[redacted]

From: FOI
Sent: 04 January 2022 09:42
To: [redacted]
Subject: FOI 144-21 - Response

Dear [redacted],

Our Ref: FOI-144-21

Thank you for your email to the Electoral Commission dated 9 December 2021.

The Commission aims to respond to requests for information promptly and has done so within the statutory timeframe of twenty working days.

Your request is shown below followed by our response.

You will recall for a number of years now I have requested the full report of the Electoral Commission into donations received by the Conservative Party from Bearwood Corporate Services.

I would be grateful if you would consider my request anew (requests FOI 100/14, FOI 102/14) and take into account the following additional factors:

1) The passage of time
2) The churn of personnel in the Conservative Party
3) The further breach of electoral law by the Conservative Party (reported today, 9 December 2021: https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-enforcement-work/investigations/report-investigation-conservative-and-unionist-party-recording-and-reporting-payments)
4) The use of legal powers in that investigation to request documents. This suggests that you are not dependent upon voluntary cooperation
5) The failure of the Conservative Party to provide accurate information in response to requests/demands during this investigation. This suggests that the voluntary cooperation that you claim your investigations rely upon does not exist when it comes to this party.

Our response is as follows:

We hold the information you have requested.

The Commission notes that this is a repeat of various previous requests, most recently in 2019 (our ref: FOI 099-19) stemming from an original request made in 2014 (FOI 100-14). We have therefore considered the request anew and provided a full response.

The information you have requested forms part of the Commission's investigation in relation to donations reported as being from Bearwood Corporate Services Limited (BCS). The Commission published a detailed case summary providing information relating to this investigation on 4 March 2010, links to this were provided in our response to that previous request.

For the reasons set out below, the Commission remains satisfied that the requested information is exempt from disclosure under sections 30, 31, 40,41 and 42 of the Freedom of Information (FOI) Act, and we are withholding this information from release.

Exemption: Investigations and proceedings: Section 30(1)(a)(i) Freedom of Information Act 2000

The Commission has a statutory function to conduct investigations into potential breaches of the reporting requirements in the Political Parties, Elections and Referendums Act (PPERA) 2000.

Section 30(1)(a)(i) of the FOI Act 2000 provides an exemption from disclosure for information which 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. The section 30 exemption applies to information that is held at any time, whether or not the investigation is on-going. The information requested is held by the Commission in relation to such an investigation.

Public interest test

Application of the section 30 exemption is subject to the public interest test. There are a number of factors that must be weighed in the balance to consider whether the public interest in applying the exemption outweighs the public interest in disclosure.

Public interest factors in favour of disclosure

The Commission recognises that with regard to the disclosure of information generally, there should be a presumption in favour of disclosure. We also recognise that there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. Flowing from that general public interest, there is a legitimate public interest in our carrying out investigations in an open and transparent way, and in promoting public understanding of the decisions we make as a regulator.

Public interest factors in favour of applying the exemption

The public interest lies in enabling the Commission to undertake inquiries as part of its investigation powers so that it can make regulatory decisions based on a firm factual basis and to gather such evidence and facts on a confidential basis. It is in the public interest to maintain this confidentiality, as it encourages the free and frank exchange of information from others to the Commission without which the Commission could not perform its statutory functions. This is notwithstanding the passage of time you refer to in your current request.

You have stated (your point 4) that the use of legal powers in our recent investigation involving the same party to request documents, suggests that we are not dependent upon voluntary cooperation. In carrying out effective inquiries the Commission depends on being able to secure the co-operation of those individuals and entities from whom we seek information. Since the BCS investigation, the Commission has been granted extended powers to require the provision of information. However, the co-operation of the regulated community and other enforcement agencies remains essential to our ability to conduct our statutory functions. It is particularly important to ensuring we are able to obtain information in a timely manner. The use of legal powers can be slower and less effective in obtaining information than voluntary co-operation, and the Commission uses its powers only where it is deemed appropriate. The cooperation of the regulated community therefore remains essential to our ability to conduct our statutory functions. As our investigations rely on gathering evidence from these individuals and entities, it is clearly in the public interest that we maintain their co-operation and avoid releasing information that could

prevent exchange of relevant information in the future, not just from this party but from others, and have the effect of hindering our ability to conduct our statutory functions.

If information provided in the course of our investigations was made public under the Act, it would make individuals and entities beyond the party in question, reluctant to co-operate and could prejudice interactions with them as well as others in the future. This would in turn impact on the type, timeliness, and quality of information provided to the Commission during its investigations which would prejudice the Commission's ability to conduct its statutory functions.

Also, as we have previously indicated, most of the individuals and entities who did provide information in the BCS case did so on a voluntary basis, as the Commission at that particular time did not have the legal power to require the production of documents except from 'supervised organisations and individuals'. Additionally, those individuals and entities had, and continue to have, a reasonable expectation that information provided in the course of the investigation would not be made available to the public at large.

You have also suggested (point 5) that the failure of the party to provide accurate information in response to requests/demands during that recent investigation suggests that voluntary cooperation does not exist in relation to this party. The party did provide voluntary cooperation during the investigation, as well as the information we required under statutory notice. Our public report on the recent investigation identified that the party did not provide full and accurate information *before* the investigation was opened.

The Commission aims to be robust and fair in its regulatory decisions. We acknowledge that there is a legitimate public interest in carrying out investigations in an open and transparent way, and in promoting public understanding of the decisions we make as a regulator. These are matters we acknowledge and take into account, including when deciding whether to disclose information, whilst ensuring proper regulation of party political funding.

For that reason, the Commission published a comprehensive case summary (and issued a press statement). The case summary was carefully considered in order to meet the public interest in promoting understanding of our decisions. The Commission recognises that this does not provide the public with the full detail of the investigative process, but does consider that it strikes a reasonable balance between full disclosure, which we do not believe would be in the public interest as set out in this response, and providing the public, and those the Commission regulates, with a clear understanding of the issues considered by the Commission during the course of the investigation, the information obtained in relation to those issues, and the legal basis for the conclusions the Commission reached. We do not therefore consider that releasing additional information beyond that contained in the case summary would significantly add to the public's understanding of those specific aspects of the case.

Balance of the public interest

In assessing where the public interest balance lies in section 30(1) case relevant matters include:

(a) the stage a particular investigation or prosecution has reached

(b) whether and to what extent the information is already in the public domain

(c) the significance or sensitivity of the information requested

(d) whether there is any evidence that an investigation or prosecution has not been carried out properly which may be disclosed by the information.

In this case the investigation is concluded. However, the information requested is not in the public domain, and the information requested is in the Commission's view sensitive and significant. These factors add weight to the public interest in maintaining the exemption in the Commission's view.

The Commission considers that the balance of public interest in this case lies on the one hand in carrying out investigations in an open and transparent way, and in promoting public understanding of the decisions we make as a regulator; and on the other in our ability to conduct investigations effectively in future, as well as on our wider regulatory work.

The Commission considers that the public interest in carrying out investigations in an open and transparent way, and in promoting public understanding of the decisions we make as a regulator was met by the fact that we made public the outcome with a comprehensive case summary which provided the appropriate level of detail to meet both our regulatory objectives and the public interest in promoting understanding of our decisions.

We consider it likely that disclosure could lead to a significant impact on the voluntary cooperation of organisations and individuals involved in this case, and others regulated by the Commission, with a consequent impact on our ability to conduct investigations effectively in future, as well as on our wider regulatory work.

In this particular case we have also taken into account that it is now eleven years since this investigation was concluded and our case summary was published, and two years since your previous request (your point 1). We note that passage of time is not of itself a reason for disclosure, rather the impact of the passage of time on the balance of public interest, weighed against other relevant factors. The grounds we have set out above continue to be relevant and appropriate.

Additionally, there has been no indication in those eleven years that the information we have already published has been insufficient to enable the public and those we regulate to understand our decision and the reasons for it.

Your points 2 and 3 concern the 'churn of personnel in the Conservative Party' and the fact that the party has further breached electoral law, noting our recent investigation. As we are not basing our decision regarding disclosure on any impact on personnel at the party, we do not consider that this has an impact on the balance of public interest. Similarly, our decision on disclosure is not based on the wider compliance of the party and we do not consider this a relevant matter.

Having carefully weighed the public interest relating to possible disclosure of the information requested under Section 30(1)(a)(i), the Commission is satisfied that it is not appropriate at this time to disclose the information which the Commission holds. The Commission is satisfied that maintaining the exemption outweighs the public interest.

Exemption: Law enforcement: Section 31(1)(g) Freedom of Information Act 2000

The Commission has a statutory function to conduct investigations into potential breaches of the reporting requirements in the Political Parties, Elections and Referendums Act 2000.

Section 31(1)(g) exempts from disclosure information that would or would be likely to prejudice the exercise of the Commission's functions under PPERA for the purposes of ascertaining whether any person has failed to comply with the law, as provided by s31(2)(a) of the FOI Act.

The information requested is held by the Commission in relation to an investigation for that purpose.

Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but, before the information can be withheld, the public interest in preventing that prejudice must outweigh the public interest in disclosure.

Prejudice

We note that the Information Commissioner recognises in guidance that some requests can set a precedent - that complying with one request would make it more difficult to refuse requests for similar information in the future. It is therefore appropriate to consider any harm that would be caused by combining the requested information with the information a public authority could be forced to subsequently provide if the current request was complied with. This is notwithstanding the passage of time you refer to in your current request.

If evidence obtained in the course of Commission investigations was made public under Freedom of Information requests, it would likely make individuals and entities under investigation reluctant to co-operate, given that evidence provided can be sensitive. This would be likely to prejudice interactions with them as well as others in the future. This would in turn prejudice the Commission's ability to conduct its statutory functions effectively.

It is the Commission's view, therefore, that to release the requested information would be likely to prejudice the exercise of the Commission's functions under PPERA for the purposes of ascertaining whether any person has failed to comply with the law in this case, and in future cases.

Public interest test

Application of the section 31 exemption is subject to the public interest test. There are a number of factors that must be weighed in the balance to consider whether the public interest in applying the exemption outweighs the public interest in disclosure.

For the same reasons set out above in relation to section 30, the Commission is satisfied that the information requested would likely prejudice the exercise of the Commission's functions under PPERA to conduct investigations into potential breaches of the reporting requirements.

Further, again for the same reasons set out above in respect of section 30, the Commission is satisfied that in this case the public interest in preventing that prejudice outweighs the public interest in disclosure.

The Commission therefore considers the information you have requested and which we hold to be exempt from disclosure under section 31 to the extent that it not exempt under section 30.

Section 40(2)

In withholding the information from disclosure, the Commission relies on the exemptions section 30(1)(a)(i) and 31(1)(g). It should also be noted that some of this information also falls within section 40(2). If this information were not already subject to exemptions mentioned previously, the Commission would apply section 40(2) considering the Data Protection Act (DPA) 2018 principles of fairness in relation to personal data. Section 40(2) provides for an exemption where the information requested constitutes personal data as defined by the DPA, and where release of the information requested would breach one of the data protection principles. This is notwithstanding the passage of time you refer to in your current request.

Some of the information we hold that is relevant to your request falls within the description of personal data as defined by section 1 of the DPA because the information relates directly to an identifiable living individual, and is 'personal data' under section 4 (2). Disclosure of this information would contravene the first principle of the DPA.

The first data protection principle states that personal data shall be processed fairly and lawfully. The Commission considers that it would be unfair to release the information requested, as it would be reasonably expected by those individuals that details of who they are, the positions they hold or held, any home addresses and similar personal data would not be disclosed to the general public, including in connection with this investigation.

In addition, some of the personal data will be sensitive personal data in view of the fact that it was gathered as part of an investigation into potential criminal offences.

Therefore, in addition to the section 30 and 31 exemptions mentioned above, the Commission is not satisfied that under section 40(2) it would be fair and lawful to provide you with the personal data contained in the information requested.

Section 41(1)

As stated above, in withholding the information from disclosure, the Commission relies on the exemptions section 30(1)(a)(i) and 31(1)(g).

However, some of this information equally falls within section 41(1) which states that information is exempt from disclosure if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence. This is notwithstanding the passage of time you refer to in your current request.

Some of the information you have requested was provided under strict agreements of confidentiality. We recognise that the law of confidence contains its own built in public interest test, meaning that there may be a public interest defence to the disclosure of confidential information in certain circumstances. We have considered whether that might apply here, but we note that guidance form the Information Commissioner's Office (ICO) says that the grounds for breaching confidentiality must be valid and very strong. For the reasons set out in relation to section 30 and 31, we do not consider that there are overriding matters of public interest here which would justify breaching confidentiality.

Therefore, in addition with the section 30, 31, and 40 exemptions as mentioned above, the Commission considers this information exempt under section 41(1) as it would not be lawful to provide you with the information requested as it would lead to an actionable breach of confidence.

Section 42(1)

In addition to the other exemptions referred to above, and specifically in relation to your request for legal advice, the Commission considers that the legal advice sought by the Commission engages the section 42(1) exemption. Section 42(1) applies to information which is legally privileged. In this case, there was legal advice sought during the investigation from internal and external counsel.

Advice privilege covers confidential communication between client and lawyer which has been made for the purpose of seeking or giving legal advice. We note that you have only requested that we disclose the nature of the legal issues on which we sought advice, rather than the advice itself.

However, this information still falls within the meaning of legal privilege as it is for the purpose of seeking legal advice.

The exemption is subject to the public interest test. The Commission recognises that there is a public interest in transparency and, in the context of investigations and enforcement, in understanding the reasons for the decision taken, including those based on legal advice.

On the other hand, it is important that the Commission is able to seek and receive robust legal advice, without being inhibited by concerns about it potentially becoming public. The ICO has recognised that there is a strong public interest in protecting the principle of legal professional privilege, which enables clients to receive legal advice in confidence. We have considered whether the passage of time since the advice was given makes any difference in this case but the law in relation to the permissibility of donations from companies has not changed since this case and, as such, the advice (including the questions relating to that advice) is of continued relevance to the Commission's work.

For these reasons, we consider that the balance of the public interest is in favour of maintaining the exemption.

As noted in our previous responses, in considering previous FOI requests to the Commission on the donations by BCS to the Conservative Party and upholding the Commission's application of exemptions to withhold information - both the ICO and Information Tribunal have had sight of the Commission legal questions and advice received. No adverse comment has been made by either the ICO or the Information Tribunal on the scope of such legal matters or the advice given.

The Commission strives to be an open, transparent authority but in some circumstances we cannot responsibly release requested information, and we ask for your understanding in this regard.

If you are not satisfied with this response, please note that the Commission operates a review procedure, details of which can be found on the Commission website at: https://www.electoralcommission.org.uk/freedom-information/make-a-freedom-information-request.

Please also note that if you have exhausted all internal Commission review procedures and you are still not satisfied you have the right to appeal to the Information Commissioner. Details of this procedure can be found on the ICO website: https://ico.org.uk/.

Yours sincerely

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