

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 2 March 2011

Public Authority: Department for Culture Media and Sport
Address: 2 – 4 Cockspur Street
London
SW1Y 5DH

Summary

The complainant requested correspondence between senior officials at the public authority and senior officials at Tate in relation to the extension development of the Tate Modern gallery. The public authority withheld the information on the basis of the exemption at section 36(2)(b)(ii). During the course of the investigation, the Commissioner found that the Environmental Information Regulations 2004 was the correct access regime and the public authority subsequently disclosed part of the information requested but withheld the remainder on the basis of the exceptions at regulations 12(5)(e) and 12(5)(d).

The Commissioner found that the disputed information was correctly withheld on the basis of the exception at regulation 12(5)(e) and in all the circumstances of the case the public interest in maintaining the exception outweighed the public interest in disclosure. He however found the public authority in breach of regulations 14(2) and 14(3) in respect of its handling of the request.

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.
2. The Environmental Information Regulations (EIR) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation

18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

The Request

3. On 3 August 2009 the complainant initially requested;

Written correspondence in the past 6 months between all Ministers at Department for Culture Media and Sports (DCMS) and Permanent Secretary Jonathan Stephens [in relation to Policy Matters concerning Capital projects, specifically the Extensions to the British Museum and Tate] and the following individuals:

- Tate Director, Nicholas Serota
- Tate Modern Director, Vicente Todoli
- Tate Chairman, Lord Browne
- Tate Britain Director, Stephen Deuchar
- British Museum Director, Neil MacGregor

Copies of all written correspondence in the past 6 months between all Ministers at the DCMS and/or Permanent Secretary Jonathan Stephens and;

- English Heritage Chief Executive, Simon Thurley
- CABE (Commission for Architecture and the Built Environment) Chairman, John Sorrell
- CABE Chief Executive, Richard Simmons

4. On 17 September 2009, following a telephone conversation between a representative of the public authority and the complainant, the public authority wrote to the complainant requesting he confirm that his request above should be restricted to policy matters concerning capital projects, specifically the extensions to the British Museum and Tate. In an email response on the same day, the complainant confirmed that his request should be so restricted.

5. The public authority therefore only addressed the revised request of 17 September 2009.

6. On 05 November 2009 the public authority responded. It confirmed that it held 'correspondence with Tate' but withheld the information on the basis of the exemption at section 36(2)(b)(ii).
7. On 20 November 2009 the complainant requested a review of the decision. He also pointed out that the public authority had failed to address the request for information relating to the British Museum, English Heritage, and CABE.
8. On 27 January 2010 the public authority wrote back with details of the outcome of the review. It upheld the original decision to apply section 36(2)(b)(ii) and clarified that it did not hold the information requested in relation to the British Museum, English Heritage, and CABE.

The Investigation

Scope of the case

9. On 30 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to review the public authority's decision to withhold the information held within the scope of the request.
10. Following written exchanges and telephone conversations between the Commissioner's representative and the complainant, the complainant confirmed on 5 January 2011 that he had indeed narrowed down his request within the terms outlined in the email of 17 September 2009.
11. He also agreed on 02 March 2011 that the Commissioner's investigation should be restricted to the following withheld information;

Written correspondence in the past 6 months between all Ministers at DCMS and Permanent Secretary Jonathan Stephens in relation to Policy Matters concerning Capital projects, specifically the Extensions to the British Museum and Tate and the following individuals:

- Tate Director, Nicholas Serota
- Tate Modern Director, Vicente Todoli
- Tate Chairman, Lord Browne
- Tate Britain Director, Stephen Deuchar, and
- British Museum Director, Neil MacGregor

12. During the course of the Commissioner's investigation the public authority agreed to disclose additional information to the complainant and therefore the information disclosed was not considered as part of the investigation.

Chronology

13. The Commissioner initially wrote to the public authority on 27 April 2010 and requested that copies of the disputed information be made available him.
14. On 19 May 2010 the public authority responded. It provided the Commissioner with copies of the disputed information and also requested clarification on the scope of the investigation.
15. On 23 August 2010 the Commissioner wrote to the complainant to clarify the scope of his complaint.
16. On 03 September 2010 the complainant responded but the scope of the request as above was confirmed on 5 January 2011 after the public authority provided a copy of the complainant's response to it confirming that his request should be restricted to the terms outlined in the email of 17 September 2009.
17. On 30 September 2010 the Commissioner wrote to the public authority. The Commissioner advised that the disputed information fell within the scope of the Environmental Information Regulations 2004 (EIR). The Commissioner therefore invited the public authority to either disclose the disputed information or rely on an appropriate exception(s) under the EIR to continue to withhold it from disclosure.
18. On 16 November 2010 the public authority responded. It explained that given the passage of time, it no longer considered parts of the disputed information exempt from disclosure and the relevant information was disclosed to the complainant on 29 November 2010.
19. The public authority subsequently sought to rely on the exceptions at regulations 12(5) (d) and (e) to withhold the remaining parts of the information to the extent that the Commissioner considered the EIR was the correct access regime.
20. On 5 January and 18 January 2011, the Commissioner's representative explained to the public authority's representative in telephone conversations that additional clarification was needed to justify the application of the exceptions above. The public authority's representative therefore arranged for representatives of Tate to speak directly to the Commissioner's representative on 18 January 2011.

21. On 27 January and 2 February 2011, Tate provided detailed submissions to justify the application of the exceptions above. Although the submissions were provided by Tate, the Commissioner has referred to them in the Notice as emanating from the public authority which is Tate's sponsor Department and therefore acting on its behalf.

Analysis

Substantive Procedural Matters

Applicable Access Regime

22. The Commissioner has detailed below the reasons for his finding that the request should have been addressed under the EIR rather than the Act.
23. The request relates to the funding for the proposed building extension to the Tate Modern gallery. Having carefully reviewed the withheld correspondence below (hereinafter referred to interchangeably as 'the disputed information'), the Commissioner notes that they relate to the planning, construction, and funding for the extension project.
24. 'Environmental Information' is defined at regulation 2(1) of the Environmental Information Regulations 2004 (EIR) as any

'information in written, visual, aural, electronic or any other

material form on-
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);
25. In the Commissioner's view, the phrase 'any information....on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. The Commissioner considers a broad interpretation of this phrase will usually include information concerning, about, or relating to the measure, activity, factor etc in question. In other words, information that would inform the public about the matter under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
26. The Commissioner therefore finds that the disputed information falls squarely within the definition of environmental information because its predominant purpose is the funding for a measure and activity (i.e. the planning and construction of the extension to Tate Modern) affecting or likely to affect the elements of the environment referred to in regulation 2(1)(a).

Exceptions

Disputed Information

27. The disputed information consists of redacted information from the following documents disclosed to the complainant on 29 November 2010:
- Letter of 12 May 2009 from Sir Nicholas Serota (Tate Director) to Jonathan Stephens (Permanent Secretary, Department for Culture, Media and Sport).
 - Email of 05 June 2009 sent on behalf of Sir Nicholas Serota to Jonathan Stephens.
 - Letter of 22 June 2009 from Jonathan Stephens to Sir Nicholas Serota.

- Letter of 30 June 2009 from Sir Nicholas Serota to Jonathan Stephens.
28. Clearly marked copies of the above documents distinguishing the disputed information from the information to be disclosed was provided to the Commissioner for the purposes of his investigation.
29. Broadly speaking, the disputed information consists of frank exchanges between Sir Nicholas Serota and Jonathan Stephens in relation to the funding arrangements for the extension project.

Regulation 12(5)(e)

30. Information is exempt on the basis of regulation 12(5)(e) if its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
31. According to the public authority, the disputed information relates to Tate's fundraising strategy and progress, including project details and scenarios for consideration. It explained that sensitive discussions with high value potential donors in the private sector are ongoing and the release of the information would be very likely to damage the progress of these negotiations and, therefore, Tate's ability to raise funds for the project. This would impact directly on Tate being able to realise the project.
32. The public authority further explained that the 'Transforming Tate Modern' Project¹ will be around 75% funded through private sources. It is therefore important that Tate's ability to secure the requisite funding is not compromised by disclosure.
33. In deciding whether the exception at regulation 12(5)(e) applied, the Commissioner considered the following:
- Is the disputed information commercial or industrial in nature?
 - Is the disputed information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

¹ The term is broadly used to encapsulate both the extension to the Tate modern gallery and the vision behind the development.

Is the information commercial or industrial in nature?

34. The disputed information relates to the plans to expand the Tate Modern art gallery in London and therefore clearly relates to a commercial activity as envisaged by regulation 12(5)(e). The extension project is designed to attract even more visitors to its galleries and consequently generate more revenue. The exchanges focused on securing the funding needed for the extension project. The Commissioner is therefore satisfied that the information is of a commercial nature.

Is the information subject to confidentiality provided by law?

35. The Commissioner considers that 'confidentiality provided by law' will include confidentiality obligations imposed on any person under the common law of confidence, contractual obligation, or statute.
36. The public authority did not provide any documentary evidence in support of an obligation of confidence and having carefully considered all of the correspondence, the Commissioner is also satisfied that it does not explicitly indicate that the information therein should be held in confidence.
37. The Commissioner however considered whether in the circumstances, the common law of confidence applies. For the purposes of the exception, the Commissioner considers that the following key questions need to be addressed in order to determine whether the common law of confidence applies;
- Does the disputed information have the necessary quality of confidence, and
 - Was the disputed information shared in circumstances importing an obligation of confidence?

Does the disputed information have the necessary quality of confidence?

38. In considering whether the disputed information had the necessary quality of confidence, the Commissioner took into account factors such as whether the information was already in the public domain, and whether the information could be said to be trivial and therefore not worthy of protection.
39. The Commissioner is satisfied that the disputed information is certainly not trivial. As noted above, it relates to funding for the proposed extension to the Tate Modern gallery. Also, there is nothing to suggest in the Commissioner's opinion that the details of the frank exchanges

between the Tate Director and the Permanent Secretary were already publicly known at the time of the request.

40. The Commissioner therefore finds that the disputed information had the necessary quality of confidence.

Was the disputed information shared in circumstances importing an obligation of confidence?

41. The public authority explained that the disputed information in part concerns the donation strategy for a major development at the Tate Modern site. It explained that the activity of raising money from major donors on the scale required for the Tate Modern development is competitive in the sense that, at any given time, other large institutions both in the UK and internationally, are seeking funds for their own projects, and some members of Tate's donor base support other institutions as well as Tate.
42. As already pointed out, there is nothing to suggest that an explicit obligation of confidence was imposed on either party. However, given the nature of the discussions (i.e. securing funding for the extension to the Tate Modern gallery), the Commissioner is satisfied that there was an implied obligation of confidence which is necessarily inherent in such discussions. He is satisfied that both parties had a reasonable expectation that the exchanges would be held in confidence.
43. The Commissioner therefore finds that the disputed information was shared in circumstances importing an obligation of confidence.
44. Additional details of the rationale for the Commissioner's finding above can be found in the confidential annex which he is issuing to the public authority only due to its specific references to the content of the disputed information.

Is the confidentiality provided to protect a legitimate economic interest?

45. Notwithstanding that the Commissioner has found there was an implied expectation that the exchanges would be held in confidence, he must also consider whether, (in the words of the regulation), 'such confidentiality is provided...to protect a legitimate economic interest..'
46. In the Commissioner's opinion, to satisfy this part of the test, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The Commissioner also considers that the threshold to justify non-disclosure on the grounds of the possibility of an adverse effect is a high one. Regulation 12(5) is worded to suggest it is necessary for a

public authority to show that on the balance of probabilities, disclosure “would” rather than could or might have the adverse effect envisaged by the relevant exception.

47. The public authority explained that Tate is statutorily obliged² to maintain collections of British, Twentieth Century and Contemporary works of art, add to the current collections, ensure that the works of art are publicly exhibited and generally promote the public’s enjoyment and understanding of both British and Contemporary works of art. The extension to the Tate Modern gallery is therefore being undertaken in furtherance of its statutory obligations. According to the public authority, although Tate does receive public money towards its expenditure, it is also heavily dependent on funding from private sources, in particular donations.
48. The public authority submitted that the disclosure of the disputed information would be very likely to damage ongoing negotiations between Tate and potential donors in the private sector and consequently the Tate’s ability to raise funds for the project to the detriment of its statutory functions above.
49. The Commissioner therefore agrees with the public authority that the confidentiality for which Tate argues protects its legitimate economic interest in having a successful fund raising programme for the Tate Modern development, which is part of the performance of Tate’s statutory functions in a highly competitive environment at a time of general economic difficulty.

Would the confidentiality described above be adversely affected by disclosure?

50. In view of the matters described in detail in the confidential annex, the Commissioner finds that the disclosure of the disputed information would have adversely affected the confidentiality of the discussions between Sir Nicholas Serota and Jonathan Stephens regarding the funding for the extension to the Tate Modern gallery because disclosure would have adversely affected Tate’s fundraising strategy. Also, given that the public authority has satisfied the first three elements above, it follows, in the Commissioner’s view, that disclosure would have adversely affected the confidentiality of the discussions.
51. In order not to defeat the exception, the Commissioner did not reproduce Tate’s submissions in the main body of this Notice. However, it is sufficient to note that discussions at that level (i.e. between Sir

² See section 2(2) of the Museums and Galleries Act 1992

Nicholas Serota and Jonathan Stephens) in relation to funding for the project would in any event have an impact on Tate's fund raising strategy. Furthermore, in the Commissioner's opinion, the exchanges contain information which would reasonably be expected to remain confidential in a highly competitive fund raising environment that was (and probably still is) also under considerable strain due to the global financial crisis of 2008.

52. The Commissioner therefore finds that the public authority correctly relied on the exception at regulation 12(5)(e) to withhold the disputed information.

Public Interest Test

53. The exceptions in the EIR are subject to a public interest test by virtue of regulation 12(1)(b). The Commissioner therefore has to also decide whether in all the circumstances of the case the public interest in maintaining the exception outweighed the public interest in disclosing the disputed information.

Public interest arguments in favour of disclosing the requested information

54. The public authority acknowledged that there is a public interest in understanding the progress of the project.

Public interest arguments in favour of maintaining the exemption

55. The public authority however strongly argued that there is a public interest in ensuring that Tate is able to raise the required funds to complete the extension to the Tate Modern gallery. The project is being undertaken in furtherance of its statutory obligations and it is not in the public interest to disclose information which would compromise the raising of donations from potential major donors.

Balance of the public interest arguments

56. In the Commissioner's opinion, disclosing official information generally promotes better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process, all of which are in the public interest.
57. Specifically in this case, the Commissioner agrees with the public authority that there is a public interest in the transparency of the progress of the project and public understanding of decisions taken in respect of the project.

58. The Commissioner also considers that the disclosure of the disputed information would enhance the public debate in relation to the successful completion of the project within the anticipated time frame.
59. The Commissioner however considers that there is a significant public interest in maintaining the confidentiality of the discussions in view of the adverse effect disclosure could have had on Tate's fundraising strategy. Without securing donations, the project would have been compromised and this would very likely also have a detrimental impact on Tate's statutory duty to, among other things, promote the public's enjoyment and understanding of the aforementioned works of art.
60. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exception at regulation 12(5)(e) outweighed the public interest in disclosure.
61. In view of his decision above, the Commissioner has not gone on to consider the application of the exception at regulation 12(5)(d).

Procedural Requirements

62. Under regulation 14(2) a public authority intending to refuse a request for environmental information is required to do so within 20 working days.
63. Under regulation 14(3) a public authority is required to specify the reasons for the refusal including the exception(s) relied on and the public interest matters it considered in reaching its decision.
64. The Commissioner therefore finds the public authority in breach of regulations 14(2) and 14(3) for the late reliance on the exception at regulation 12(5)(e) and 12(5)(d).

The Decision

65. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:
 - The public authority correctly withheld the disputed information on the basis of the exception at regulation 12(5)(e).
66. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- The public authority breached regulations 14(2) and 14(3) for failing to rely on the exception at regulation 12(5)(e) and 12(5)(d) at the time of the request.

Steps Required

67. The Commissioner requires no steps to be taken.

Right of Appeal

68. Either party has the right to appeal against this Decision Notice to the First tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

69. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 2nd day of March 2011

Signed

**Lisa Adshead
Group Manager
Information Commissioner's Office
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SK9 5AF**

Legal Annex

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(1)

Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5);
and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(5)

For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 2. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

3. has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 14 - Refusal to disclose information

Regulation 14(1)

If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2)

The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3)

The refusal shall specify the reasons not to disclose the information requested, including –

- (h) any exception relied on under regulations 12(4), 12(5) or 13; and
- (i) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).