

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2018

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

Decision (including any steps ordered)

1. The complainant has requested information about a painting known as 'the Arnolfini Portrait' by Jan van Eyck. The National Gallery ('the Gallery') has refused to comply with the request, citing section 14(1) of the FOIA (vexatious request).
2. The Commissioner's decision is that the Gallery:
 - breached section 10(1) of the FOIA as it did not comply with section 1(1) promptly and within 20 working days; and
 - is not obliged to comply with the complainant's request for information as the request is vexatious under section 14(1).
3. The Commissioner does not require the Gallery to take any steps.

Request and response

4. On 11 June 2017 the complainant wrote to the Gallery and requested information in the following terms:

"1. Since 11 June 2016 has the National Gallery exchange correspondence and communications (including emails) with any individual and or outside body which specifically relates to the painting known as The Arnolfini Portrait by Jan van Eyck

2. If the answer is yes can you please provide copies of this correspondence and communications including emails.

3. Since 11 June 2016 has the Gallery commissioned and or produced and or received new research about the aforementioned painting. This research will include but will not be limited to new information about the provenance and or the creation and or the preservation of the work. If the answer is yes can you please provide copies of this research together with any supporting photographs and or images and or sketches and or drawings.

4. Since 11 June 2016 has the gallery carried out any repair and or restoration and or cleaning work to the aforementioned work. If the answer is yes can you please proving the following details. Can you detail the kind of work carried out and specify whether it was in response to specific damage or a particular problem. Can you please provide any internal documentation held by the gallery (including external and internal communications (which relate to this repair and or restoration work."

5. The Gallery responded on 3 August 2017 – its reference F423. It explained why there had been a delay in responding to the request and apologised. The Gallery refused to comply with the request which it considered to be vexatious under section 14(1) of the FOIA.

6. In its internal review dated 4 September 2017 the Gallery maintained its position that the complainant's request is vexatious. The Gallery also discussed its archive in relation to a separate request for information that the complainant had submitted to it.

Scope of the case

7. The complainant contacted the Commissioner on 13 September 2017 to complain about the way his request for information had been handled, specifically the delay in providing a response and its application of section 14(1) to his request.

8. The complainant also expressed a concern about the Gallery's archive not being a complete record and history of the art works in its collection. The Commissioner regulates the FOIA. The matter of the Gallery's

archive falls outside the scope of her role and is therefore not something she can investigate.

9. The Commissioner's investigation has focussed on whether the Gallery was correct to categorise the complainant's request of 11 June 2017 as vexatious under section 14(1) of the FOIA. She has also considered whether the Gallery breached section 10(1) of the FOIA.

Reasons for decision

Section 10 – time for compliance

10. Section 1(1) of the FOIA says that anyone who requests information from a public authority is entitled to be told whether the authority holds the information and to have the information communicated to him or her if it is held.
11. Section 10(1) says that a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
12. In this case, the complainant submitted his request on 11 June 2017 and did not receive a response until 3 August 2017. The Commissioner has noted that the Gallery apologised to the complainant, explained the reason behind the delay and confirmed that it has now put in place measures to avoid similar delays happening in the future. Nevertheless the Gallery did breach section 10(1) on this occasion.

Section 14 – vexatious and repeat requests

13. Section 14(1) says that a public authority is not obliged to comply with a request for information if the request is vexatious.
14. The term 'vexatious' is not defined in the FOIA. The Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests. In short they include:
 - Abusive or aggressive language
 - Burden on the authority
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance

15. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
16. The Commissioner's guidance suggests that if a request is not patently vexatious the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
17. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
18. In its submission to the Commissioner, the Gallery begins by saying that its decision to categorise the complainant's request as vexatious was not one it took lightly. In reaching its decision, the Gallery says it sought to judge the impact on it of complying with the request against the purpose and value of the request. It also says that, in this case, it is correct to look at the wider context of the complainant's request; his previous requests, previous behaviour and the information it has already provided to the complainant about its record keeping.

Burden on the authority

19. Taking into account the background and history of the request, the Gallery says it quickly recognised the large number of its departments and members of staff that would need to be involved in responding to the complainant's request. At least 12 departments would need to be contacted with various staff members in each investigating what information they held. The wide-ranging nature of the request and therefore the vast amount of information that the Gallery holds and which would need to be identified is discussed below.

Intransigence

20. In the Gallery's view, the complainant has shown no willingness to engage with it. It says the complainant has previously rejected its efforts to assist him in refining requests in a meaningful way. Instead, the Gallery says he has opted to request internal reviews and then to make complaints to the Commissioner. The Gallery has told the Commissioner that the present request reuses the exact wording of a previous request that the complainant submitted on 21 December 2016 – its reference F405 - albeit in relation to a different painting and for a shortened time period. The Gallery has provided the Commissioner with a copy of this previous request. It says that the similarities between the

two requests mean that the latter is arguably a refinement of the former following the Gallery's earlier application of section 12 of the FOIA (cost of complying exceeds the appropriate limit). The Gallery considers that the complainant's approach to refinement is indicative of his lack of engagement with it.

21. The Gallery has provided the Commissioner with a timeline of events in relation to the two related requests: F405 and F423. The timeline includes dates when both requests were submitted, the date of the Gallery's response to F405, the request for an internal review and the review response, and the date of a complaint to the Commissioner concerning F405. The Gallery considers that the manner in which the complainant pursued his first request, and the speed with which he dropped one line of enquiry and picked up another, is evidence that he has no intention of engaging with the Gallery in a meaningful way. (The Gallery also considers that it is reflective of the complainant's scattergun approach and this is discussed below.)
22. The Gallery notes that the timeline shows that the complainant submitted his request F423 before the Gallery was even aware of his complaint to the ICO in relation to F405. Furthermore, on receipt of the Gallery's submission to the Commissioner in relation to F405 (and the Commissioner's initial assessment that the Gallery was correct to apply section 12), the complainant chased his request F423 without any sort of revision or contextual information. In the Gallery's view, the complainant showed so little interest in engaging with the Gallery's comments in relation to F405 that when F423 was submitted it repeated two typographical errors present in the previous request.
23. The Gallery has drawn the Commissioner's attention to another request the complainant submitted in April 2016 regarding loans to the Gallery – its reference F382. In its response it says that it explained that for each painting within the scope of the complainant's request:

Some correspondence about loans is held by our Curatorial Department. The Head of the Curatorial Department has estimated that it would take approximately two hours per painting to identify and retrieve all of the information relevant to your request.

This time estimate was in addition to the searches required by other departments within the Gallery. The Gallery says that whilst the complainant did, on that occasion, submit a revised request (F385), he simply reduced the number of paintings to which his request related, ignoring all the Gallery's other advice regarding refining the request. However, the complainant's new request sought information about nine paintings, a number that would immediately place it beyond the cost limit of 18 hours. The Gallery says it nevertheless responded citing

section 12 and offering advice to bring the request within the cost limit, including the statement:

The time required by the curatorial department has been estimated per painting. A minimum of two hours per painting will be required regardless of the number of paintings to which your request refers.

24. Rather than engage further with the Gallery, the Gallery says that the complainant requested an internal review and then made a complaint to the Commissioner.
25. The Gallery has told the Commissioner that it has offered the above example not because the Gallery has judged the complainant's latest request based on his previous activity but because it forms part of the wider context in which it has considered F423. It considers there is a clear parallel in so far as the complainant has taken a simplistic approach to refining a request whilst disregarding the substantive comments the Gallery has made to him. It says it is the same approach to that which was taken in F423 following the Gallery's application of section 12 in relation to F405.

Scattergun approach

26. In the Gallery's view the complainant is fishing for information and has no idea what information might be revealed to him. It says his request F423 lacks clear focus, particularly when placed in the context of F405. The speed with which the complainant switched his attention from four paintings (F405) to a single completely different work (F423) is evidence, according to the Gallery, of a random approach.
27. The Gallery says that taking the five paintings as a whole, very little connects them beyond the fact that they are well known. Two are on oak (including the 'Arnolfini Portrait') but three are on canvas. The paintings do not share a provenance, are not all part of the same School, do not all fall under the same curator's area of responsibility. The Gallery's earliest acquisition of one of the paintings was in 1842, the latest acquisition was in 1924. Three of paintings arrived at the Gallery as purchases, one as a bequest and one as a gift. The earliest picture (the 'Arnolfini Portrait') was painted approximately 450 years before the latest picture (the Sunflowers).
28. The Gallery has referred to the Commissioner's section 14 guidance, in relation to 'fishing for information'. It has drawn her attention to the large number of emails referred to in its quote at paragraph 30 as an example of the quantity of information the Gallery would have to sift through. Furthermore, it has noted that a good deal of the information captured will be of limited value. The Gallery considers that the

complainant's request has all the hallmarks of a 'fishing' request and is one of a number of 'fishing expeditions' that the complainant has engaged in. Finally, the Gallery says the scattergun approach taken is not as a result of the requestor not understanding the structure of the Gallery's recordkeeping systems, nor is it a result of uncertainty about terminology.

Disproportionate effort

29. The Gallery has argued that complying with the request would result in it squandering resources with little benefit to the complainant (given the nature of much of what would be captured by the request) or the public. It has referred the Commissioner to the comments made in its internal review response:

"[It] would not take more than a few minutes searching online to establish, for example, that The Arnolfini Portrait, the subject of your request F423, is to be the subject of an exhibition at the Gallery this autumn, with a published catalogue, ensuring that the painting continues to be displayed and promoted as well as researched. Submitting such broad requests for information in relation to such well known works about which information is widely and freely available, the outcome of which is likely to be insignificant in terms of the public interest seems disproportionate and to place an unreasonable burden on the Gallery, and thus to be in accordance with the ICO guidance on vexatious requests."

Frivolous request

30. The Gallery has considered how the notion of a frivolous request might apply to the information within the scope of the complainant's request. It has told the Commissioner that it does not suggest that the complainant submitted his request for the sole purpose of amusement, but it has concluded that much of the information captured by F423 is "inane or extremely trivial". The Gallery has noted that in responding to the complainant's request F405, it commented that:

"[It] would not be uncommon for the Gallery to conduct a brief exchange of written communication with a visitor who has enjoyed viewing one of the paintings you mention. Given the large number of visitors the Gallery receives, both in person and online via our website, this type of communication is likely to be extensive, this is particularly the case for information held by the Visitor Engagement department. Similarly, we believe that correspondence exchanged by the Education department with freelancers regarding events involving the four paintings is currently within the scope of your request. Whilst such correspondence would relate to the paintings named, it is likely to often

be administrative in nature, perhaps referring to the ordering of supplies (paper, pens, etc.). By explaining the type of correspondence and subject matter in greater detail, we would be able to search in a more focused way and potentially remove some departments from the list of those which hold relevant information."

31. The Gallery says that while the above comments sought to highlight the scope of the complainant's request (and indeed refer to the scope of his current request), they also demonstrate the ephemeral nature of much of the information held.

Why the impact would be unjustified or disproportionate in relation to the request itself and its inherent purpose or value

32. The Gallery says that, in its submission to the Commissioner, it has given some indication of how the Gallery considered the complainant's request and sought to weigh the impact of responding against the inherent purpose or value. It has acknowledged that in his request for an internal review, the complainant offered some explanation of the purpose of his request. Following the Commissioner's guidance that "*the authority should ... consider any comments the applicant might have made about the purpose behind their request*", the Gallery says it incorporated the complainant's statements into its assessment of the purpose and value of the request. While the comments were not available to the individual who prepared the original response to the request, the subsequent internal review submission did nothing to persuade the Gallery that it was incorrect in applying section 14(1).
33. The complainant had explained that he "*considers part of my brief [as a journalist] to examine the extent to which our taxpayer funded National Museums and Galleries are displaying, looking after and promoting key works in their collections*". The Gallery says it has explained to the complainant that oversight already exists, in the form of Government-appointed Trustees and through the auditing of its accounts. The public interest does not rest with the complainant undertaking further scrutiny of the Gallery's activities. This is particularly so if that scrutiny is blindly targeted at nothing in particular via wide-ranging requests which remove staff from other duties by obliging them to investigate vast quantities of information. The Gallery has argued that, furthermore, the staff, Trustees and Government oversight which is in place does not focus solely on "*key works*" but takes responsibility for the appropriate display, care and promotion of the Gallery's entire collection. The Gallery has additionally referred the Commissioner to the following comments in its internal review response:

"As an organisation funded in part by the tax-payer we appreciate the need for transparency, and publish considerable amounts of information

to show value for money, as we are required to do, as well as, for example, being accountable to our board of trustees for the conservation of the collection, documented in minutes which are regularly published online. There would undoubtedly and rightly be considerable public concern if there were evidence that we were not, for example, displaying, looking after, or promoting Van Gogh's Sunflowers or any other such well-loved work in the collection. You have not been able to provide us with such evidence."

34. The Gallery says that not only has the complainant not supplied it with any evidence, he has not limited his requests to areas where he might reasonably expect to find such evidence, should it exist. It says it can find no evidence that the complainant is following a genuine line of enquiry. His stated 'brief' is vague and generic. The Gallery has advised that it would assure the Commissioner and the complainant that there can be little or no public interest in much of what is captured by the complainant's request and responding to it in any way other than through the application of section 14(1) would result in a significant impact on the Gallery. It considers that, for example, the 'research' referred to in the request could be unsolicited and of no serious purpose and that including such 'research' would seem to fall outside of the complainant's self-determined brief.
35. In conclusion, the Gallery has told the Commissioner that it has stated in the past, and restated in its submission, that the complainant is very welcome to visit its reading room where it will make available to him painting dossiers and its published catalogues. It says this would be the standard starting point for anybody seeking information about a painting in the Gallery's collection. Furthermore, if the complainant were to engage in a dialogue regarding what information *specifically* he is trying to identify then the Gallery says it would be very happy to assist him.
36. As the Gallery has noted, the Commissioner's published guidance on section 14(1) discusses 'fishing' expeditions. This is the apparent tendency of some requesters, most notably journalists, to use their FOIA rights where they have no idea what information, if any, will be caught by the request. These requests are often called 'fishing expeditions' because the requester casts their net widely in the hope that this will catch information that is noteworthy or otherwise useful to them.
37. Whilst fishing for information is not, in itself, enough to make a request vexatious, some requests may:
 - Impose a burden by obliging the authority to sift through a substantial volume of information to isolate and extract the relevant details

- Encompass information which is only of limited value because of the wide scope of the request;
 - Create a burden by requiring the authority to spend a considerable amount of time considering any exemptions and redactions
 - Be part of a pattern of persistent fishing expeditions by the same requester.
38. The guidance advises that if the request has any of these characteristics then the authority may take this into consideration when weighing the impact of that request against its purpose and value.
39. In the Commissioner's view the Gallery has provided sufficiently compelling evidence that the request meets a number of the indicia for vexatiousness. She considers that the request is fishing for information and, on this occasion, has the features at paragraph 37.
40. In its submission the Gallery has advised that it could also have refused to comply with the request under section 12 (cost of compliance exceeds the appropriate limit), such is the degree of work that it would need to undertake to comply with the request. The Gallery has provided the Commissioner with an indication of this work and the resulting burden to its staff and the Commissioner considers that the Gallery would have good grounds for applying section 12. With regards to the Gallery's application of section 14(1), however, the Commissioner agrees with the Gallery that the disruption to its staff that it has described is disproportionate to the request's purpose or value. The request appears to have little public interest and such public interest that there is in the request is satisfied by the Gallery's governance and audit arrangements.
41. The Commissioner considers that the Gallery has submitted a thorough, and well-argued case for the complainant's request being vexatious. The Commissioner notes that the complainant has not submitted a high number of requests, at this point or cumulatively over time. However, the volume of requests an applicant has submitted is only one indicator of vexatiousness, and there are others. In this case the Commissioner has been persuaded that the principal reason why the request can be categorised as vexatious is because the complainant is 'fishing' for information.
42. The complainant has submitted a wide ranging request using as a template a previous request to the Gallery – complete with typographical errors - and substituting the paintings in that case with the 'Arnolfini Portrait' in this case. He has not taken on board the Gallery's advice on how he might refine the request so that the Gallery could consider whether it holds any, more specific, information. Complying with the request as it is phrased would be a significant distraction for the Gallery. Because the Commissioner is satisfied that

the complainant is 'fishing' she considers the value and purpose of the request is limited and disproportionate to the burden that complying with it would cause the Gallery. She notes that a search of the internet, while certainly not exhaustive, has not identified any concerns about how the Gallery manages the 'Arnolfini Portrait' or, indeed, its collection generally.

43. Having considered all the circumstances of this case, the Commissioner has been persuaded by the Gallery's submission and is satisfied that the Gallery was correct to apply section 14(1) to the request. It has therefore not been necessary to consider whether section 12 applies.

Right of appeal

44. 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
LEICESTER
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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