

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 September 2007

Public Authority: The Tate Gallery ("The Tate")
Address: Millbank
London
SW1P 4RG

Summary

The complainant made a request for information, relating to The Tate's purchase of an item of art work, which was refused under sections 40, 41, 43 and 36 of the Act. The Commissioner investigated The Tate's refusal to withhold the information under section 40, 41 and 43 but not the application of section 36 as the information withheld under this exemption was subsequently disclosed. The Commissioner's decision is that The Tate was correct in its application of sections 40 but that section 43 was not engaged. Section 41 was not considered as it was applied to the same information to which section 40 applied. The Commissioner requires the public authority to disclose the requested information to the complainant, redacted of the information withheld under section 40, within 35 calendar days of this notice.

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. On the 3 January 2006 the complainant requested the following information from The Tate Gallery:

"1. A list of all private individuals and organisations who contributed towards the purchase of the Upper Room by Chris Ofili. This should include the amounts contributed."

- 2. Copies of correspondence and internal documents with the above donors which concern the purchase of the Upper Room.*
 - 3. All internal documents (including emails, telephone transcripts and memos) which detail the Tate's search for would be private donors.*
 - 4. All correspondence between the Tate and would be donors whether they actually contributed or not.*
 - 5. All correspondence and contact between the Tate and the Department of Culture, Media and Sport concerning the purchase of Chris Ofili's the Upper Room. This correspondence will include any letters/emails, telephone transcripts, which have touched upon the recent controversy surrounding the purchase of the work.*
 - 6. Any correspondence (including letter, transcripts, telephone conversations) with the charity commission concerning the purchase of The Upper Room.*
 - 7. All correspondence between the Tate and Charles Saatchi and or his representatives concerning the purchase of The Upper Room.*
3. On the 30 January 2006 the Tate responded to the complainant's request. In relation to points one to four of his request, the Tate stated that the information was the personal data of the donors and disclosure would breach the data protection principles and was therefore exempt under section 40 of the Act. Additionally it stated that disclosure could prejudice its future ability to fundraise and that section 43 of the Act 'Commercial Interests' was also engaged, the Tate concluded that the public interest lay in maintaining the exemption so that the gallery can fund-raise effectively. The Tate also considered that some of the information falling within points one to four of the request was information provided to the Tate with the expectation of confidentiality and was therefore exempt under section 41 of the Act.
 4. The Tate also stated that the information requested in points five and six of the complainant's request was exempt from disclosure under section 36 of the Act as disclosure of the discussions and communications would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
 5. In relation to point seven of the request the Tate informed the complainant that it did not hold any information falling within the scope of the request.
 6. On the 31 January 2006 the complainant requested a review of the Tate's decision. In particular the complainant asked the Tate to reconsider its application of sections 41, 43 and 36.
 7. The Tate conducted its internal review and communicated the result to the Complainant on the 7 March 2006. The internal review upheld the original decision to withhold the information requested under sections 40, 41, 43 and 36 of the Act.

The Investigation

Scope of the case

8. On 8 March 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to investigate the Tate's refusal to disclose information in relation to points 1 to 6 of this request.
9. The Commissioner has not considered the Tate's application of section 36 in this Decision Notice as, during the course of the investigation, the Tate acknowledged that since the request had been made the discussions between the Tate, the Charity Commission and the Department for Culture Media and Sport had concluded and the findings of the Charity Commission published. In light of this the Tate considered the public interest balance had shifted and now lay in disclosing the information requested in points five and six of the request. The Commissioner recognises that the considerations regarding the balance of the public interest test can change with the passage of time.

Chronology

10. On the 3 January 2007 the Commissioner began his investigation into the refusal to disclose by writing to the Tate. In his letter the Commissioner asked the Tate to expand on its reasoning for withholding the information under sections 40, 41, 43 and 36. In particular the Commissioner asked the Tate to consider the expectations donors may have that their details would be disclosed and to clarify if the donors were already known as donors to the Tate under its publication scheme. The Commissioner also asked the Tate to further demonstrate how disclosure would prejudice the Tate's commercial interests and how the information has the necessary quality of confidence.
11. In relation to the Tate's application of section 36 the Commissioner asked the Tate to clarify who the relevant qualified person was and the dates on which their opinion was sought and given.
12. The Commissioner also requested an explanation of the application of the public interest test considered by the Tate in relation to sections 36 and 43.
13. The Tate responded on the 9 February 2007 explaining in further detail its application of sections 40, 41 and 43 and confirming who the qualified person was in relation to section 36 and when their opinion had been sought and given. Additionally the Tate outlined the factors it had considered in relation to the public interest test and section 43.
14. On the 14 February 2007 the Commissioner wrote to the Tate asking for disclosure to the Commissioner of copies of the information being withheld and for an outline of the public interest factors considered in its application of section 36.

15. The Tate responded on the 8 March 2007 enclosing copies of the information withheld and outlining the public interest factors considered in maintaining the section 36 exemption. The Tate also stated, in relation to points five and six of the request, that as discussions between the Tate, the Charity Commission and the Department for Culture, Media and Sport (DMCS) were now completed it would be likely to release this information to the complainant.
16. The Commissioner wrote to the complainant on the 13 March 2007 informing the complainant that the information in point five and six of his request was now likely to be disclosed. The Commissioner also wrote to the Tate on this date confirming the authority's intention to disclose this information to the complainant.
17. The Commissioner wrote again to the Tate on the 16 March 2007 asking the Tate to consider redacting the remaining information withheld and to answer some further questions surrounding the applicability of section 40.

Findings of fact

18. The exemptions under sections 40 and 41 were both applied by the Tate to any information within the correspondence that references the donors by name, address, the amounts contributed and other information which could lead to their identification.
19. The disclosure of information still being disputed is the information in requests one to four.
20. Whilst the request was for correspondence between the Tate and donors and would be donors the Tate has confirmed that no would be donors were approached who did not in fact make a donation towards the purchase of the work.

Analysis

Exemption: Section 40 'Personal Data'

21. Section 40 provides that information is exempt if the information is the personal data of someone other than the applicant, 'third party data', and disclosure of the information would breach any of the data protection principles. The term 'personal data' includes information about a living individual from which that individual can be identified.
22. The Tate considers that the identity of donors is personal information in relation to those individuals and that disclosure of this personal information would contravene one of the data protection principles.
23. In order for the Commissioner to reach a decision as to whether section 40 has been applied correctly the Commissioner must first consider if the information is

personal data and then decide if disclosure would breach any of the data protection principles.

24. The information withheld under section 40 consists of the names of private individuals, their addresses, the amounts they contributed to the art work and information such as biographical information which could lead to their identification. Having viewed the information withheld the Commissioner is satisfied that the information is personal data. The Commissioner has also looked at the data classified by the Tate as information which could lead to their identities being known and considers that this is also personal data as the information is sufficiently detailed that the identities of those to whom the information refers could be deduced from it.
25. The Commissioner is therefore satisfied that the information withheld by virtue of section 40 is personal data. The Commissioner must therefore decide if disclosure of the information would breach any of the data protection principles. The first data protection principle requires that personal data be processed fairly and lawfully. When considering compliance with the First Data Protection Principle it is necessary to consider, among other things, what the legitimate expectations of the data subject would be with regard to disclosure and whether disclosure would cause them unnecessary or unwarranted distress.
26. The Tate explained that the donors in question are already known to the wider public as donors to the Tate through its publication scheme. However, the Tate states that they are not referred to in relation to specific art works and no specific amounts contributed are attributed to them. The Tate went on to explain that it is their policy to acknowledge donations in relation to specific pieces of art only where the donation is over 10% of the overall purchase price.
27. The Tate also acknowledged that some of the donors had completed 'Gift Crediting Reply Forms'. These forms include the following statement with an option to remain anonymous:

"Below is a suggestion as to how your gift might be recognised in relevant Tate publications. I would be grateful if you would indicate your preference and / or any amendments that you would like to make."
28. The Commissioner has considered the relevance of this and considers that the reference to 'relevant Tate publications' is important. As has already been highlighted, those who do not indicate that they wish to remain anonymous, are detailed in the Tate's publication scheme as donors to the Tate. However, at no point are references made associating a particular donor with any specific piece of art or details of the amount contributed.
29. In any event the Commissioner notes that in most cases the forms referred to were completed by the donors after the request for information in this case was made. The Commissioner also notes that the individual donors were acting in a purely private capacity. The Commissioner is therefore satisfied that, even had they not given a prior indication of their wish to remain anonymous in respect of

a specific donation, the donors would not have expected the information requested to be made public.

30. The Commissioner therefore accepts that, in the circumstances of this case, to release this kind of personal data about the donors would contravene the fairness element of the first data protection principle.
31. The Commissioner therefore finds that section 40 is engaged and as section 40 is an absolute exemption there is no need to consider the public interest test.
32. Sections 40 and 41 have both been applied to information which identifies the donors and to the amounts contributed by them. As the Commissioner has found that section 40 is engaged it is not necessary for him to investigate the application of section 41 in this case.

Exemption: Section 43 'Commercial Interests'

- 33 Under section 43, information is exempt if disclosure would, or would be likely to prejudice the commercial interests of any person.
34. The Tate has explained that its ability to fundraise by seeking the help of wealthy private individuals is a crucial and fundamental part of its ability to acquire new works into the national collections. The Tate went onto explain that it takes the issue of ethics in fundraising very seriously and considers the acceptance of funds from individuals and companies in accordance with The Tate's ethical policy. The Tate explained that this policy states, for example, that the Tate does not accept funding from companies whose significant income or property is made via the manufacture and sale of arms.
35. Once a donor is secured the Tate respects the wishes of the donor with regard to publishing details of the gift. In cases where a donor has requested total anonymity, that is respected.
36. The Tate argues that if all the details of the Tate's fundraising were made public i.e. the strategies employed, how donors were approached, why some contributed and others did not this would prejudice the Tate's future ability to fundraise in the same way. Fundraising negotiations are often very sensitive and donors do not want the specific sums they donate to be made known to the public in order to prevent unnecessary or unwanted communications from those seeking further monetary donations. The Tate also states that disclosure of the communications would reveal its fundraising strategy to competitor institutions.
37. The Commissioner has considered the arguments put forward by the Tate and considered the information regarding the ethical fundraising policy. However, the Commissioner has not considered the arguments The Tate has put forward relating to the prejudice and the disclosing of the names of donors and the amounts donated; the Commissioner has already decided these are exempt by virtue of section 40.

38. The Commissioner also notes the conclusions in the Tribunal Case EA/2005/005 '*John Connor Press Associates vs. The Information Commissioner*'. In relation to prejudice to future negotiations an emphasis was placed on the similarities of the future negotiations and how much they could be treated as true comparables. The Commissioner has also considered the information regarding purchase of the art work already in the public domain. It is already known for instance, how much the Tate paid for the work and that it was purchased through private donations.
39. The Commissioner is mindful of the Tate's argument that disclosure of the communications would reveal its negotiating strategy. However the Tate has also acknowledged that the negotiations between donors will vary depending on the donor in question and the amount being requested or donated. It is also worth noting that the cost of the art work will vary depending on the artist, size, and type of work and the approach to donors will be dependant as much on this as on anything else. The Commissioner believes that negotiations with different donors will not be based on a standard approach and therefore disclosure of the contents of one negotiation will not automatically have a bearing on another negotiation. Discussions about a donation will be based around the specific wishes and requirements that the donor may have or conditions or restrictions they may wish to place on the use of the donation. This will vary case by case rather than follow a set pattern.
40. In reaching his decision the Commissioner has to consider the likelihood of prejudice. The notion of prejudice was discussed in the Tribunal decision EA/2005/005 '*John Connor Press Associates vs. The Information Commissioner*'. The tribunal interpreted the exemption at section 43 to mean that the chance of prejudice must be more than a hypothetical or remote possibility; there must be a real or significant risk. In determining the whether disclosure of the information requested would prejudice the commercial interests of the Tate, the Commissioner has considered the fact that under section 40 the names of donors and amounts contributed would be redacted. In light of this the Commissioner does not find that the risk of prejudice in disclosing the remaining information is 'real or significant'. Whilst he acknowledges that there is a risk that disclosure could reveal some information which would prejudice the negotiating position of the Tate, he is not convinced that this risk is significant. The commissioner notes in particular that the arguments put forward by the Tate focus on the risk to negotiations through the disclosure of the donors' personal information; he has already accepted that such information should be withheld in accordance with the Data Protection Act.
41. The Commissioner therefore finds that the exemption at section 43 of the Act is not engaged.

The Decision

42. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

(i) The application of section 40.

43. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

(ii) The application of section 43

Steps Required

44. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose the information withheld under section 43 redacted of the personal information correctly withheld under section 40.

45. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Right of Appeal

47. 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 24th day of September 2007

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Personal information

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data

- protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Commercial interests

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“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).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”