

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 30th January 2007

Public Authority: National Portrait Gallery
Address: St Martin's Place
London
WC2H 0HE

Summary

1. The complainant asked the public authority ('the Gallery') for information about how much it had paid to an artist commissioned to make a video portrait of David Beckham, and who owned the work. The Gallery provided information about ownership but withheld other information, citing the exemptions contained in sections 21 and 43 of the Freedom of Information Act 2000 ('the Act'). The complainant objected to the withholding of that part of the information to which the Gallery had applied section 43, and after the Commissioner's intervention the Gallery released that information. The Commissioner has decided that section 43 did not apply at the time of the original request both because the prejudice to the commercial interests of the Gallery was insufficient to engage the exemption and that (even if the exemption had been engaged) the public interest in maintaining the exemption did not outweigh the public interest in disclosure. He has also decided that the Gallery breached section 17(3) of the Act because its refusal notice failed to explain its application of the public interest test. However, since the information has now been released the Commissioner does not require it to take any further action.

The Commissioner's Role

2. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

3. On 14 January 2005 the complainant made this request to the National Portrait Gallery ('the Gallery'):

'How much was paid out to Sam Taylor-Wood in fees and expenses for David the video portrait of David Beckham? Please provide details of any expenses that were paid to Mr Taylor-Wood associated with the commission.

Under the terms of agreement of the commission who owns David'.

4. In its response of 25 January 2005, the Gallery confirmed to the complainant that it:

'owned the commissioned portrait of David Beckham, that the contract for the commission is between ourselves and the artist Sam Taylor-Wood and that payment was made to her via White Cube as the gallery that represents her'.

It also made the general point that:

'All information relating to our video portrait of David Beckham by Sam Taylor-Wood (NPG 6661) is held in what we call a "registered packet" (i.e. acquisition and object file). The registered packets are included in our Publication Scheme, which can be accessed on the Gallery's website at www.npg.org.uk/live/freedom.asp, and the files themselves may be consulted in our Public Study Room (which is open to the public by appointment Tuesday-Friday 10:00-17:00; telephone: 0202 7306 0055 extension 257 between the times specified above)'.

The Gallery claimed that this information was therefore accessible by other means and exempt from disclosure according to section 21 of the Act.

5. In relation to fees and expenses paid to the artist, the Gallery expressed the view that this was subject to section 43 of the Act, in that disclosure would be detrimental to its commercial interests. It identified two factors as favouring maintenance of the exemption under section 43.

'1. Commercial galleries are very concerned to maintain the going rate for their artists. If they give us as a public institution a favourable price, they do not wish this to damage their own interests. In some cases, and it needs to be judged case-by-case, if they thought that the price would immediately be made public, they might not be willing to give us such favourable treatment, thus damaging our commercial interests. We believe that revealing the payment details of the portrait of David Beckham would therefore make it more difficult to negotiate advantageous arrangements when acquiring or commissioning new portraits.

2. In the case of commissions, also some contemporary (and non-contemporary) acquisitions, knowledge of what we paid an artist or a photographer can be used by other artists as a tool to negotiate up their fee to a higher level, thus damaging our commercial interests. We have had recent experience of difficult negotiations over the acquisition of a portrait in which we were under price pressure because the artist concerned was aware of what we had paid to others. Therefore, once again, we believe that revealing the payment details of the portrait of David Beckham would make it more difficult to negotiate advantageous arrangements when acquiring or commissioning new portraits from artists.'

In other words, it identified two elements of potential prejudice to its commercial interests:

- the deterrent effect of disclosure on other artists' willingness to agree financial arrangements advantageous to the Gallery; and
- the bargaining advantage to artists generally in negotiations with the Gallery should they have access to information about previous financial agreements.

It advised the complainant of the procedure for review.

6. The complainant appealed on 26 January 2005 quoting guidance on the Act:

'[A] simple assertion by an individual or body that there would be prejudice to his or her interests is not sufficient. The assertion must be supported by reasoned argument, and where practicable by empirical evidence.'

He also referred to the experience of the Republic of Ireland in relation to the public interest test, indicating that there was a much stronger public interest in making information available after the award of a contract than beforehand.

7. The Gallery wrote back on 27 January 2005. It stated that it might take six weeks to complete the review, since it would be necessary to seek advice from colleagues in other national museums and galleries, and also the Department for Media, Culture and Sport and the Department for Constitutional Affairs.
8. On 24 February 2005 the Gallery sent the complainant its review decision. It upheld the original decision that disclosure of the price paid for the portrait would undermine its commercial interests. Amongst other things, it referred to consultation with:

'colleagues in the Gallery's collections management and curatorial teams who confirm that we do indeed not infrequently secure prices that are lower than the open market price. I have also looked at examples of this in the papers we hold on acquisitions and can confirm that there is evidence to show that we are sometimes able to negotiate very favourable prices for acquisitions'

Furthermore, it pointed out that:

'the impact of disclosing prices may be rather different in a competitive tender situation than in the sort of one to one negotiations involved in acquiring works of art'.

It explained that there were 'checks and balances' built into its acquisitions procedure to ensure value for money, in that all acquisitions to its primary collection were discussed by the full curatorial team led by the director, and no acquisition could be made without the approval of the Gallery's trustees.

The Investigation

Scope of the case

9. On 1 July 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - *'The [Gallery] contends that artists would be reluctant to work for public institutions if they knew that the details of their contracts were to become public. Bearing in mind [the Commissioner's] ruling [in the National Maritime Museum case] (FS50063478) I would suggest that is not a correct standpoint. The Information Commissioner in that case said "those who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about the details of those activities than had previously been the case prior to the Act coming into force"'*;
 - that decision also recognised that the likelihood of prejudice would diminish over time, and in this case the art had been exhibited for over a year;
 - the general public did not have the same idea of a reasonable price for a work of art as it did with other public authority expenditure, making it even more important that such expenditure should be disclosed;
 - *'[t]he cost of providing services to the public sector should be open to inspection' otherwise public authorities 'would never have to release any information as they are continually looking to renegotiate contracts'*;
 - the Gallery was obliged to provide value for money, and *'[t]he whole point of the Fol act was that the greater openness would eventually ensure better value for money as people would be able to examine how public money was spent'*;

- other public authorities whose core function was not related to art had already accepted the need to publicise the cost to them of items of art (he cited the BBC's commissioning of Tracey Emin);
- *'Not providing the information is anti-competitive and therefore not helping openness in Government which should eventually save the taxpayer money'.*

These factors related to the information withheld under section 43 of the Act. The complainant did not object to the Gallery's application of section 21, and the Commissioner has therefore not undertaken a review of this section.

Chronology

10. The Commissioner wrote to the Gallery and the complainant on 25 October 2006. He asked the Gallery to comment on its application of the section 43 exemption, including any prejudice which it believed was likely to arise from disclosure and its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure.
11. The Gallery replied on 8 November 2006. It stated that *'all information held by the Gallery concerning the portraits in its collection are publicly accessible in the Public Study Room of the Heinz Archive & Library'*. It explained its previous conclusion that the requested information was commercially sensitive, but pointed out that it had recognised that the commercial sensitivity of negotiated prices diminishes over time. It reported that it had therefore disclosed the price information in response to a request on 2 August 2006 from another person *'on the grounds that it was no longer considered to be sufficiently commercially sensitive to warrant further exclusion'*. The Gallery confirmed this in a telephone call to the Information Commissioner's Office on 10 November.
12. Following a telephone call from the Information Commissioner's Office on 21 November, the Gallery agreed to send the requested information to the complainant. The Gallery subsequently copied to the Commissioner the letter covering the information which had been sent to the complainant on 30 November 2006. The Gallery also stated that its Board of Trustees had decided:

'to disclose annually on the Gallery website the purchase prices of portraits, subject to a case by case consideration of their commercial sensitivity, as part of the publication of its board meeting minutes'.

Analysis

Exemption – section 43

13. The relevant section of the Act is section 43(2), which states:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

To engage the exemption it is therefore necessary for the public authority to demonstrate both that disclosure of the information would prejudice somebody's commercial interests, and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

The prejudice test

14. Giving consideration to the Gallery's refusal notice of 25 January 2005, two potential causes of prejudice are identified:

- the deterrent effect of disclosure on other artists' willingness to agree financial arrangements advantageous to the Gallery; and
- the bargaining advantage to artists generally in negotiations with the Gallery should they have access to information about previous financial agreements.

15. In his letter of complaint to the Commissioner dated 1 July 2005 the complainant made two points which bear on the issue of prejudice. He cited the Information Commissioner's Decision Notice in another case about the National Maritime Museum (reference FS50063478) which he believed suggested that the Gallery was incorrect to conclude that *'artists would be reluctant to work for public institutions if they knew that the details of their contracts were to become public'*. He also claimed that that decision recognised that the likelihood of prejudice would diminish over time, and he pointed out that at the time of his complaint the art piece at issue had been exhibited for over a year.

16. However, the Commissioner notes that the decision in the National Maritime Museum case differed in material respects from this case. The National Maritime Museum had claimed that prejudice arose because at the time of the information request it was currently involved in active negotiations with another artist exhibiting in a similar project. It was the active nature of negotiations on another relevant commission that made the prejudice time-sensitive. In this case the Commissioner does not consider that the prejudice identified by the Gallery is time-sensitive in any such specific way, as negotiations had concluded and the piece has been on display for over a year.

17. Having considered the points made by the Gallery in its refusal notice, and also the comment in its review decision of 24 February 2005 that *'the impact of*

disclosing prices may be rather different in a competitive tender situation than in the sort of one to one negotiations involved in acquiring works of art, the Commissioner accepts that artists might be deterred from agreeing financial arrangements advantageous to the Gallery by the likelihood of disclosure of those arrangements. The Commissioner also accepts the Gallery's other argument, that artists in negotiations would be likely to obtain some advantage in bargaining with the Gallery should they have access to information about its previous financial agreements.

18. However, he does not believe that this prejudice is significant enough to engage the section 43 exemption. The Commissioner believes that in general the Gallery is in a strong negotiating position with respect to artists seeking a commission. There are various alternative benefits (eg publicity, exposure and prestige) accruing to any artist obtaining a commission from a prestigious public institution such as the National Portrait Gallery. The Commissioner considers that these alternative benefits will tend to offset both the deterrent effect of artists agreeing financial terms below their normal 'market rate', and the benefit to them of having access to information about the Gallery's previous financial agreements. Furthermore, the Commissioner believes that the potential bargaining advantage is in any event very limited since, to the extent that the Gallery does obtain preferential financial terms, public knowledge of that is just as likely to encourage artists to agree similar concessions than to refuse them. Finally, the Commissioner notes that the Gallery itself accepted that the commercial sensitivity diminished following the conclusion of commissioning negotiations, since it released the information in this case to another requester in November 2006, and has also now modified its policy to create a presumption of annual disclosure of the purchase prices of portraits. For these reasons, the Commissioner does not believe that the prejudice to the commercial interests of the Gallery was significant enough in this case to engage the section 43 exemption, and that the Gallery should therefore have disclosed the information when it was originally requested on 14 January 2005.

Additional prejudice

19. In the National Maritime Museum case which was mentioned by the complainant, the public authority had claimed that as well as prejudice to itself there would be a prejudice caused to the artist involved were price information to be disclosed in the short term. The Commissioner notes that in this case the Gallery has not claimed the exemption under section 43(2) in respect of any prejudice caused to the artist involved. For the avoidance of doubt, however, having considered the possible prejudice and the public interest test in relation both to the particular artist in this case, and the impact that a policy of disclosure of such information might have generally on artists' ability to negotiate favourable commissions, the Commissioner takes the same view in this case as he did in the National Maritime Museum case, insofar as there was:

'potential prejudice to [the artist's] commercial interests by the release of the requested information. The Commissioner also acknowledges the public interest in encouraging new artists and entrepreneurs to flourish and the role that public authorities can play in bringing them to wider attention.

By withholding this information until [the artist] had negotiated his next sale or commission, arguably the public authority would be affording [him] an important degree of commercial protection at a crucial stage of his career.

However, the Commissioner was not persuaded that the potential prejudice to [the artist's] commercial interests was, of itself, sufficient reason to maintain the exemption. The Commissioner is of the view that those who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about the details of those activities than had previously been the case prior to the Act coming into force.'

(Although the Commissioner's decision in the National Maritime Museum case was subsequently reviewed by the Information Tribunal, the Commissioner's consideration of the issue of the artist's commercial interests was not challenged in the appeal, and consequently did not form any part of the Tribunal's decision.)

The public interest test

20. While the Commissioner is satisfied that there is insufficient prejudice to the commercial interests of the Gallery to engage the exemption under section 43, in this case he considers that it would nevertheless be useful to outline his assessment of the public interest test in relation to the exemption. In its refusal notice of 25 January 2005 the Gallery identified the alleged prejudice to itself of disclosing the requested price information, but it did not undertake any separate assessment of the public interest test. Its letter to the Commissioner dated 8 November 2006 merely asserted that at the time of the request the price information '*was still sufficiently commercially sensitive in this respect to outweigh the public interest in disclosure at that time*'. In light of the available documentary evidence, the Commissioner does not consider that the Gallery has demonstrated that it adequately weighed up the public interests in favour of maintaining the exemption and against disclosure.
21. However, it is possible to infer one public interest factor in favour of maintaining the exemption under section 43(2) from the Gallery's comments that revealing the price information in this case would make it more difficult for it generally to negotiate advantageous arrangements when acquiring or commissioning new portraits. In the National Maritime Museum case mentioned by the complainant, the Information Tribunal also accepted that the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction. It took the view that the level of potential prejudice would depend on the nature of the information and the degree of similarity between the two transactions. Unlike this case, in that one there were specific ongoing negotiations with another artist at the time when the public authority determined the information request, making the potential prejudice more likely. Despite that, the Tribunal held that disclosure was not sufficiently '*likely to prejudice*' the identified public interests to justify application of the exemption under section 43(2).

22. The Commissioner accepts that there is a public interest in public authorities such as the Gallery being able to negotiate advantageous financial arrangements, since that will lower the burden on the public purse. However, the Commissioner also believes that the public interest in withholding commercially sensitive information becomes much diminished after negotiations have concluded and a commission has been awarded.
23. Furthermore, the Commissioner has identified several public interest factors in favour of disclosure. The complainant raised some of these in his letter of complaint dated 1 July 2005:
 - the Gallery was obliged to provide value for money, and *'[t]he whole point of the Fol act was that the greater openness would eventually ensure better value for money as people would be able to examine how public money was spent'*;
 - since the general public was less sure of the reasonable price for art than with other public authority expenditure, it was even more important that such expenditure should be disclosed;
 - other public authorities whose core function was not related to art had already accepted the need to publicise the cost to them of items of art (he cited the BBC's commissioning of Tracey Emin).
24. The Commissioner believes that there is clearly a public interest in financial transparency and accountability of public authorities, through scrutiny of the spending of public money. In this case, such scrutiny will contribute to public confidence in the integrity of the Gallery's commissioning procedures, and demonstrate that the Gallery is obtaining value for money. Disclosure of the requested information may also serve to inform public debate about funding of the Gallery and the arts generally.
25. The Commissioner has taken into account the Gallery's internal review decision of 24 February 2005, which explained that there were 'checks and balances' built into its acquisitions procedure to ensure value for money. He has noted in particular that all acquisitions to its primary collection were discussed by the full curatorial team led by the director, and no acquisition could be made without the approval of the Gallery's trustees. However, the Commissioner considers that the public interest in scrutiny of the procurement policy of the Gallery is not satisfied by these sort of internal 'checks and balances' alone, and that an important element of such scrutiny is the availability of relevant information for consideration by the public themselves.
26. Having taken all of these factors into consideration, the Commissioner considers that in this case, even if there were sufficient prejudice to engage the section 43 exemption, the public interest in disclosure of the information outweighed the public interest in maintaining the exemption under section 43(2). Accordingly, he considers that the Gallery should have disclosed the requested information to the complainant when he originally requested it on 14 January 2005.

The Decision

27. The Commissioner's decision is that the public authority has not dealt with the following elements of the request in accordance with the requirements of Part I of the Act:

Section 17(3) – the refusal notice issued to the complainant did not properly explain why the public interest required the maintenance of the exemption relating to commercial interests.

Section 43(2) – some of the requested information was inappropriately withheld on the basis that it is exempt under section 43(2).

Steps Required

28. Since the requested information has now been disclosed to the complainant, the Commissioner does not require any steps to be taken.

Other matters

29. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern. When the Gallery received a request from another person for the information which had previously been requested by the complainant it decided that the section 43 exemption no longer applied and released the information to the new requester in November 2006. However, despite the fact that the Gallery had been informed by the Information Commissioner's Office that the original requester had made a complaint, and was aware that this complaint was still outstanding, the Gallery did not make any attempt to disclose the information to the original requester. The Commissioner considers that the Gallery should have noted that this original request for the information by the complainant in this case was outstanding and, as a matter of good practice, proactively taken steps to disclose the information to him.

Right of Appeal

30. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 30th day of January 2007

Signed

**Richard Thomas
Information Commissioner**

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