

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 21 May 2007

**Public Authority:** National Gallery  
**Address:** Trafalgar Square  
London  
WC2N 5DN

### Summary

---

The complainant requested correspondence between the owner of the painting and the National Gallery relating to a specific painting. The Gallery disclosed some information relating to correspondence between the Gallery and Heritage Lottery fund but withheld the remainder of the information under section 43. The Commissioner investigated the application of section 43 and finds that the exemption is engaged and that in all circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken by the public authority.

### The Commissioner's Role

---

1. 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

---

2. The complainant has advised that on the 2 November 2005 she made a request under the Freedom of Information Act to the National Gallery (the Gallery) for the following information:

*"complete copies of any and all correspondence between the owner of the painting and his representatives and the National Gallery from January 2002 to the present relating to a specific painting.*

*Under the Act, I would also like to request copies of all correspondence between the Heritage Lottery Fund and the National Heritage Memorial*

*Fund and the National Gallery from January 2002 to the present relating to a specific painting.”*

3. The Gallery responded on the 24 November 2005. The Gallery confirmed that it held information in relation to the first part of the complainant's request but that it had decided not to release the information as disclosure could prejudice the Gallery's ability to negotiate in the future and could lessen the confidence that auction houses, vendors, dealer and donors would have in the Gallery and so was exempt by virtue of section 43 of the Act 'Commercial Interests'. In applying this exemption the Gallery also considered the public interest for and against disclosing the requested information but found that the balance lay in maintaining the exemption.
4. In relation to the second part of the complainants request the Gallery confirmed that it did not hold any correspondence with the National Heritage Memorial Fund but did disclose three items: an email from Heritage Lottery Fund to the National Gallery, 5 September 2005; a letter from Carole Souter to the Guardian, 7 September 2005 and an email from Heritage Lottery Fund to the National Gallery and attached letter, 20 September 2005.
5. The Complainant requested a review of the Galleries decision on the 19 January 2006 asking it to reconsider its application of section 43 of the Act and putting forward arguments for the public interest in disclosure.
6. On the 14 February 2006 the Gallery communicated the findings of its internal review to the complainant. The Gallery upheld its original decision to apply section 43 of the Act as disclosure would or would be likely to prejudice the Gallery and the owner of the painting's commercial interests. The Gallery also confirmed its findings that the public interest lay in maintaining the exemption.

## **The Investigation**

---

### **Scope of the case**

7. On 23 February 2006 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to review the application of section 43 in respect of the information and to consider the public interest in disclosure.
8. The Commissioner's investigation focused on the application of section 43 and the public interest arguments for and against disclosing the requested information.

### **Chronology**

9. On the 8 January 2006 the Commissioner contacted the Gallery asking the Gallery to expand on its justification for applying section 43 of the Act and specifically requesting further examples of how the information would or would be

likely to prejudice the Gallery or the owner's commercial interests. The Commissioner also requested copies of the information being withheld.

10. On the 2 February 2006 the Gallery responded. In the response the Gallery informed the Commissioner that as well as section 43 they Gallery wished the Commissioner to consider that sections 36, 40, 41 and 44 applied to some of the information. In addition the Gallery provided documentary evidence from third parties demonstrating that disclosure would discourage them from further participation with the Gallery regarding purchasing art works and how disclosure would prejudice their own commercial interests.
11. On the 27 February 2007 the Commissioner contacted the Gallery again to clarify how all the information disclosed fell within the scope of the complainant's request. The Commissioner also asked the Gallery to answer further questions regarding the 'douceur' available in the Gallery's negotiating strategy. The 'douceur' is the negotiating tool available to the Gallery to purchase certain works of art at a reduced price by deducting the amount of tax payable by the vendor if the work were sold to a private purchaser. The Commissioner also asked the Gallery to confirm where the exemptions 36, 40, 41 and 44 were being applied in relation to the disclosed information and for further information regarding their application.
12. The Gallery responded on the 20 March 2007 explaining how the information disclosed fell within scope of the complainant's request. The Gallery also emphasised that the position was still that section 43 applied to the information as whole and that if the Commissioner found that section 43 did not apply it wished him to consider the other exemptions. The Gallery provided the Commissioner with a list of the documents by exemption and provided further arguments and evidence for their application. In relation to the section 36 exemption the Gallery provided evidence of the qualified person's opinion.
13. The Gallery also provided the Commissioner with further justification for relying on section 43. Specifically the Gallery explained in more detail the negotiating position it is in as regards the tax benefit it can offer in certain circumstances.
14. On the 22 March 2007 the Commissioner wrote again asking for an expansion to the public interest arguments put forward in relation to section 36 and 43 and for further information regarding the section 40 and 41 exemptions.

### **Findings of fact**

15. The information is being withheld in its entirety by virtue of sections 43 and 36. Section 40 has been applied to references to the valuation of the art work, calculations surrounding the net price and any references to the owner's tax position. Section 41 has been applied to the majority of the information excluding two communications.

### Exemption – Section 43 ‘Commercial Interests’

16. Section 43 provides that information is exempt from disclosure if the information constitutes a trade secret or disclosure of the information would or would be likely to prejudice the commercial interests of any person.
17. The Gallery has stated that disclosure of the information would be likely to damage its business reputation or the confidence vendors may have in the Gallery; have a detrimental impact on its commercial revenue; threaten its ability to obtain suppliers or secure finance; weaken its position in a competitive environment by revealing market sensitive information and reveal information of potential usefulness to its competitors. The National Gallery has an important role in acquiring and preserving major works of art for the nation and in performing this role the Gallery must be able to attract the interest and confidence of vendors.
18. The Gallery further explained that it must constantly compete against other institutions and individuals to secure paintings for the nation and to provide the best possible value for money. The information requested contains communications not only with the owner regarding the valuation of this highly valuable piece of art but also with auction houses regarding valuations. The correspondence reflects the respective negotiating positions of the owner and the Gallery in recent times when the art work remains for sale.
19. The Gallery also provided correspondence it has received following the FOI request from the owner of the specific painting and other owners which demonstrate that disclosure of information of this type would dissuade them from approaching the Gallery first when selling art. The owner and his solicitors have also demonstrated that disclosure of this information would be damaging to the owner's commercial interests as the painting remains for sale and the communications reveal the extent to which the owner was willing to negotiate the price with the Gallery and the differing opinions proffered on the actual value of the work. The Gallery does accept that once the painting has been sold the commercial prejudice to the owner will reduce, but at the time of the request the painting remained for sale.
20. The Gallery explained that the painting to which the request relates is on the 'Paramount list'. This list was approved by the Government in 1922 and identified works of art then in private ownership considered so important to the nation's heritage and culture that should they become available for sale, the Government of the day should purchase them. The Gallery provided an example of a painting sold in 1970 which was included on this list. In this case the vendor did not first approach the Gallery but the work went to auction, the Gallery was unable to raise the funds in order to purchase the work within the short time frame and the work was sold overseas. The Gallery points out that this is a real consequence of vendors not approaching the Gallery first and if negotiations of the sort requested are disclosed, as demonstrated by the supporting correspondence sent, vendors would be discouraged from approaching the Gallery and further works could be lost.

21. The Gallery also demonstrated that in a similar case the vendor approached the Gallery first, the negotiations were conducted and concluded in private and sufficient time was given to the Gallery in order for it to be able to raise sufficient funds.
22. The Gallery has a unique negotiating tool, in that the sale of certain exempt properties such as an 'old master' as in this case, to certain museums and libraries does not attract capital gains tax. The Gallery uses this to offer a lower price than would prevail if the proceeds were taxable. The basis the Gallery uses for calculating this lower price is based on its valuation of the work and the private tax position of the vendor. This figure is called the 'douceur' and is decided on a case by case basis. The Gallery's negotiating position would be damaged if disclosure of the amount of 'douceur' were disclosed in this case.
23. The Commissioner is satisfied that the exemption at section 43 of the Act is engaged in respect of the information requested. The Commissioner finds that the Gallery has demonstrated how disclosure of this information could harm its commercial interests and that of the owner's. In reaching this decision the Commissioner is mindful of the decision reached in the Tribunal case '*John Connor Press Associates vs. The Information Commissioner*'. The tribunal found that the likelihood of prejudice was linked to the similarity of works the National Maritime Museum would be negotiating over in the future.
24. In this case, the work of art in question is an 'old master'. On the one hand works of art of this type and value rarely come on the market and the art world can be volatile and valuations on works fluctuate. However, the prejudice is engaged here as the Gallery has demonstrated how disclosure would discourage vendors of such work from approaching the Gallery in future and how this would impact on its ability to raise funds to purchase works of this kind and value in the future. Additionally, the 'douceur' offered by the Gallery is negotiable between the Gallery and the vendor and can vary at the Gallery's discretion.
25. The Tribunal also pointed out in the John Connor case that the National Maritime Museum had a strong negotiating position in that it could also offer alternative benefits such as publicity, public exposure and prestige. Clearly in this case this does not apply, the Gallery cannot offer these sorts of benefits to vendors as the vendor is merely the owner of the art work and not the artist himself. Additionally the prejudice surrounds both the negotiating position disclosure would reveal and the risk that it would discourage vendors from approaching the Gallery in future.
26. The Gallery has also demonstrated that disclosure would place the owner's commercial interests at risk as the painting is currently for sale on the open market and disclosure of the information would reveal the degree to which the owner was willing to negotiate on the price, information about different valuations of the work as well as his personal tax position.

## Public Interest test

27. Section 43 is a qualified exemption and is therefore subject to the public interest test. In considering the reasons why the public interest lies in maintaining the exemption the Gallery has put forward the following arguments:
- The Gallery has a public function of acquiring great works of arts for future generations
  - the Gallery believes it would not be in the public interest to release information which would: deter future vendors from doing business with the Gallery; give a competitive edge to rivals, inhibit value for money and lessen the confidence of vendors and others in the Gallery as a negotiating partner and undermine the Gallery's ability to compete in a challenging world market in order to secure great paintings for the public now and in the future.
  - It is not in the public interest to reveal either party's negotiating position in a commercially sensitive transaction.
  - Disclosure would set a precedent that commercial and personal confidentiality will not be respected by the Gallery and thus deter approaches from potential vendors.
28. In considering the public interest in disclosure the Commissioner has considered the following arguments:
- It is important for the Gallery to maintain accountability and transparency in the proposed expenditure of public money.
  - It is in the public interest to see how and why the negotiations failed to secure the purchase of art work that has been in the public view for many years.
  - It is in the public interest to gain a better understanding to the complicated tax calculations the Gallery can offer in securing art work.
29. The Commissioner is mindful in reaching his decision on the public interest that in this case the painting was still for sale and the information remained sensitive to both parties. Although the Gallery has for the moment ceased negotiating for the work, whilst it remains for sale the possibility of negotiations re-commencing is always possible. The Commissioner also considers that the arguments put forward by the Gallery demonstrating that vendors would be discouraged from approaching the Gallery in future and the effect this would have, demonstrate a strong public interest for maintaining the exemption. The Commissioner is especially influenced here by the fact that the painting remains for sale.
30. The Commissioner recognises that there is a public interest in accountability regarding the spending of public monies; however he notes that in this case no public money has been spent.
31. For all these reasons the Commissioner finds that section 43 is engaged and that in all circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure..

## **The Decision**

---

32. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

---

33. The Commissioner requires no steps to be taken.

## **Failure to comply**

---

3. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

---

4. 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](mailto: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 21<sup>st</sup> day of May 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**