electoral Commission's entitlement to rely upon two provisions of the Freedom of Information Act ("FOIA") to refuse the request: s30(1)(a) (exemption for information held for the purposes of an investigation into a criminal offence) and s40(2) (exemption for personal data).

3. The appeal comes before us, notwithstanding its Scottish flavour, because the Electoral Commission is a UK public authority; the provisions relating to information held by Scottish public authorities are not applicable.

The request for information

4. The requester, a Mr David Ferguson, who is a Scottish voter, wrote to the Electoral Commission on 25 January 2008, submitting 26 questions relating to the Commission's investigation.

5. On 7 February 2008 the Commission released a public statement setting out the conclusions of its investigation. We shall refer to this in more detail below.

6. Subsequent to its public statement the Commission answered some of Mr Ferguson's questions and declined to answer others, relying initially on FOIA ss30 and 44.

The complaint to the Information Commissioner

7. Mr Ferguson complained to the Information Commissioner in relation to the requests that were refused. During the Information Commissioner's investigation the Electoral Commission answered some of the outstanding requests. The Commission continued to rely on the s30 exemption, which is qualified by the public interest test in FOIA s2(2)(b), but abandoned reliance on s44.

8. The Commission also introduced a new ground for refusal, namely, that disclosure was prohibited by FOIA s40(2), because the withheld information constituted personal data of persons other than Mr Ferguson and disclosure would breach the first data protection principle. The exemption in s40(2) is absolute in the sense that it does not depend upon the public interest test in s2(2)(b).

9. In regard to the requests which remained unanswered, the Information Commissioner concluded in his Decision Notice dated 24 March 2010:

   a. The Electoral Commission held information relating to all of the unanswered requests. We will call this "the disputed information".

   b. The disputed information fell within the exemption under FOIA s30(1)(a), but in regard to the notes of interviews conducted with two particular individuals the balance of public interest favoured disclosure, so that the Electoral Commission could not rely on that exemption to justify its refusal so far as those notes were concerned. The Information Commissioner recorded the names of the two individuals in a confidential annex which was not issued to the public.

   c. All the disputed information (including the notes of the two interviews) fell within the s40(2) exemption and the Electoral Commission was correct to withhold it.

The appeal to the Tribunal

10. Mr Ferguson appealed to the Tribunal. In summary, his grounds of appeal were:

    a. The Electoral Commission had not relied upon FOIA s40(2) when it refused his requests. The Information Commissioner had not notified him that s40(2) had been raised in the course of the Commissioner's investigation. Mr Ferguson had no opportunity to comment, and first learned of the reliance on s40(2) in the published Decision Notice.

    b. In regard to s40(2) the Commissioner had not analysed the facts correctly or applied the law correctly, and he ought to have decided that disclosure could take place consistently with the data protection principles.

11. The Information Commissioner's position was that the conclusions set out in his Decision Notice were correct. The disputed information was sensitive personal data. To disclose it would be a breach of the first data protection principle.

12. We joined the Electoral Commission to the appeal as an additional party. The Electoral Commission supported the Information Commissioner's position in relation to s40(2), but argued in addition that the public interest balance under s30(1)(a) favoured the maintenance of the s30(1)(a) exemption in relation to the two sets of interview notes.

The facts

13. The primary facts relevant to the issues in the appeal were not in dispute, and were placed before us by means of written materials. We were able to view the disputed information which was not made available to Mr Ferguson. We now set out our findings.

14. The facts need to be understood in the context of the statutory control of political parties and donations.

15. The Electoral Commission was set up under the Political Parties, Elections and Referendums Act 2000 ("PPERA"). PPERA includes various restrictions on party election finance. By PPERA s145, one of the Commission's functions is to monitor compliance with those restrictions. It is not necessary for us to describe the restrictions in detail: for present purposes it is sufficient to note that PPERA s54 prohibits acceptance of donations from donors who are not permissible donors or whose identity cannot be ascertained. Under these rules donations cannot properly be accepted from individuals who are not registered electors in the UK, but can properly be accepted from UK companies.

16. The Commission's supervisory function includes the monitoring of possible offences under PPERA ss56 and 61. These sections are written to apply to political parties but by PPERA Schedule 7 they are also made applicable to donations to members of registered parties in connection with their political activities.

17. By s56(1), where a donation is received, all reasonable steps must be taken forthwith by the donee to verify the identity of the donor and whether he is a permissible donor. By s56(2), if the donor is not a permissible donor, the donation must be sent back within 30 days. Failure to do so is a criminal offence contrary to s56(3).

18. At the material time, while the taking of reasonable steps under s56(1) was a statutory duty resting upon the donee, it was not part of the definition of the criminal offence. The offence was one of strict liability, committed by retaining an impermissible donation for more than 30 days. It was only with effect from 1 January 2010 that a statutory defence was introduced by which proof that the donee had taken reasonable steps became a defence to a charge under s56(3).

19. PPERA s61 creates offences of knowingly facilitating, concealing or disguising an impermissible donation and of knowingly giving false information or withholding information in relation to an impermissible donation.

20. The donation in question was made by Mr Paul Green, who was not a UK registered elector. We infer from the open material that the donation was made in August or September 2007 by means of a personal cheque. It had been solicited by Mr Charlie Gordon MSP. At some point the donation was recorded in the campaign team's records as having been made by Combined Property Services Ltd, a UK registered company.

21. Questions about the donation were raised in the Press in late November, and on 29 November 2007 Mr Gordon made a public statement (which we have not seen) resigning as Shadow Transport Minister. He also contacted the Electoral Commission. The BBC reported Mr Gordon as saying in a statement to journalists:

> 'I asked for a donation from Mr Green, and he asked me to ensure that it was in line with the rules. I handed the donation on to the campaign team and conveyed to them that it was a donation under the auspices of Combined Property Services and that Mr Green had a controlling interest in the company. Unfortunately I was wrong in both these assumptions. I acted in good faith.'

22. On the same day Mr Green issued a statement which included:

> 'In August of this year I was asked by Mr Gordon to donate £950 to Wendy Alexander's campaign to become leader of the Scottish Labour Party. I asked Mr Gordon if this complied with the Electoral Commission Rules and was told that it did. Relying on that confirmation I made the donation from my personal account. … Combined Property Services Limited is a completely independent company.'

23. At the same time it was publicly accepted by Mr Tom McCabe MSP, Wendy Alexander's campaign manager, that the donation was a clear breach of the law.

He stated at a press conference that arrangements were being made to return the money, and that co-operation with the Electoral Commission was a priority.

24. On 5 December 2007 the Labour Party announced that Ms Alexander had supplied a 'huge amount' of documents to the Electoral Commission to assist in its inquiry. At the same time Mr Whitton MSP, who managed the finances for the campaign, told BBC Scotland '… we're preparing our evidence for the Electoral Commission. We'll give all that evidence to them, then we'll wait to hear what they've got to say.'

25. On 7 December Mr Gordon made a further statement in which he said:

> 'Last week I realised that I had unwittingly made serious errors in connection with two political donations of under £1000. I immediately alerted and apologised to those whom I had unwittingly misled and I resigned as Shadow Transport Minister. I also reported the matter to the Electoral Commission and they are now in dialogue with me.'

26. The Electoral Commission's duty under PPERA s145 to monitor compliance with controls imposed by the Act is supplemented by certain investigatory powers under s146. Under these powers political parties and certain other bodies can be required to produce records of income and expenditure and to furnish information and explanations. A 'regulated donee' (such as Ms Alexander) can be required to furnish information and explanations relating to their income and expenditure in connection with political activities, but cannot be required to produce records. Information from others can only be obtained by the Commission on a voluntary basis. (Wider powers have since been legislated for, but the new powers are not yet in force.)

27. The Commission carried out its investigation pursuant to PPERA ss145-146. From the various public statements made, as referred to above, it was to be inferred that Ms Alexander and her campaign team were co-operating with and supplying information to the Electoral Commission. All persons interviewed by the Commission were read the following scripted preamble at the commencement of interview:

> 'Thank you for attending this interview voluntarily, …. I should make clear from the outset that you are not obliged to remain, nor are you obliged to answer our questions. The Electoral Commission is performing a fact finding exercise, and the purpose of this is to allow us to make a proper and considered decision, rather than one based simply on media reports, whether there is any case to ask the Procurator Fiscal to look at. … …

> For the record, given the possibility that this matter could be referred to the Procurator Fiscal, I do however intend to caution you. This is for clarity of your rights and should not be taken as implying anything else. You are not obliged to say anything but anything you do say will be noted, and may be used in evidence.'

28. In addition to this statement, several of the interviewees were informed by Commission staff conducting the interviews to the following effect:

> The Commission 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.

29. Unfortunately the Commission did not record details of the making of the latter statement, so that its precise wording is not available to us; nor were we told whether it was made before, during or after the interviews; nor is it known for certain to which interviewees it was made.

30. When the Commission had completed its investigation it made a public statement by way of a news release on 7 February 2008. The release included:

a. The Commission had interviewed Wendy Alexander MSP and members of her campaign team and staff.

b. Wendy Alexander had accepted a donation of £950 from Paul Green, an individual not registered to vote in the UK. The donation had been recorded as received from a UK registered company.

c. Wendy Alexander had acknowledged that the donation in question was impermissible, and had voluntarily forfeited it.

31. Regarding possible criminal offences, the Electoral Commission stated:

> 'In respect of a possible offence under section 56, the Commission has concluded that, while Wendy Alexander did not take all reasonable steps in seeking to comply with the relevant legislation, she did take significant steps. Having considered all the circumstances, the Commission has decided that it is not appropriate or in the public interest to report this matter to the Procurator Fiscal.

> In respect of possible offences under section 61, the Commission has concluded that there is not sufficient evidence to establish that an offence has been committed. The Commission has therefore decided that it is not appropriate to report this matter to the Procurator Fiscal.'

32. On the same day Ms Alexander read a statement to the media, which included the following:

> 'Significant steps were taken to ensure compliance – it is however clear that our system of checks did fail, which I entirely accept. …
>
> I also welcome the Commission's decision that there is no basis for any finding of intentional wrongdoing on the part of me or my campaign team. …
>
> I deeply regret that my campaign accepted a £950 donation, which it transpired was in breach of the rules …'

33. There followed public criticism of the robustness of the investigation and of the Electoral Commission's decision not to refer the matter to the Procurator Fiscal. The Scottish First Minister, Alex Salmond, was quoted as saying 'it sounds a bit like a not proven - there's not sufficient evidence for this or not sufficient evidence for that.''

34. We note that the BBC report of 7 February 2008 to which we were referred (cited in the Information Commissioner's Decision Notice) conflated the two separate issues of whether there was an offence under s56 and whether there was an offence under s61. It stated that the Electoral Commission 'found there was not sufficient evidence to prove an offence, but said not all reasonable steps had been taken to prevent one'. However, according to the Electoral Commission's statement the insufficiency of evidence related only to s61: the Commission was unable to say whether anyone had committed an offence under that section. The position under s56 was different. The Commission did not say that there was a lack of evidence that an offence had been committed under s56. While not spelled out explicitly in the statement, it was implicit that the Commission had concluded that Ms Alexander had committed an offence under s56(3), simply because the donation had been impermissible and had not been returned within 30 days. Mr Pitt-Payne QC expressly confirmed on instructions that it was the Commission's view that Ms Alexander had committed an offence under s56(3), while adding the proper caveat (which we endorse) that whether a criminal court would find the offence proved was a separate question.

35. Mr Ferguson's questions on the content of the Electoral Commission's investigation were numbered 17 to 26. We set them out here with the partial answers that were eventually supplied:

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? **Yes**

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? **Yes**

19 Has the investigation asked the Labour Party, or any individual, who recorded the source of the above donation as Combined Property Services? **Yes**

20 Has the investigation received a reply to this question? **Yes**

21 Who provided the answer to the question? ***Not answered***

22 Who on behalf of Ms Alexander's campaign did record the source of the donation as Combined Property Services? ***Not answered***

23 Has the investigation asked the Labour Party, or any individual, why the source of the above donation was recorded as Combined Property Services? **Yes**

24 Has the investigation received a reply to this question? **Yes**

25 Who provided the answer to the question? ***Not answered***

26 What was the reply to the question? ***Not answered***

36. The purpose of Mr Ferguson's request was to assure himself on behalf of the wider public that the investigation was conducted by the Electoral Commission in keeping with its proper objectives and was not contaminated by administrative convenience or other narrower interests or undue consideration of the interests of the subjects under investigation. This was in circumstances where-

a. the public has an important interest in the probity and competence of politicians,

b. the statutory role of the Electoral Commission is intended to be an important guarantor of the public interest in compliance with the laws concerning political donations,

c. the brief news release which the Electoral Commission issued before it answered any of Mr Ferguson's questions gave the public only limited information on what it had found out,

d. the release gave limited and unsatisfactory information on why matters arising under PPERA s56 were not referred to the Procurator Fiscal, in particular-

e. the information given by the Commission indicated that it had applied a test of 'significant steps' which had no warrant in, and was less stringent than, the statutory test of 'all reasonable steps' under PPERA s56(1),

f. beyond the reference to 'significant steps', which was of debatable relevance in the context of an offence which Parliament had decided should be an offence of strict liability, the Commission's statement gave no explanation of why the Commission considered it was not appropriate or in the public interest to report to the Procurator Fiscal the s56(3) offence which the Commission considered that Ms Alexander had committed.

37. Mr Ferguson further stated:

> 'If the Electoral Commission did not conduct its investigation with its primary objective as the protection of the public interest, then it has failed to discharge its duty to the public. If this is the case, then I have a right to seek legal advice as to what means of redress might be available either to me or to others against the Electoral Commission. To this end I am currently preparing a legal brief, and I require the information requested as part of my brief.'

38. Mr Pitt-Payne identified that a relevant potential means of redress on which to take advice would be a claim for judicial review of the decision of the Electoral Commission.

39. Mr Ferguson argued in addition that the news release was unsatisfactory in its explanation of the Commission's decision not to report any possible offence under PPERA s61 to the Procurator Fiscal, in circumstances where, as he put it, a false name had been substituted in place of the true source of the donation on a document submitted to the Electoral Commission detailing the sources of the

donations to the leadership campaign. Contrary to Mr Ferguson's submission, we regard this as a point of only limited significance in the context of the issues that we have to decide. It was well known after the Commission's statement, and indeed before, that an illegal donation had somehow been facilitated. But proof of an offence under s61 requires proof that the relevant act was done 'knowingly'. Since the Commission concluded that there was not sufficient evidence to establish that an offence under s61 had been committed, it was plain that the Commission considered that it did not have evidence sufficient to prove that the act had been done knowingly. We find as a fact that that was the Commission's view. We note, however, that the Commission did not really explain why it was not thought appropriate to request further investigation by the police or further consideration by the Procurator Fiscal service. We make no finding as to the quality of the Commission's investigation in relation to PPERA s61 or whether its conclusion was justified by the evidence which it obtained.

The questions for the Tribunal

40. Before we can properly consider the two exemptions which are claimed we need to consider the proper scope of the information which would need to be disclosed in order to give proper answers to the outstanding requests.

41. In regard to the exemption under FOIA s30(1)(a) for information held by the Electoral Commission for the purposes of an investigation, the question which we have to consider is whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

42. In regard to the exemption under FOIA s40(2) for personal data, the questions are:

    a. Does the information which would answer the requests constitute (i) personal data, (ii) sensitive personal data, relating to persons other than Mr Ferguson?

    b. Would disclosure of the data to a member of the public otherwise than under FOIA contravene any of the data protection principles?

43. Mr Ferguson's complaint that he had no opportunity to make representations to the Information Commissioner concerning the Electoral Commission's reliance on FOIA s40(2) is essentially procedural. It has been remedied by his bringing of an appeal to the Tribunal. We have not heard submissions in this case on whether the Information Commissioner had any legal obligation to notify Mr Ferguson that

the Electoral Commission had raised an entirely new exemption in the course of the Commissioner's investigation. We observe that, where the public authority raises an exemption for the first time in the course of the Information Commissioner's investigation, the investigation is likely to be of a higher quality, and is less likely to lead to an appeal, if the requester is given a fair opportunity to comment on the new exemption before the Information Commissioner makes his decision.

The scope of the disputed information

44. The answers to four of Mr Ferguson's requests have not been given. The scope of what would be the proper answers to those four questions was the subject of debate in closed session with counsel for the Electoral Commission and counsel for the Information Commissioner.

45. We have concluded that the answers to questions 21, 22 and 25 are the names of one or more individuals, as follows:

> 22 and 21 Respectively, the individual who recorded the source of the donation as Combined Property Services and the name of the individual who identified that person to the Electoral Commission.
>
> 25 The names of six individuals, each of whom provided some information toward answering the question 'why was the source of the donation recorded as Combined Property Services?'

46. The answer to question 26 is the information that was provided to the Electoral Commission in answer to the question *why* the source of Mr Green's donation was recorded as Combined Property Services. We do not consider that this information is coterminous with the two sets of interview notes identified by the Information Commissioner in the confidential annex. The interview notes (whether those two sets or others) are not themselves the answer to question 26. An answer to question 26 would be more on the lines of a composite explanation that A asked B to do such and such; B contacted C; C received information from D; and suchlike. We here use the letters A, B, C, D merely to indicate in an illustrative way that an answer to question 26 would involve stating what, according to the information held by the Electoral Commission, was said or done by various involved individuals, which resulted in the source of the donation being recorded as Combined Property Services.

Whether personal data or sensitive personal data

47. Not having seen the disputed information, Mr Ferguson was not in a position to make submissions concerning whether the answers to the questions constituted personal data or sensitive personal data. We received submissions from the other parties on those questions, which we have carefully considered.

48. We were reminded of the definitions of personal data in s1(1) of the Data Protection Act 1998 ("DPA") and the guidance given by the Court of Appeal in *Durant v Financial Services Authority* [2003] EWCA Civ 1746 at paragraphs 21-31, which we regard as binding upon us. We would comment that the relative narrowness of the Court's view of what constituted personal data is consistent with the nature of the rights given to the data subject in DPA ss 10-12 and 14. To constitute personal data the information should have the data subject as its focus and affect the subject's personal privacy. Identification that a person was involved in some matter which has no personal connotations will not amount to personal data.

49. In the present case, involvement in the answers to questions 22 and 26 has personal connotations, because of the very subject matter of the Electoral Commission's investigation, which concerned breach of rules on receipt of political donations. In our judgment the answers to those questions constitute personal data of the individuals whose names would be included in the answers.

50. We have considered whether the answer to question 26 could be redacted in such a way as to provide the gist of the information, without identification of particular individuals so as not to disclose the personal data. The Electoral Commission and the Information Commissioner submitted that this was not possible, because redactions sufficient to protect the identities of the individuals would be so severe as to render the remainder of the information either so incoherent as to be unintelligible or so anodyne as to be useless. We accept those submissions.[1]

51. We have more difficulty with the submissions of the Information Commissioner and the Electoral Commission that the answers to questions 21 and 25 amount to

[1] Mr Pitt-Payne made a further submission based on the wording of the definition of personal data in DPA s1(1): 'data which relate to a living individual who can be identified … from those data and other information which is in the possession of … the data controller'. He submitted that the redaction of the names would not prevent the data controller - here, the Electoral Commission - from being able to identify the individuals, and accordingly that the information to answer question 26, even when redacted, would still constitute personal data. It is not necessary for us to reach a decision on whether that submission is correct and in particular on whether it can be sufficiently reconciled with *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, paragraphs 21-27, 75-88, 92, 96-97.

personal data. In the present context the fact that Mr X or Ms Y provided answers to questions is not obviously biographical in a significant sense. To say merely that Mr X or Ms Y relayed a certain category of information to the Electoral Commission would not reveal the extent to which Mr X or Ms Y was personally involved in the subject matter or whether they were merely relaying information received from someone else. In the *Durant* case Auld LJ stated:

> 'The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct … In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity.'

52. It is already public knowledge that Wendy Alexander and her campaign team co-operated with the Electoral Commission's investigation. It does not appear to us that disclosing the names of the persons who supplied the Commission with answers to questions 21 and 25 would be disclosure of personal data of those individuals.

53. DPA s2 classifies certain kinds of personal information as sensitive personal data. This includes information as to the commission or alleged commission of any offence by the data subject. The names of the persons who supplied the answers to questions 21 and 25, even if they are properly to be regarded as personal data, are not sensitive personal data. The fact that they supplied the answers to the two questions is not itself something that relates to the commission or alleged commission of any offence by the data subjects.

54. The answers to questions 22 and 26 are in a different category. The Electoral Commission considered that it had insufficient evidence to conclude that an offence had been committed under PPERA s61, but the Commission was investigating the possibility that such an offence may have been committed and did not reach a positive conclusion that no such offence occurred. Because of the possibility that an offence under s61 was committed we have concluded, in agreement with the submissions of the Information Commissioner and the Electoral Commission, that the answers to questions 22 and 26 constitute sensitive personal data. (Mr Pitt-Payne submitted that this conclusion could be supported on the additional ground that the answers to questions 22 and 26 constitute sensitive personal data specifically of Wendy Alexander, on the basis that they relate not only to the possibility of an offence by someone under PPERA s61 but also to the actual offence apparently committed by her under PPERA s56(3). We do not need to reach a conclusion on this additional ground.)

Whether contravention of data protection principles: questions 21 and 25

55. We have to consider whether disclosure of the data to a member of the public otherwise than under FOIA would contravene any of the data protection principles.

56. We have concluded that the answers to questions 21 and 25 are not personal data. On that basis, the question of contravention of data protection principles if those answers are made public does not arise. We nevertheless consider the question, in case we are wrong and answers 21 and 25 should properly be categorised as personal data.

57. The first data protection principle is set out in DPA Schedule 1 Part I paragraph 1:

> '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.'

58. The Information Commissioner and the Electoral Commission relied on the first data protection principle, in particular the requirement that personal data 'shall be processed fairly'. Neither addressed to us any arguments that disclosure would be unlawful or that a Schedule 2 condition would not be met. The Electoral Commission submitted that no Schedule 3 condition was met, but that argument is not relevant on the footing that the answers to questions 21 and 25 do not constitute sensitive personal data.

59. On the question of unfairness Ms Blackwood for the Information Commissioner referred us to *Blake v IC* EA/2009/0026, 16 September 2009, at paragraph 24: 'FOIA promotes the right to information but when section 40(2) is under consideration, the DPA determines the proper approach, and the interests of data subjects receive a high degree of protection' (see also *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, paragraph 7). We agree that that is the proper approach here, subject to the detailed terms of the DPA.

60. Ms Blackwood further submitted, by reference to paragraph 28 of the decision in *Blake* that consideration of fairness to the data subject did not connote any

balancing exercise. While in the circumstances this does not affect our decision in this case, we do not accept that this submission correctly states the law. In *Johnson v MDU* [2007] EWCA Civ 262 Buxton LJ said at paragraph 62 that fairness required consideration of the interests not only of data subjects but also of data users and Arden LJ stated at paragraph 141 that the very word 'fairness' suggested a balancing of interests, the interests in question being those of the data subject and of the data user. Similarly, many of the Schedule 2 and Schedule 3 conditions involve a balancing exercise.

61. The principal point in the arguments about fairness was that the interviewees, and therefore the various data subjects, gave information on the basis of an expectation of confidentiality arising from the scripted preamble that was read out at the commencement of interviews. In our view the insuperable difficulty with this submission is that the preamble said nothing about confidentiality. The Information Commissioner and the Electoral Commission relied also on the oral statement said to have been made to several interviewees concerning confidentiality. But the evidence that was placed before us did not enable us to conclude that this statement was made to any particular individual, or that it was made before interviews proceeded. We found no trace of such a statement in any of the interview notes or in the correspondence conducted in the same time period as the interviews. We also note in passing that Mr Ferguson recently wrote to Ms Alexander asking her if she had had an expectation of confidentiality and she did not reply. We are not satisfied that the interviewees expected confidentiality to be maintained. On the contrary, we conclude on the evidence that they were all well aware of the possibility that things said in interview could become public knowledge. It is also relevant to note that there is no evidence that the Electoral Commission has asked any of the interviewees whether they have any objection to the disclosure of the information that is sought by Mr Ferguson.

62. It was further suggested to us that disclosure would be unfair because it might cause distress. We are not persuaded by this. It appears to us improbable that disclosure of the answers to questions 21 and 25 would or could cause distress to anyone. Moreover, people involved in political campaigns must anticipate some risk of publicity and possible criticism.

63. We would add that, if we are wrong about whether answers 21 and 25 constitute personal data, we consider that condition 6(1) of Schedule 2 would be satisfied, given on the one hand the legitimate interest of Mr Ferguson as a member of the public in obtaining better information concerning the Electoral Commission's investigation in the circumstances set out above and on the other hand the minimal prejudice to the legitimate interests of the data subjects through revealing the answers to questions 21 and 25.

Whether contravention of data protection principles: questions 22 and 26

64. We turn next to whether disclosure of the answers to questions 22 and 26 to a member of the public otherwise than under FOIA would contravene any of the data protection principles. Since these answers constitute sensitive personal data, we consider first whether any Schedule 3 condition would be met. If no Schedule 3 condition is met, disclosure would contravene the first data protection principle, with the result that FOIA s40(2) would exempt the information from disclosure.

65. It is often stated that requesters' rights under FOIA are purpose-blind, in the sense that an applicant's personal identity and motives for requesting information are irrelevant. This generalisation can mislead. There are some cases in which the applicant's identity and motives may shed light on the public interests involved. More significantly, the applicant's identity and motives can be of direct relevance to the exemption in FOIA s40(2) because of the provisions of DPA Schedules 2 and 3, which contain a number of references to the purpose of the disclosure and to the interests pursued by the persons to whom the disclosure would be made. For example, a journalist or author may be able to outflank the s40(2) exemption by reliance upon DPA Schedule 3 condition 10 and paragraph 3 of the Schedule to the Data Protection (Processing of Sensitive Personal Data) Order 2000, where it is in the substantial public interest that wrongdoing should be publicised.

66. The Schedule 3 conditions relied on by Mr Ferguson were condition 3 (vital interests), condition 6 (legal proceedings, advice or rights), and condition 7(1)(a) (administration of justice). In response to a request for clarification of his position Mr Ferguson made clear that he did not rely on condition 10.

67. During the course of the hearing Mr Ferguson rightly abandoned his reliance on condition 3; 'vital interests' within the legal meaning of that phrase are not at stake in the present case. We also do not consider that reliance on condition 7(1)(a) is arguable. In making his information requests Mr Ferguson was not engaged in the administration of justice.

68. Condition 6 is potentially relevant. It reads:

> 'The processing-
>
> (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),

(b) is otherwise necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.'

69. Mr Ferguson did not suggest that he had got any closer to taking legal proceedings than preparing a brief for the taking of legal advice, so we need to consider under this condition only the question of the necessity of disclosure for the purpose of taking legal advice regarding possible future proceedings.

70. In this context Mr Ferguson placed more emphasis on PPERA s61 than on s56. What the Commission disclosed in regard to its approach under s56, while limited and unsatisfactory (see paragraph 36e to f above), was in our view sufficient to enable at least initial legal advice to be taken on whether judicial review would be available.

71. In relation to the s61 aspect Mr Ferguson submitted:

'… most reasonable people would consider the existence of a document that should contain the name '*Paul Green*' and an address in Jersey, and in fact contains the name '*Combined Property Services*', and an address in Glasgow to be fairly substantial evidence of an arrangement intended to conceal the receipt of an illegal donation. …

The question whether the Alexander campaign team committed a serious offence under PPERA s61 is a matter of the highest public interest … If the Electoral Commission has failed to conduct a thorough and proper investigation of the matter, or has failed to make a sound decision on the matter, then it is guilty of the grossest malpractice and maladministration … and this is likewise a matter of the highest public interest.

If the Commission failed in its duty to the public then the public is entitled to know and seek redress. … Furthermore, I am in the process of preparing a brief with a view to taking legal advice on what forms of redress might be available to the public.'

72. These are forceful arguments, and in our judgment there is a strong public interest in the publication of fuller and better information about the investigation than the meagre statement issued by the Electoral Commission on 7 February 2008, but we are not persuaded that condition 6 of Schedule 3 is satisfied. We remind ourselves that we have to consider the situation at the time when the

Commission replied to Mr Ferguson's information requests. It was plain that the Commission considered it did not have evidence sufficient to prove that the act of facilitating the illegal donation had been done knowingly. Mr Ferguson has not satisfied us that the answers to his outstanding questions were necessary at the material time in order to enable him to obtain legal advice on possible legal proceedings against the Electoral Commission. There was no evidence before us that he had tried to seek such advice, or had been told by his legal adviser that the answers were necessary to enable meaningful advice to be given. It is not clear to us to what extent the answers would be necessary.

73. Since we have not been persuaded by Mr Ferguson's arguments in relation to condition 6 of Schedule 3, we do not need to reach a conclusion on the satisfaction of a Schedule 2 condition. We acknowledge that in the circumstances Mr Ferguson would have had a strongly arguable case under condition 6(1) of Schedule 2, but we make no finding on it.

74. While it is not strictly necessary for us to reach definite conclusions on whether disclosure would be unfair irrespective of Schedules 2 and 3, this aspect was fully argued and we will give our views. Two arguments were relied on by the Information Commissioner and the Electoral Commission:

    a. It was submitted that unfairness would arise from disappointing the expectations arising from what the interviewees were told at the time of interview. We have found that the interviewees were well aware of the possibility that things said in interview could become public knowledge. Moreover the people involved were engaged in a political campaign which was required by law to comply with strict rules on donations. Politics is an inherently public activity. The extent and manner of compliance with the rules should be expected to be subject to public scrutiny. In our judgment no unfairness would arise from what the interviewees were told at the time of interview.

    b. The second argument was that disclosure outside the context of a criminal trial would mean that the material would be disseminated without the corresponding safeguards of a trial, such as the opportunity to put forth a defence and to have the evidence tested: this would be unfair. Disclosure would be likely to fuel speculation about the possibility of the commission of criminal offences by the data subjects, which would cause undue distress. This argument requires fuller consideration.

75. The questions who recorded the source of the donation as Combined Property Services and why the source was so recorded are obviously relevant to the

possibility of an offence under s61 but are also relevant to the offence under s56(3), because they might shed light on how the latter offence came to be committed.

76. In regard to the s56 aspect, Mr Ferguson pointed out the circular, even Orwellian, nature of the other parties' submissions. Their arguments amounted to this: Ms Alexander committed an offence; the Electoral Commission, by deciding not to refer the offence to the Procurator Fiscal, effectively granted her an amnesty; so the Electoral Commission cannot reveal to the public its full reasoning on why the amnesty was granted, because Ms Alexander will not have the opportunity of having the matter ventilated in a criminal court. Like Mr Ferguson, we cannot see how in these circumstances unfairness can be claimed on Ms Alexander's behalf. She has been spared having to face criminal proceedings. And if there were further public debate about her conduct under s56(3) resulting from the disclosure of the answers to questions 22 and 26, she would be well able to say in mitigation anything that she wished by making public statements, as any serious politician would.

77. The position in relation to s61 seems to us to be materially different because there no definite conclusion was reached by the Electoral Commission, except that in its view there was an insufficiency of evidence to prove an offence by anyone under s61. We have borne in mind the Nolan principles, to which Mr Ferguson referred us, of accountability, openness and leadership. But in our judgment the release of the answers to questions 22 and 26 would risk placing the data subjects under a cloud of suspicion, in circumstances where there might be no definitive termination of speculation and where, as a result, undue distress would be likely to ensue.

78. Accordingly our conclusions are that FOIA s40(2) exempts from disclosure the answers to questions 22 and 26 but not the answers to questions 21 and 25.

FOIA s30(1)(a)

79. In regard to the notes of interviews conducted with two particular individuals the Information Commissioner decided that the balance of public interest favoured disclosure, so that the Electoral Commission could not rely on that exemption to justify its refusal so far as those notes were concerned.

80. If the two sets of interview notes comprised, as they stand, the information that would answer questions 21, 22, 25 and 26, we would agree with the Information Commissioner's conclusion on the balance of public interest in relation to the exemption in s30(1)(a). On that footing we would be in broad agreement with the

Information Commissioner's reasoning in paragraphs 36-56 of the Decision Notice.

81. The Electoral Commission submitted that disclosure of the disputed information would inevitably inhibit any future voluntary co-operation with the Electoral Commission, for fear that information provided would subsequently be made public, which would hinder the Commission's ability to carry out its important public functions. In our judgment this concern is grossly overstated. As the facts of the present case illustrate, politicians and their supporters have strong incentives to co-operate with the Commission; refusal to co-operate would tend to damage the politicians' public standing. Moreover the Commission provided no evidence that any interviewees had insisted that their co-operation would be given only in return for a promise of anonymity or confidentiality, whether in this or any other investigation.

82. Given our conclusions on the scope of the information which would answer each question, and on the impermissibility of disclosing the answers to questions 22 and 26 for data protection reasons, the practical question which we have to consider is whether the public interest in maintaining the s30(1)(a) exemption in relation to the answers to questions 21 and 25 outweighs the public interest in disclosing the information.

83. Because answers 21 and 25 would be so limited, being merely the names of persons who co-operated with the Electoral Commission by supplying answers to questions, the interests to be weighed on each side are modest.

84. In our judgment the public interest in maintaining the s30(1)(a) exemption in relation to that information was very slight. We keep in mind the limited range of the Electoral Commission's powers of compulsion, but we do not accept that there was any material risk to its future investigatory work if in the present case the names of those who co-operated with the Commission by answering two particular questions were to be released.

85. The public interest in disclosing the identity of those persons, though modest, was real. The Electoral Commission itself stated in its letter of 17 July 2009:

> 'It is accepted that there is a public interest in the Commission carrying out investigations in an open and transparent way. The restrictions on campaign funding imposed by PPERA Part IV are important; it is in the public interest that they should be properly enforced, and seen to be properly enforced.'

86. The Electoral Commission was unforthcoming in supplying the public with information about its investigation. It provided limited and unsatisfactory information on why matters arising under PPERA s56 were not referred to the Procurator Fiscal. While the answers to questions 21 and 25 could not themselves provide the public with assurance that the investigation was conducted by the Electoral Commission in keeping with its proper objectives, in view of the transparency deficit we consider that a small step in that direction was better than nothing at all, and accordingly that there was a public interest in disclosure of the answers, which was not outweighed by the public interest in maintaining the exemption.

87. While we have taken into account all the factors urged on us by the parties in relation to the balance of public interest, the considerations which we regard as decisive on the issues of public interest in the circumstances of this case are those we have identified in paragraphs 83-86 above, set in the larger context of our findings of fact.

Conclusion and remedy

88. We allow the appeal in part. We conclude that the answers to Mr Ferguson's questions numbered 21 and 25 should be provided by the Electoral Commission pursuant to FOIA s1(1)(b).

89. Given the terms of Mr Ferguson's questions and their practical context, the answers to questions numbered 22 and 26 were lawfully withheld by virtue of FOIA s40(2).

90. Our decision is unanimous.

Signed:

Andrew Bartlett QC

Tribunal Judge Date: 4 November 2010

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2010/0085

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50205418

Dated: 24 March 2010

Appellant: David Ferguson

Respondent: Information Commissioner

Additional Party: The Electoral Commission

Date of decision: 4 November 2010

Date of decision on application for permission to appeal: 13 December 2010

REASONS FOR REFUSAL OF PERMISSION TO APPEAL

1. Mr Ferguson has applied for permission to appeal the decision of the Tribunal.

   DPA Schedule 3 Condition 7(1)(a): paragraphs 4-8 and 24-25 of the Grounds for Appeal

2. The high point of Mr Ferguson's case under condition 7(1)(a) was the statement in his written skeleton argument: "If the Commission has failed in its duty to the public then the public is entitled to know and to seek redress. I therefore submit that the conditions of Schedule 3(6)(c) and 7(1)(a) are amply met."

3. Mr Ferguson did not provide evidence to satisfy the Tribunal that condition 7(1)(a) was met. The Tribunal's brief comment that "In making his information requests Mr Ferguson was not engaged in the administration of justice" was a finding of fact. In view of the lack of evidence it was not necessary for the Tribunal to spell out that the administration of justice by some other unspecified person or body was also not made out.

4. It was not suggested at the hearing that the Commission was engaged in the administration of justice. Nor would such a suggestion be correct in law. But in any event the information request was dealt with by the Commission after it had completed its functions in relation to the illegal donation.

5. There is no arguable point of law in regard to Condition 7.

   DPA Schedule 3 Condition 6: paragraphs 9-17 of the Grounds for Appeal

6. The burden of proving that condition 6 was applicable was on Mr Ferguson. That on the evidence condition 6 was not satisfied was a conclusion of fact by the Tribunal. His case on condition 6 failed on the facts and evidence.

7. There was no clear evidence or argument from Mr Ferguson spelling out what he meant by the 'forms of redress' that 'might be available to the public'. The reason why judicial review proceedings against the Commission were mentioned in paragraph 72 of the Tribunal's decision was that these were the only proceedings which were suggested during the hearing as a realistic possibility. Consideration of some other, even less likely, form of proceedings would not have assisted his case.

8. There is no arguable point of law in regard to Condition 6.

Fairness under the first data protection principle: paragraphs 18-23 and 26-32 of the Grounds for Appeal

9. The Tribunal's judgment was not based on the narrow interests of Ms Alexander. The data subjects in paragraph 77 are plural. The Tribunal decided that despite the Nolan principles in all the circumstances the interests of the data subjects prevailed because there would be undue distress. The word 'undue' connotes the result of the balancing exercise.

10. The lack of any expectation of confidentiality on the part of the data subjects was taken into account by the Tribunal in making its judgment under the first data protection principle.

11. There is no arguable point of law in regard to the first data protection principle.

Additional grounds for appeal dated 9 December 2010

12. The Tribunal has not seen the post-hearing statement of the Electoral Commission to which Mr Ferguson refers. Paragraph 5 of the additional grounds interprets Mr Gordon's statement in a different way from the way the Tribunal interpreted it; Mr Gordon's statement, referred to in paragraph 21 of the Tribunal's decision, did not say when he conveyed to the campaign team that the donation was under the auspices of Combined Property Services.

13. The additional grounds relate to an argument about whether there would have been unfairness to Ms Alexander. This misses the point. The data subjects whose interests would have been unfairly prejudiced by the disclosure sought were plural.

14. The additional grounds do not raise any discernible point of law.

Conclusions

15. The Tribunal is not satisfied that there is an error of law in its decision. The Tribunal has therefore decided not to review its decision pursuant to rules 43(1) and 44 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

16. The Tribunal does not consider that the grounds or additional grounds for appeal disclose a point of law with a real prospect of success. The Tribunal therefore refuses permission to appeal.

17. Mr Ferguson has the right to make an application to the Upper Tribunal for permission to appeal. Under the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended, rule 21(3)(b) any application for permission to appeal must be made in writing and received by the Upper Tribunal no later than one month from the date this ruling was sent to him. The address is Upper Tribunal (Administrative Appeals Chamber) 5th Floor, Chichester Rents, 81 Chancery Lane, London WC2A 1DD. By rule 21(4) the application must state (a) the name and address of the appellant, (b) the name and address of the representative (if any) of the appellant, (c) an address where documents for the appellant may be sent or delivered, (d) details (including the full reference) of the decision challenged, (e) the grounds on which the appellant relies, and (f) whether the appellant wants the application to be dealt with at a hearing. By rule 21(5) the appellant must provide with the application a copy of the First-tier Tribunal's decision and reasons, and a copy of this ruling.

18. The Upper Tribunal's website is at www.administrativeappeals.tribunals.gov.uk

Andrew Bartlett QC
Tribunal Judge

13 December 2010