IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Case No. EA/2011/0136

GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

The Information Commissioner's
Decision Notice No: FS50351910
Dated: 21 June 2011

Appellant: Mr Peter Jackson

1st Respondent: Information Commissioner

2nd Respondent: The Electoral Commission

Heard at: Royal Courts of Justice, Friday 18 November 2011

Before

David Marks QC
Tribunal Judge

Lay Members

Steve Shaw
Vivian Bowern

DECISION

For the reasons given below, the Tribunal upholds the Decision Notice of the Information Commissioner ("the Commissioner") dated 21st June 2011, ref FS50351910, and dismisses the appeal

REASONS FOR DECISION

Introduction

1. The Decision Notice concerns the response made by the Electoral Commission ("the EC") to Mr Peter Jackson who had submitted an FOI request in connection with an investigation made by the EC into donations made to the Liberal Democrat Party by a company known as 5th Avenue Partners Ltd (5AP). Some of the requested information was withheld under the exemption of the Freedom of Information Act 2000 (FOIA) which deals with legal professional privilege, namely section 42(1).

Background to the Request

2. The EC began an investigation into donations by 5AP to the Liberal Democratic Party in 2005. The donations were said to total some £2.4m.

3. As part of its investigations, the EC considered whether 5AP was what is called a permissible donor under the Political Parties Elections and Referendums Act 2000 (PPERA) and whether in fact 5AP was the true donor. Under the PPERA, it is an offence to accept and retain a donation from an impermissible donor. Further reference will be made to the relevant provisions of the PPERA later in this judgment.

4. After a gap in proceedings requested by the City of London Police whilst related criminal enquiries and a subsequent prosecution took place, the EC presented the findings of its investigations on 20 November 2009. These were placed in the public domain in the form of a "Case Summary". It

confirmed that 5AP was a permissible donor and that there was "no reasonable basis to conclude that the true donor was someone other than [5AP]".

5. In particular, the EC stated that it had considered whether company law in this case allowed the actions of 5AP to be treated as the actions of that company's sole director, a Mr Michael Brown, or as those of its parent company, a company known as 5th Avenue Partners GmbH.

6. The EC invoked a principle which is generally treated as part of company law to the effect that in certain cases what is usually called the veil of incorporation can be removed or pierced so that appropriate responsibility or liability can be applied or fixed upon the individual party or parties who in fact control the company in question.

7. The EC's Case Summary stated that the EC considered that:

"… there is no reasonable likelihood that a court would remove the usual protection provided by the veil of incorporation."

8. The passage quoted above represented the principal basis for the Appellant's request. The Appellant contends that the donation actually came from Mr Brown himself who was, in the Appellant's view, an impermissible donor. The Appellant claimed that it necessarily followed that the Liberal Democrat Party would have had to forfeit the donations under the PPERA.

9. On 23 May 2010, the Appellant wrote to the public authority to request information regarding its investigation. The EC acknowledged the request on 26 May 2010. However, it did not send a substantive response until 5 July 2010.

10. There were 12 requests for information in the Appellant's letter of 23rd May. Eleven were answered completely and to the apparent satisfaction of the

appellant. Only one was incompletely answered to which the Electoral Commission claimed that Section 42(1) of FOIA provided a qualified exemption to disclosure on the grounds of legal privilege. It was as follows:

"In reaching its decision that the corporate veil could not be lifted, did the Electoral Commission refer to any specific legal precedents on the circumstances in which the corporate veil could or could not be lifted and if so please name the cases?"

11. With regard to this request, the public authority (the EC) confirmed that it held the information but that its disclosure was subject to legal professional privilege. It explained that precedent cases were examined and cited as part of the legal advice it had obtained in relation to its investigation. The list of such cases was nonetheless legally privileged since it constituted part of the communication and advice between its lawyers and the public authority. It went on to confirm that the information had been kept confidential. It had not been released into the public domain and had not been released to another party who would otherwise waive the privilege. Section 42, is a qualified exemption requiring consideration of the public interest. The EC therefore considered the balance of public interests and set out the factors it had taken into consideration.

12. In the event, the EC concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

13. In mid-July 2010, the Appellant contacted the public authority and asked it to carry out an internal review of its response to his FOI requests He reiterated that he was only seeking the names of those cases which had been referred to as part of the legal advice obtained by the public authority and as part of the investigation. He was not, he said, seeking the legal advice itself.

14. In due course, in early September 2010, the EC presented the findings of the internal review. It upheld its earlier decision to refuse to disclose the requested information under the first request by virtue of section 42.

15. Mr Jackson submitted a formal Section 50 complaint regarding the public authority's response to the Information Commissioner on the 3rd September 2010.

The exchanges between the Commissioner and the EC

16. Following Mr Jackson's formal complaint to the Information Commissioner dated 3 September 2010, the Commissioner contacted the EC in mid-January 2011. The Commissioner observed that since the complainant had indicated that he was not interested in any of the content of the legal advice the EC had received, he took the view that the request necessarily meant that only the names of the relevant cases or case law would fall within the scope of the request. The Commissioner asked the EC why that type of information attracted legal professional privilege.

17. In its reply to the Commissioner, the EC expanded on its reasons as to why the exemption applied, a matter which will be revisited in the light of the more extensive submissions made by the parties on this appeal. The EC explained that as part of its investigation into 5AP, it had been in receipt of legal advice and in relation to that advice it had had regard to the case law which dealt with the subject of what is usually called lifting or piercing the corporate veil.

18. Further background relating to 5AP and the EC's investigation will be set out below. For present purposes, it is enough to state, as did the Commissioner in his Decision Notice at paragraph 14, that the EC had in the event been satisfied that the corporate veil regarding 5AP did not require to be lifted or pierced in respect of the substantial donations it had made to the Liberal Democrat Party.

The Decision Notice: the Commissioner's findings

19. At paragraph 15 and in the following paragraphs of the Decision Notice, the Commissioner set out his analysis of the issues regarding the applicability of exemption under section 42. It is appropriate to set out its material terms at this point. It provides that:

> "(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.
>
> (2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings."

20. The Commissioner pointed out that there are two basic types of legal privilege, namely, litigation privilege which, as its title suggests, applies when litigation is in progress or in contemplation, and legal advice privilege when such is not the case.

21. The EC had explained that legal advice has been required as part of its investigation into the 5AP donations, in particular, as to whether there had been a breach or breaches of the governing statute applying to the activities of the EC, namely, the PPERA and particularly as to whether 5AP or some other party or individual had been a proper donor.

22. The Commissioner accepted in his Decision Notice that section 42 was engaged. He observed that the advice had included what were referred to as the "precedent cases" (see paragraph 18 of the Decision Notice). Moreover, the principles behind these cases was, he found, discussed within the content of the legal advice. Therefore, the release of the cases could reveal some of the rationale contained within that advice. Further as

the material had not otherwise been placed into the public domain the exemption remained engaged.

23. The competing public interests were then referred to. In this respect, the Commissioner accepted that disclosure could inhibit the EC from obtaining future legal advice. The Commissioner pointed to the principles inherent in earlier decisions of the Information Tribunal (and in at least one High Court decision) which have referred to the strong "in-built" public interest inherent in section 42 itself.

24. Even though the Commissioner (see especially paragraph 34) said that there were "relatively strong arguments" in favour of disclosure to provide reassurance that the public authority consulted appropriate case law when coming to its decision, he nonetheless found that such arguments were not of sufficient weight to militate in favour of disclosure, given, first, the importance of the concept behind the privilege and second, the fact that the legal advice was recent and remained "relevant for future cases". The Commissioner therefore found in favour of the EC.

The Grounds of Appeal

25. The Information Commissioner's Decision Notice is dated 21 June 2011. The Grounds of Appeal relating to the request which is the subject of this appeal contend that the "sole issue" is "whether it is in the public interest to publish the information". The Tribunal has therefore addressed the appeal on that basis alone. The Grounds of Appeal request that the submissions it contained "be read in conjunction" with various earlier documents provided in a "bundle" which accompanied the Grounds themselves.

26. However, at paragraph 3, the Appellant specifically confirmed that he "only required the names of the legal precedents, nothing more …" and only those which "relate to lifting the corporate veil and not all the cases referred to in the legal advice." He claimed that the "very limited nature of the

request must contribute towards tipping the balance in favour of disclosure, even if alone it is not the decisive factor".

27. He then referred to the EC's Case Summary and quoted a passage in which the EC said that there was no reasonable basis for concluding that the true donor in respect of the donations which are here in issue was "anyone other than 5AP". At paragraph 8 of his Grounds of Appeal, the Appellant stated that there was "no dispute" that Mr Michael Brown as the "sole director" of 5AP "stole the £2.4 million he donated for the Liberal Democrat Party and facilitated his dishonesty through the company – there is no question that the party accepted the money in good faith."

28. Put shortly, the Appellant therefore claimed that the balance of the competing public interests militated in favour of disclosure in effect because it was important for the truth as to the circumstances surrounding the donation or donations to be revealed. As the Appellant puts it at paragraph 13 of his Grounds of Appeal:

"Disclosure of the information will allow the public to judge what cases compelled the [EC] to conclude that a court was unlikely to remove the veil of incorporation and effectively allow a criminal to finance a political party with the proceeds [sic] financial crime facilitated through a company set up exclusively for criminal purposes."

29. At paragraph 6 of his Grounds of Appeal, the Appellant states the following:

"Normally, actions taken in the name of an incorporated company protects [sic] its directors from personal liability and this is referred to as the corporate veil. However, in certain circumstances the courts can remove the corporate veil to make a director personally liable. One such exemption is if a director facilitates theft or fraud through his company. It is perhaps self-evident that a director who facilitates theft or fraud through his company

cannot escape personal liability for his crimes by hiding behind the corporate veil."

30. The Appellant then cites the decision of the House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corporation* [2002] UKHR 43 (2003) 1 AC959. He quotes from paragraph 22 of Lord Hoffmann's speech in which Lord Hoffmann stated that: "No one can escape liability for his fraud by saying "I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable." "

31. The Appellant then contended that the "someone else" in the context of the present case was 5AP being an incorporated company. He added that: "Although this case refers specifically to fraud, it does cover related dishonestly [sic] like theft."

32. He further states in paragraph 9 of his Grounds of Appeal, citing the terms of a complaint he has apparently made to the Parliamentary and Health Services Ombudsman about the EC:

"In reality 5th Avenue Partners Ltd was an off-the-shelf company with no trading record and its *raison d'etre* was crime. Brown himself was a convicted criminal wanted in the USA. In summary, the business carried on by the company was facilitating financial crime. All this and more was known to the Electoral Commission from evidence provided by the police when it wrote the case summary."

33. The Appellant then contended in paragraph 10 that the evidence he referred to was "a matter of public record", and that there could be "no dispute that the police provided the Electoral Commission with this evidence and more, yet they deliberately omitted it from the case summary and chose to give the false impression that 5th Avenue Partners Ltd [was a legitimate company …". The Appellant considered that " based on this evidence alone, a reasonable person would be compelled to the conclusion that a court was

likely to remove the veil of incorporation". The EC in his view " by omitting the police evidence" had "misled the public and were not open and transparent in the case summary" (Paragraph 12). The question to be addressed was whether the legal advice was proper in view of the fact that the police evidence had apparently been excluded.

34. The legal advice according to the Appellant was either wrong, ignored, or "more likely it was not based on the full facts and this resulted in a perverse and therefore unlawful decision". (Paragraph 23)

35. The Appellant considered that disclosure of the list of the precedent cases contained in the legal advice would allow the " public to judge what cases compelled the Electoral Commission to conclude that a court was unlikely to remove the veil of incorporation." (Paragraph 13)

The general background: the Electoral Commission

36. The EC is a statutory body which is set up under the PPERA. It is not part of the Crown. It is accountable not to any government department but to a cross-party House of Commons Committee chaired by the Speaker.

37. One of its primary functions is to monitor party election finances. At the time of the investigation which is relevant to this appeal, section 145 of the PPERA provided that the EC held the general function of monitoring compliance with the restrictions on party election finances imposed under Part III to Part VII of the PPERA. This includes the monitoring of possible offences in respect of the making and receipt of political donations under sections 56 and 61 of the PPERA.

38. 5AP donated some £2.4m to the Liberal Democrat Party. 5AP was a company registered in the UK under the Companies Act 1985 and is a subsidiary of a Swiss company, namely, 5th Avenue Partners GmbH. Both 5AP and the parent company were controlled by Mr Michael Brown. In

2008 Mr Brown was convicted of theft, furnishing a false bank account, money laundering and perverting the course of justice.

39. The EC conducted an investigation into 5AP's donations to the Liberal Democrat Party. Under the PPERA, the EC has responsibility for regulating the financing of political parties and those persons who participated in political campaigns. The relevant provision is section 54 which provides as follows, namely:

> "54 Permissible donors
>
> (1) A donation received by a registered party must not be accepted by the party if –
>
> (a) the person by whom the donation would be made is not, at the time of his receipt by the party, a permissible donor; or
>
> (b) the party is (whether because the donation is given anonymously or by reason of any deception or concealment or otherwise) unable to ascertain the identify of that person.
>
> (2) For the purposes of this Part the following are permissible donors–
>
> (a) an individual registered in an electoral register;
>
> (b) a company –
>
> (i) registered under the Companies Act 2006, and
>
> (ii) incorporated within the United Kingdom or another member State, which carries on business in the United Kingdom …"

40. The EC published its summary of its investigation in the Case Summary already referred to on 20 November 2009. The Tribunal has seen this

document although the date does not appear on the face of the document. At paragraph 3.5, the following critical passage appears, namely:

"The Commission considers that there is no reasonable basis for taking into account the facts of this case and the relevant law to conclude that the true donor was anyone other than 5th Avenue Partners Ltd. The Commission looked at the relevant evidence and considered that there was no reasonable likelihood that a court would find that 5th Avenue Partners Ltd acted as an agent on behalf of either Michael Brown or 5th Avenue Partners GmbH when making the donations. The Commission also considered whether company law allowed the actions of 5th Avenue Partners Ltd to be treated as the actions of Michael Brown or 5th Avenue Partners GmbH. The Commission considered that there was no reasonable likelihood that a court would remove the usual protection provided by the veil of incorporation."

41. The Case Summary notes that inquiries concerning the donations "began in May 2005" but were suspended in March 2007 at the request of the City of London Police. Inquiries resumed at the conclusion of the criminal proceedings in November 2008 when Mr Brown, being the sole director of 5AP, was convicted. The EC stated that during its investigation it had made a number of inquiries and obtained and considered a large number of documents "including evidence used in the criminal proceedings against Michael Brown". It is said that these documents became available to the EC in May 2009 "sometime after the investigation was resumed".

42. At paragraph 1.3, the following passage occurs, namely:

"Having carefully examined the evidence and the applicable law, the Commission has concluded that 5th Avenue Partners Ltd met the permissibility requirements under PPERA, and therefore was a permissible donor. The Commission also considers that there is no reasonable basis, on the facts of this case and taking into account the relevant law, to

conclude that the true donor was someone other than 5th Avenue Partners Ltd."

43. At paragraph 1.4, the following passage appears, namely:

"No evidence emerged during the investigation to change the Commission's previously expressed view that it was reasonable for the Liberal Democrats, based on the information available to them at the time, to have regarded the donations as permissible."

44. The Case Summary then lists the donations from 5AP as consisting as five in number being the sums of £100,000, £151,000, £1,536,064.80, £632,000 and £30,000 in respect of the use of an aircraft, it seems from what the Tribunal has seen in this case on a number of occasions in early to mid-2005.

45. Section 3 of the Case Summary sets out what the EC considers to be the key issues in the case. Firstly, whether 5AP was "a permissible donor" and secondly, whether 5AP was the true donor. This in turn leads to the conclusion at paragraph 3.5 already set out above with the EC adding at paragraph 3.6 that there was "no credible evidence that any of the donations came from Michael Brown's own money rather than from one of his companies." In relation to the first three donations of £100,000, £151,000 and £632,000, the evidence indicated that money in relation to these came from money transferred into 5AP by investors. The Case Summary went on to note that in respect of the £1.54 million cash donation as well as the provision of £30,000 for the use of an aircraft, "the movement of funds was different in that the parent company was involved" and had transferred the funds to 5AP.

46. At paragraph 3.10, the EC stated that it had considered "whether the transfers amounted to an agency arrangement." It concluded that an agency arrangement in the sense of an agreement where one person acts

on behalf of another "would not arise purely because a holding company made funds available to its subsidiary." It also rejected any conclusion that any agency arose between the parent and 5AP in any other way.

47. As already indicated earlier, a donation from either an individual who is not on the Electoral Register or a company that is not registered in the Companies Act 2006 and/or is not carrying on business in the United Kingdom will not be a permissible donation.

48. Section 56 of PPERA makes provision as to the steps that a political party is expected to take on receipt of a donation. It also addresses the circumstances in which a party will be guilty of an offence under the Act. Section 56 provides in relevant part, namely:

"56 Acceptance or return of donations: general

(1) Where –

(a) a donation is received by a registered party, and

(b) it is not immediately decided that the party should (for whatever reason) refuse the donation,

all reasonable steps must be taken forthwith by or on behalf of the party to verify (or, so far as any of the following is not apparent, ascertain) the identity of a donor, whether he is a permissible donor, and (if that appears to be the case) all such details in respect of him as are required by virtue of paragraph 2 … of Schedule 6 to be given in respect of the donor of a recordable donation.

(2) If a registered party receives a donation which it is prohibited from accepting by virtue of section 54(1), or which it is decided that the party should for any other reason refuse, then –

(a) … the donation or a payment of any equivalent amount, must be sent back to the person who made the donation or any person appearing to be acting on his behalf …

within the period of 30 days beginning with the date when the donation is received by the party.

(3) Where –

(a) subsection (2)(a) applies in relation to a donation, and

(b) the donation is not dealt with in accordance with that provision,

the party and the treasurer of the party are each guilty of an offence.

(3A) Where a party or its treasurer is charged with an offence under subsection (3), it shall be a defence to prove that:

(a) all reasonable were taken by or on behalf of the party to verify (or ascertain) whether the donor was the permissible donor, and

(b) as a result, the treasurer believed the donor to be a permissible donor."

49. The details required by section 56(1) are set out in paragraphs (2) and (2A) of Schedule 6. In summary, these comprise the donor's name and address on the Electoral Register or the details of the company's number and registered office.

50. Section 56(1) requires a party to take all reasonable steps to ascertain whether a donor is a permissible donor. If the donation emanates from an impermissible donor, then it must be returned within 30 days. In the event

that the party does accept an impermissible donation, and in the event that it has not taken all reasonable steps to ascertain whether the donor was permissible, it will be guilty of an offence.

51. There are two other related offences prescribed by section 61 of the PPERA dealing with the evasion of the restrictions on donations, but they need not be set out in full here: see sections 61(1) and 61(2) addressing, by and large, the knowing entering into an arrangement which facilitates the making of impermissible donations or the knowing provision of false information in relation to such a donation.

52. The EC points out in its written submissions that it is not specifically designated as a prosecuting authority in relation to the criminal offences prescribed by the PPERA. However, as with many other regulatory bodies, the EC can bring its own prosecutions or refer matters to the CPS to prosecute. The Commission's current policy is to refer prosecution to the CPS. The Commission now also has powers under section 147 of Schedule 19C of that Act to impose a civil sanction when it considers that a criminal offence has been committed.

53. The EC also points out that it has a specific statutory role under section 58 of PPERA where a party has accepted an impermissible donation. In such a case, the Commission has the power to apply to the Magistrates' court for an order that an amount equal to the donation be forfeited. The EC also points out that an application for forfeiture is not dependent on there having been any failure by the party to take reasonable steps to verify the identity of the donor as required by section 56(1). It follows that an application may be made in respect of any impermissible donation, even if the party has taken all reasonable steps to verify the identity of the donor.

54. Although the EC is the party which is empowered by section 58 to make an application for forfeiture, it will be a Magistrates court in England and Wales which will determine first whether or not the conditions for making such an

application are satisfied and if so, secondly, whether it is appropriate for that court to exercise its discretion to order forfeiture in the particular case.

The Commissioner's Response

55. The Commissioner's Response to the Appellant's Grounds of Appeal is dated 1 August 2011. After setting out the terms of section 42 of FOIA, the Response refers to the fact that the application of the public interest balancing exercise under that section "has been explored extensively" (paragraph 18). Express reference is made to the terms of the other Tribunal authorities namely and principally, *Bellamy v Information Commissioner and DTI* (EA/2005/0023), including a decision that went to the High Court and is recorded as *DBERR V O'Brien and IC* [2009] EWHC 164 (QB) per Wyn Williams J, particularly at paragraph 53 of that judgment where reference is made to the inbuilt public interest within the exemption.

56. The Response also pointed out that the Information Tribunal in other decisions relating to the issue of legal privilege has held that the "age" of legal advice may be a relevant factor in determining whether the advice should be disclosed. See e.g. *Kessler v Information Commission and HMRC* (EA/2007/0043), particularly at 57(e) and 73-74.

57. The Response identifies three strands relating to the Appellant's argument as to the competing public interests. They are, first, that the information requested is of a very limited nature. In other words, the Appellant has asked only for the authorities considered in the EC's legal advice relating to the veil of incorporation, not for any substantive legal advice Secondly, the Commissioner refers to the fact that the EC has already disclosed the statutory provisions considered in this legal advice. Thirdly, the Appellant has in effect submitted that the circumstances of this case are, exceptional based particularly on three factors, set out below.

58. The first is that the EC's conclusion at paragraph 3.5 of its Case Summary, already cited above, is wrong in law. This is principally because, it is claimed by the Appellant that Mr Brown stole from 5AP from which it followed that the impact of the Theft Act (and indeed that of other statutory provisions) meant that Mr Brown owned the funds following upon the theft and that when they were donated to the Liberal Democrat Party they must therefore have come from him with, as pointed out above, 5AP being merely a "conduit". In this connection, the Appellant had also argued that the effect of Mr Brown's conviction in practical terms meant that the corporate veil had already been pierced or lifted by the courts.

59. The second factor is that the implication of the EC's conclusion in paragraph 3.5 is that political activities in the UK can be funded from the proceeds of crime.

60. The third and final factor is that the EC's Case Summary is not transparent. The Appellant, in the view of the Commissioner, considered that it amounted to a misleading of the public by the omission of relevant facts and contended that the EC's legal advice may also have been based on incomplete information by alleging that the legal advice was, in the Appellant's words "either wrong in law or the [Electoral Commission] ignored legal advice, or more likely it was not based on the full facts and this resulted in the perverse and therefore unlawful decision." The Appellant further contended that, the public is prevented from reaching its own view on whether a court would pierce the corporate veil in the circumstances of this case unless they are given the reasons why the EC concluded it would not do so.

61. The Commissioner then set out his formal Response to these strands to the Appellant's position and accompanying factors stressed by the Appellant. Before doing so, he emphasised three matters which, in the Tribunal's view, are deserving of mention. First, there is the significant weight that should

be afforded to legal professional privilege in accordance with the principles now endorsed by the High Court in *DBERR v O'Brien supra*. Second, as already referred to, the EC indicated the advice still has potential significance for other cases. Third, the EC's particular concern was that if the information requested were to be disclosed, there may well be a question as to whether the same amounted to a partial waiver of its privilege with regard to the legal advice.

62. Dealing with the three factors cited by the Appellant favouring disclosure and set out above, the Commissioner made in effect six principal submissions.

63. First, the thrust of the Appellant's contention lay in taking issue with the substantive conclusion reached by the EC as to the interpretation of section 52 of the PPERA as to the facts of this case and this particular investigation is wrong in law. The Commissioner's view is that such a question is simply not capable of determination by him (or by the Tribunal) by virtue of the statutory schemes set up, not only by FOIA, by also by the PPERA.

64. Second, the Commissioner looked at the legal advice from which the disputed information would be extracted. He reached his own independent view on whether there is any reason to doubt that it is full and proper or whether it is based on sufficient information or whether the EC followed it, either in accordance with the content of paragraph 3.5 of the Case Summary, or at all. The Tribunal would have the opportunity to do the same.

65. Third, even the though the Commissioner accepted that the implication of the conclusion of the EC appeared to be that political parties in the UK can be funded by the proceeds of crime, thereby giving rise to a matter of substantial public interest, this conclusion was not outweighed by the factors which favour withholding the particular information in this case. Public authorities regularly rely on legal advice as to the interpretation of the

scope of statutory provisions. Whether or not such advice leads to a possible lacuna to begin with or even an actual lacuna in a statutory scheme that cannot in the Commissioner's contention be a sufficient reason to require disclosure of the advice.

66. Fourth, the Commissioner did not accept that the EC acted without transparency with regard to the decision making process in this case. He cites three reasons:-

First, the Case Summary identified matters on which the EC based its investigation as well as the conclusions and the reason for the same. Second, any contention that the Case Summary omitted certain background factual matters is simply not relevant to the question of whether it would be in the public interest to disclose the information requested. Third and finally, the Appellant's contention that the public are prevented from reaching their own conclusion as to whether a court would pierce the corporate veil had no foundation. Indeed, the Appellant himself represented an illustration of why there is simply no force in that contention. Members of the public, such as the Appellant himself, can access the relevant law, seek their own legal advice and indeed reach their own view without in any way knowing what law or legal materials the EC has been advised is, or might be, relevant.

67. Fifth, the Commissioner stressed that the fact that the information requested is not the full advice received, but only the authorities considered in that advice (or, as it was put in the request, the "case precedents") in effect, represented something of a double-edged sword. To disclose the information would on the one hand enable members of the public to speculate possibly correctly on the contents of the legal advice. In such a case, prejudice to the EC would be in effect the same as if the advice itself were disclosed as a whole. On the other hand, disclosure might also lead to members of the public speculating incorrectly on the contents of the legal

advice. In the latter case, the prejudice might be less, but the usefulness of the information would be thereby much reduced.

68. Sixth and finally, any contention made by the Appellant that there could be no harm in disclosing the case law where the appropriate statutory provisions had been disclosed was, the Commissioner claimed, misconceived. The essence of legal advice would have necessarily involved the interpretation of the relevant statutory provisions, mindful of the role and purpose of the EC itself. The Commissioner claimed that disclosing the terms of the question or questions relating to the appropriate interpretation simply did not affect the conclusion that harm would arise from disclosing the contents of the advice given upon that question.

The Electoral Commission's response

69. The Electoral Commission submitted a written Response dated 12 August 2011.

70. At paragraph 15, the Commission reiterates its view that it has not been established whether the donations to the Liberal Democrats from 5AP were made from the proceeds of crime. The EC's investigation did not seek to establish whether the donation came from the proceeds of crime, nor could it have done under the statutory powers available to the EC. The investigation only concerned whether 5AP was an impermissible donor and whether it was true donor. Reference is then made to paragraph 3.5 of the Case Summary.

The Evidence

71. The Tribunal has heard evidence in the course of the appeal. However, it also received in advance of the appeal, written evidence. The first took the form of a statement from the Appellant himself dated 29 September 2011.

This largely reiterates the arguments and concerns set out in the Grounds of Appeal and Responses.

72. The Appellant clearly contended that the "issue" between the parties was whether in what he called the exceptional and extraordinary circumstances of the case, the public interest in maintaining the exemption outweigh the public interest in disclosure.

73. He repeated his contention that the EC acted "unlawfully" in failing properly to conduct its investigation contending generally that the Tribunal had to decide whether the EC had misrepresented or misinterpreted the evidence in this case, in its Case Summary.

74. He expanded his claim by alleging that therefore "gross negligence, incompetence or bias" lay at the heart of the matter and that the EC had failed to take into account matters which they lawfully ought to have taken into account, resulting in what he called an "absurdity". It followed, he claimed, that the legal advice was equally "absurd" or was not based on the proper facts.

75. The remainder of his submissions revisited the materials appended to his Grounds of Appeal. He also referred to the various other statutory provisions, such as the Companies Act 1985, in particular section 458, now in fact re-enacted as section 993 of the 2006 Act which sets out the ingredients of the offence of fraudulent trading. Reference was also made to section 9 of the Fraud Act 2006. The stated aim of these references was to show that it was not "Parliament's intention to include financial crimes in any interpretation of carrying on a business".

76. The other witness statement is from Lisa Ellen Klein dated 29 September 2011. Ms Klein is a Director of Party Election Finance within the EC and has held that position since April 2007. She describes her responsibilities as including delivery of the EC's corporate objective of ensuring the

transparency of party and election finance and compliance with the relevant rules. She formally confirmed the investigative steps which were taken by the EC with regard to the first issue it was charged with, namely, to see whether 5AP was a permissible donor. This has been touched on above and she duly confirmed the same. With regard to the second question as to whether 5AP was a true donor, she also formally confirmed that the EC considered there was no reasonable basis, taking into account the facts of the case and the relevant law, to conclude that the true donor was anyone other than 5AP.

77. In paragraph 10 of her statement, she also formally confirmed that the investigation "raised legal issues for which there was no precedent within the context of PPERA". Legal advice was sought from the EC's own specialist internal lawyers, but was also obtained from external Counsel, including Leading Counsel.

78. She adds that the issue of impermissible donors potentially using UK registered and incorporated companies to make donations is an on-going one. The advice concerning the lifting of the corporate veil has been used, she says, in the context of at least one other investigation since being received. As at the date of her witness statement which is 29 September 2011, she claims that there was an anticipation that the EC would use the legal advice for future cases .

79. She also confirms that the EC issued a press release as well as the Case Summary already referred to.

80. Her witness statement at para 14 states the following:

"The Commission draws upon its experience of the law's operation and where appropriate, it highlights potential areas of concern. For example, in its written evidence to the Committee on Standards in Public Life in October 2010 as part of the Committee's review of the political finance regulatory

framework, the Commission raised the question of the permissibility of companies and cited this investigation when discussing the implications of the PPERA permissibility requirements."

81. Ms Klein also gave oral evidence before the Tribunal and was cross-examined by the Appellant. In her further evidence, she confirmed that a team within the EC, of which she was one, conducted the relevant investigation. She stated that she would have decided whether to seek what she called external legal advice. However, she said that the Head of the Legal Department at the EC would then have decided upon the identity of the relevant Counsel. She also confirmed that following upon receipt of the legal advice, the publication of the Case Summary would have been decided upon by herself subject first to the approval of the Chief Executive of the EC, and then subject to the approval of the Board of the EC.

82. On being cross-examined by the Appellant, she confirmed that, as it was put, she did not "sign off" the decision eventually made by the Board to publish the Case Summary. She denied that there had been any negligence or any other form of impropriety in connection with the investigation.

Analysis

83. The Tribunal accepts that there is a general public interest in allowing public access to information. In this case it is clear that there is a strong public interest in the issues raised by the Appellant. On the face of it, it would seem, as he claims, inconceivable that Parliament envisaged that political parties could be funded by the proceeds of crime, as acknowledged by the ICO: "The Commissioner accepts that the implication of the EC's conclusion appears to be that political parties in the UK can be funded by the proceeds of crime." (para 24c of ICO response (page 89).

84. Moreover the Tribunal is aware that many of the issues raised – in terms of the permissibility of donors, agency relationships and transparency of donations - are very topical. The Electoral Commission has only recently made written representations to the Committee on Standards in Public Life who have been considering these very issues. The case focused upon by the Appellant in respect of 5AP is directly referred to in the EC's evidence "Party Funding" (para 4.14) dated October 2010.

85. The Tribunal has noted the Thirteenth Report of the Committee on Standards in Public Life dated 22 November 2011. In particular, it noted the recommendations, and in particular, those numbered recommendation 2 and recommendation 3, the former of which suggests that private companies should "declare their ultimate ownership and be able to demonstrate that their owners would be permissible donors if they had given the same money directly". Recommendation 3 suggests that to be a permissible donor, "all companies, whether publicly or privately owned, should have to be able to demonstrate that they are trading in the UK and earning sufficient income here to fund any donations." It also noted that in its first recommendation the Committee proposed a cap on the size of donations in any one year which would if adopted would preclude by a significant margin donations of the size of those which were the subject of this case.

86. Even accepting that the request was made some 18 months ago, these issues were clearly current then.

87. Nevertheless it is very clear to the Tribunal that it is not its role to determine whether the EC's decisions set out in the Case Summary were right. The Tribunal's decision relates only to whether the ICO was right in upholding the decision that it was in the public interest to withhold the disputed information – namely the list of case precedents relating to the lifting of the veil of incorporation. The Tribunal's statutory remit under FOIA, which is

principally enshrined in Part V of FOIA, in particular section 58, does not allow it to reinvestigate these matters. Although section 58(2) refers to reviewing findings of fact, that does not authorise the Tribunal to query, let alone re-examine, a finding of fact in turn made on the basis of legal advice taken by a third party, in particular, a separate regulatory body which the Tribunal in this case had no basis, let alone any jurisdiction to question. To reinvestigate matters which were looked at in the way described by the EC would in effect cause the Tribunal to act in breach of statutory duty by trespassing upon the function and role of the EC in a way not contemplated by statute, in particular, the PPERA.

88. It is the EC's role to implement the law as currently enacted. In doing so it is vital that it seeks where necessary, and obtains, proper legal advice in carrying out its obligations. It is important that that advice be subject to legal privilege as recognised by the strong "in-built" public interest inherent in section 42 of FOIA itself, and subsequent Information Tribunal judgments. (see para 52)

89. Moreover the Tribunal accepts – and the reference above to the topicality of the issue underlines - that this is an area where the EC may well need to deal with further cases under PPERA as currently enacted.

90. The Tribunal's view is that on balance, in this case, the public interest in maintaining the principle of legal privilege outweighs the public interest in disclosure . It has considered the fact that the information requested is a list of the legal precedents cited – and not the actual legal advice itself - but it is clear that this still constitutes legally privileged information.

91. The Tribunal recognises that, were there any basis for inferring that the EC ignored the legal advice it received or has misled the public, then there would be a genuine degree of public interest in ensuring that the EC reached a proper decision.

92. Taking account of the evidence of Ms Klein and the closed material (which included the legal advice; the list of legal precedents referred to and the report of the investigation presented to the EC Board), the Tribunal finds that it has found no indication of any evidence that the public has been misled. From what it has seen the Tribunal is satisfied that nothing in the closed materials as a whole lends any support to the suggestion that the advice the EC received was anything less than thorough and that the investigation which the EC carried out, as set out in the Case Summary, was equally thorough and properly conducted. Nothing in the closed materials would indicate that the investigation was carried out in anything approximating a perverse or unlawful manner and therefore adding particular extra weight to the public interest justifying disclosure of the list of case precedents requested by Mr Jackson.

93. The Tribunal notes that, following a complaint from the Appellant in this case and subsequent correspondence between him and the Parliamentary and Health Services Ombudsman an investigation into aspects of the Electoral Commission's investigation of the donations in question has been initiated. The Tribunal confirms its view that the expressed concerns of the Appellant which go beyond the specific FOIA request considered by this Tribunal are addressed as appropriate by the Ombudsman.

Conclusion

94. For the reasons set out above the Tribunal upholds the Decision Notice of the Information Commissioner, and therefore dismisses the Appellant's appeal.

Signed:

David Marks QC
Tribunal Judge

Dated: 17th January 2012

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Case No. EA/2011/0136

GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS
Against the Information Commissioner's Decision Notice No: FS50351910

Appellant: Mr Peter Jackson
1st Respondent: Information Commissioner
2nd Respondent: The Electoral Commission

DECISION ON MR JACKSON'S APPLICATION FOR PERMISSION TO APPEAL FROM THE FIRST-TIER TRIBUNAL TO THE UPPER TRIBUNAL

1. Mr Jackson wishes to appeal from the Decision of the First-tier Tribunal made on 17 January 2012. His application for permission to appeal was referred to me by the Principal Judge after Mr David Marks QC, who chaired the hearing before the First-tier Tribunal, recused himself, the Principal Judge being prevented by other judicial duties from dealing with the application himself.

2. Mr Jackson submitted on 10 February 2012 an application for permission to appeal to the Upper Tribunal. The application was verbose and ran to 52 closely-typed pages, being much longer than the decision that he wished to appeal.

3. The Principal Judge, as he was entitled to do, directed on 15 February 2012 that Mr Jackson provide revised and more succinct grounds in no more than 2000 words.

4. Mr Jackson on 20 February 2012 supplied a five-page document which-

    a. applied to add a further ground of appeal on the basis of alleged bias (paragraphs 1-5),

    b. set out lengthy and manifestly ill-founded complaints about the Principal Judge's procedural direction, which I infer were based on a misunderstanding of the requirements for an application for permission to appeal and of the Tribunal's procedural powers (paragraphs 6-15), and

    c. highlighted one of the existing grounds of appeal (paragraphs 16-22).

5. Mr Jackson is not legally represented. Given Mr Jackson's evident misunderstanding both of what was required in an application for permission to appeal and of the Tribunal's procedural powers, I have read not only the Decision and the five-page document but also the 52 page application.

6. The requested information, so far as in dispute, was limited to the specific legal precedents referred to by the Electoral Commission in regard to the circumstances in which the corporate veil could be lifted. The sole question was whether the public interest in maintaining the legal professional privilege exemption outweighed the public interest in the disclosure of the requested information.

7. The heart of the reasoning of the Decision is in paragraphs 83-93 of the Decision.

8. Doing the best I can to distil the essence of Mr Jackson's grounds of appeal, his principal contentions seem to me to be that (a) there is an inconsistency between the reasoning in paragraph 87 of the Decision and the reasoning in paragraphs 91-92, and (b) in any event, given the contents of the evidence adduced at the hearing and in particular admissions which he says were made by the Electoral Commission's witness, the finding in paragraph 92 was not supported by any or sufficient evidence and/or was not adequately reasoned.

9. I consider that these points are reasonably arguable; they may fail, but, if what he says is correct, they could possibly succeed.

10. Despite the appearance that the Tribunal reached its conclusion at paragraph 90 based on the matters considered up to that point, it is reasonably arguable that the finding in paragraph 92 was also a matter taken into account by the Tribunal in reaching its view on where the public interest balance lay.

11. I am therefore not in a position to say that the appeal has no reasonable prospect of success, and I reluctantly grant permission to appeal.

12. The reason for my reluctance is that, even supposing it were decided on appeal that the Tribunal made an error of law, I find it difficult to see how at the end of the day the public interest balance could be re-decided in Mr Jackson's favour. Irrespective of whether the Electoral Commission acted lawfully and properly or unlawfully and improperly, the value to the public of knowing which legal precedents it referred to seems to me to be minimal and in any event wholly insufficient to outweigh the public interest in maintaining the legal privilege exemption. However, I am not in a position to make a definite judgment on that point: if there was an error of law, the public interest balance will have to be reconsidered by a Tribunal taking full account of the whole of the evidence and arguments.

13. I now turn to Mr Jackson's application to amend the grounds of appeal to include the allegation of bias.

14. The basis for the application is an email sent by the Tribunal office to the Information Commissioner's office, and copied to Mr Jackson and to the Electoral Commission, which stated:

> "Dear Mr Sowerbutts,
>
> The Tribunal received the attached application for permission to appeal from Mr Jackson yesterday. The Tribunal Judge has asked if the Commissioner has any representations he thinks advisable on what the Tribunal should do with an application of such length and /or with this specific application. In particular, is the Commissioner of the view that the Tribunal should make a direction that the grounds be shortened to a document that is no longer than 4 pages in length? The Tribunal would be grateful if the Commissioner could respond to this by the end of Friday.
>
> Best wishes,
>
> Pete
>
> Pete Martin
>
> Clerk to the Tribunal (Information Rights)"

15. The reply from the Commissioner declined to give any specific view, merely noting the Tribunal's inherent power under rule 5(1)(c) of the Tribunal Rules.

16. On 14 February 2012 Mr Jackson sent in a submission which stated:

The Tribunal heard an appeal against the decision of the Information Commissioner and issued its judgment, which now give rise an application by the Appellant for leave to appeal against the judgment. The Information Commissioner is therefore a party before the Tribunal with no more standing than the Appellant.

It is entirely wrong for the judge to give one party the appearance of special privilege over another party by seeking advice not just on the length of the Appellant's application, but on what the Tribunal should do with *"this specific application."* This is a clear invitation to the Information Commission to force an unrepresented Appellant to curtail substantial and detailed arguments in favour of an appeal against the original decision of the Information Commissioner and furthermore directly influence whether leave should be granted to appeal against the original decision of the Information Commissioner. In short, an invitation to the Information Commissioner to act in breach of the law that *nemo iudex in causa sua.*

The Information Commissioner recognized that he would be acting unlawfully to give the advice sought and quite rightly rejected the request with the promptness it deserved.

It is the Appellant's view that the mere fact that the judge sought the advice of the Information Commissioner, in relation to an application to appeal against a decision of the Information Commissioner, gives rise to a reasonable suspicion that during the hearing the judge regarded the opinions of the Information Commissioner as being endowed with special privilege over the Appellant and more as an advisor than a party defending its decision.

The judge acted unlawfully, through his approach to the Information Commissioner, and this indicates a general predisposition to act on the opinion of the Commissioner not just in relation to the application, but during the hearing which gave rise to the application.

In the famous case of *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233) Lord Hewart started:

A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

The question is not whether the judge was actually predisposed towards the Information Commissioner, "*but upon what might appear to be done.*" In this case there is the appearance of the judge being predisposed towards the Information Commissioner and this is bias.

The Appellant has set out his arguments in favour of granting leave to appeal. They are lengthy, but they are "*proportionate to the importance of the case*" and "*the complexity of the issues.*" The Appellant is not represented and cannot afford legal representation. He can only advance his arguments as best he can and within his ability and resources. Had the judge acted in accordance with the overriding directive, he ought to have been able to decide if the Appellant had grounds for appeal based on the evidence before him. As it is, he sought to unlawfully involve the Information Commissioner in curtailing the Appellant's argument and on their merits- inviting the Commissioner to make "any *representations he thinks advisable on what the Tribunal should do…….…… with this specific application"* is an invitation to give advise [*sic*] on the merits of the grounds for appeal."

The weight of the evidence, set out by the Appellant, indicates that the judge made a perverse decision in his original judgment, so this is not a case where the original decision was so manifestly fair the possibility of bias is precluded.

The Appellant submits that the judge forthwith recuse himself from this case and the matter be referred to the Upper Tribunal. If the Appellant is not informed that this has been done, within a reasonable time, he will have to consider whether to take this mater to judicial review as a matter of urgency. The judiciary is either totally independent or it is not independent at all.

17. It was in response to that submission that Mr David Marks QC decided to recuse himself from considering Mr Jackson's application for permission to appeal.

18. Mr Jackson submits in his five-page document that "the recusal of the judge is evidence *per se* that there was real danger or reasonable apprehension or suspicion that the judge might have been biased". That is simply wrong, and in my view it is not a reasonably arguable submission. When a challenge is made, it is always open to a Judge, if he so decides, to stand aside and allow the matter to be dealt with by another Judge, irrespective of his views concerning whether the challenge has any validity. The fact of recusal is not in itself evidence of bias.

19. The test of bias involves considering how the matter might appear to a "fair-minded and informed observer": see *Helow v Secretary of State for the Home Department* [2008] UKHL 62.

20. Mr Jackson submits that the email indicated a general predisposition to act on the opinion of the Commissioner, and to do so not just in relation to the application to

appeal, but during the substantive hearing. It does not seem to me to be reasonably arguable that the hypothetical fair-minded and informed observer would take that view, or would consider that it was a real possibility. The fair-minded and informed observer would know that the Judge was entitled to ask for the parties' views on how procedurally to deal with a disproportionately long application to appeal. The Commissioner was invited to comment and the invitation was copied to the other parties at the same time. If the Commissioner had seen fit to make any representations as to the appropriate procedural course, the other parties would then have had opportunity to comment on his representations, if they had anything that they wished to say. The fair-minded and informed observer would know that it is not unusual to ask one party for its views on what has been submitted by another party, since consecutive submissions tend to be more focused than submissions sent without knowledge of what another party is saying. In this instance the responding party was not even asked to comment on the substance of the document but only on the appropriate procedure for dealing with it.

21. I do not consider it arguable that the fair-minded and informed observer would infer, from the procedural email, a real possibility of a predisposition in favour of the Information Commissioner on the substantive issue of the appeal.

22. The application to amend the grounds is therefore refused. Permission to appeal is limited to the grounds in the original application (and, if they add anything, in paragraphs 16-22 of the five-page document).

Andrew Bartlett QC

Judge of the First-tier Tribunal

23 February 2012