

[REDACTED]

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**From:** FOI  
**Sent:** 28 July 2022 09:06  
**To:** [REDACTED]  
**Subject:** FOI 054-22 - Response

Dear [REDACTED],

**Our Ref: FOI-054-22**

Thank you for your email to the Electoral Commission dated 2 July 2022 and received by the Commission on 4 July 2022.

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 in bold below followed by our response.

*Under the Freedom of Information Act 2000, please provide me with:*

**1) any information the Electoral Commission obtained from Companies House in the UK and in Gibraltar related to its investigation into certain payments made to Better for the Country Limited and Leave.EU Group Limited (Leave.EU);**

**2) any letters and emails sent and received between the Electoral Commission and Mr Banks, Rock Services, Leave.EU, and Better for the Country Limited;**

**3) any bank account statements for accounts held by Mr Banks, Rock Services, Leave.EU, and Better for the Country Limited;**

**4) the Electoral Commission's referral of Mr Banks to the National Crime Agency;**

**5) any emails, letters, and/or memos related to the above referral held by the Electoral Commission;**

**6) the settlement agreement between the Electoral Commission, Mr Banks, and Leave.EU chief executive Liz Bilney; and**

**7) any emails, letters, and/or memos related to the above settlement agreement held by the Electoral Commission.**

*If my request is denied in whole or in part, I ask that you justify all deletions by reference to specific exemptions of the Act.*

**Our response is as follows:**

We hold some of the information you have requested.

Whilst we hold information relevant to your various requests, we regard all of that information as exempt from disclosure. We have explained the specific exemptions we are applying below.

In terms of your requests 1-5, all of the material requested is held in connection with an investigation conducted by the Commission.

**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 Political Parties, Elections and Referendums Act 2000 (“PPERA”).

Section 30(1)(a)(i) of the Freedom of Information Act 2000 (FOIA) 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.

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. Whilst the Commission has powers to require information, the co-operation of the regulated community 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 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 reluctant to co-operate and may 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.

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 we made public that we [opened this investigation](#), along with the reasons for that decision. We then published a [detailed summary of our investigation](#) and explained our decision to notify the National Crime Agency (NCA).

### **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; and
- (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 our investigation was concluded in November 2018, and the NCA case was closed later in 2020, and the exemption can apply even after an investigation is concluded. In our view the time elapsed does not significantly influence the balance of the public interest. The information requested is not in the public domain, the information requested is in the Commission's view sensitive and significant, and no evidence appears to be put forward to suggest that the investigation is not being carried out properly. All of 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 does not consider that disclosure of specific evidence in this case would add to any significant degree to public understanding of our decisions. In addition, 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.

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 in disclosure.

### **Exemption: Law enforcement: Section 31(1)(g) Freedom of Information 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.

For the same reasons set out above in relation to s.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 s.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.

In terms of your requests 6-7, the material held is subject to exemption as personal data. The Commission published a [joint statement](#) by the then Chief Executive and Mr Banks on 29 April 2020 regarding settlement of a complaint.

### **Exemption: Personal information: Section 40(2) Freedom of Information Act 2000**

Section 40(2) exempts from disclosure personal data, where this would contravene the UK GDPR data protection principles.

Personal data" means any information relating to an identified or identifiable living individual. The information you have requested includes personal data, as it, in its entirety, relates to Mr Posner and Mr Banks.

Principle (a) states that 'personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject...'

Disclosure is a form of processing. This means that the data can only be disclosed if it would be lawful, fair and transparent. Article 6 of the UK GDPR sets out what is a lawful basis for processing data. At least one of these must apply in order for processing, in this case disclosure, to be lawful.

**(a) Consent:** this does not apply as neither individual has given consent for this data to be disclosed.

**(b) Contract:** this does not apply as disclosure is not necessary for a contract with either individual

**(c) Legal obligation:** this does not apply as disclosure is not necessary to comply with the law

**(d) Vital interests:** this does not apply as disclosure is not necessary to protect someone's life.

**(e) Public task:** this does not apply as disclosure is not necessary for the Commission to perform a task in the public interest or for official functions,

**(f) Legitimate interests:** this does not apply as the Commission does not consider disclosure is necessary for legitimate interests. The Commission has, as previously noted, published a statement explaining that a settlement has been reached, and a summary of the basis for that settlement. The Commission can see little, if any, legitimate interest in the detail of that settlement, and also considers that any legitimate interest that may exist is outweighed by the interests or fundamental rights and freedoms of the data subjects which require the protection of personal data.

We considered whether redaction of the material could be achieved in order to disclose it, but as only two identifiable individuals were party to the agreement, redaction would not have prevented the data protection principle being breached.

In terms of your requests 6-7, the material held is also subject to legal professional privilege.

### **Exemption: Legal professional privilege: Section 42(1) Freedom of Information Act 2000**

Section 42 exempts from disclosure information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. The material you have requested is, in the Commission's view, subject to legal professional privilege. The material the Commission holds is confidential communications made for the purpose of providing or obtaining legal advice about litigation. There was a real prospect of litigation, and the material was created for the sole purpose of giving or obtaining legal advice and for lawyers to use in preparing a case for litigation.

The Commission is not aware of any previous disclosure of this material or similar material that would lead to a loss of the privilege.

### **Public interest test**

Application of the section 42(1) 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.

The public interest arguments in favour of disclosure therefore include the general public interest in access to information about the Commission, being transparent about how we make decisions and our public functions. There is also a public interest in material (potentially including legally privileged material) being disclosed so that this information can be scrutinised publicly.

### **Public interest factors in favour of applying the exemption**

There is a strong public interest in people/organisations having access to legal advice, being able to communicate freely with their legal advisors in confidence and in being able to receive advice from them in confidence. The importance of this public interest has been reaffirmed by the House of Lords (*Three Rivers DC v. Bank of England* 2004), the High Court (*Department for Business Enterprise and Regulatory Reform v O'Brien*, 2009) and the Information Commissioner. The underlying rationale for the arguments against disclosure is that it encourages full and frank exchanges between clients and their legal advisers, which is judicially recognised as being strongly in the public interest.

The Information Commissioner has made clear in a number of tribunal decisions that there is a strong element of public interest built into the concept of the privilege. It is therefore necessary to demonstrate at least equally strong, specific, compelling considerations to override that inbuilt public interest.

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

Having considered all the circumstances of the case, the Commission recognises that there is a public interest in transparency and accountability.

However, the maintenance of this privilege, as the Information Commissioner's Office and the courts have stated, helps ensure the administration of justice and the effective undertaking of public policy, so having carefully weighed the public interest relating to possible disclosure of the information requested under s 42(1), the Commission is satisfied that it is not appropriate at this time to disclose the information that the Commission holds. The Commission is satisfied that maintaining the exemption outweighs the public interest in disclosure.

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

Information Officer

[FOI@electoralcommission.org.uk](mailto:FOI@electoralcommission.org.uk)

**The Electoral Commission**

[electoralcommission.org.uk](https://www.electoralcommission.org.uk)