

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 December 2009

Public Authority: House of Commons
Address: London
SW1A 0AA

Summary

The complainant made a request to the House of Commons for information concerning plans to produce a portrait, photograph or sculpture of the Rt Hon Gordon Brown MP. The information was refused on the basis that it was exempt under sections 43(2) and 40(2) of the Freedom of Information Act 2000 and this decision was upheld at the internal review stage. The Commissioner has decided that the House of Commons was correct to withhold the requested information and therefore he requires no further action to be taken in relation to this request. The Commissioner has recorded a minor procedural breach of the Act.

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 27 November 2008 the complainant wrote to the House of Commons (the "House") and requested the following information:
 - "1. All internal documentation held by the House of Commons which relates to plans to produce a portrait and or photograph and or sculpture of the Rt Hon Gordon Brown MP. These documents could relate to a specific proposal and or commission or they could relate to the general idea of a portrait.
 2. All correspondence (including emails) between the House of Commons and Downing Street which relates to the aforementioned

plans.

3. All correspondence (including emails) between the House of Commons and any artist(s) which relates to the aforementioned plans.”
3. The House responded on 22 December 2008 and provided information in response to his request. It withheld the following information:
 - details of estimated fees to be paid to artists (under section 43(2) of the Act); and
 - names of short-listed artists (under section 40(2) of the Act).
4. On 23 December 2008 the complainant asked the House to review its handling of the request. He specifically requested the House to consider:
 - its application of section 43(2) of the Act;
 - its application of section 40 of the Act; and
 - whether it had disclosed all of the available information and the most up-to-date information on the matter.
5. The House responded on 6 February 2009 after carrying out an internal review into the handling of the request. It confirmed its decision to withhold the requested information and further stated that it considered section 43(2) to apply to both parts of the withheld information.

The Investigation

Scope of the case

6. On 13 February 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the House's application of sections 43(2) and 40(2) of the Act.

Chronology

7. On 11 September 2009 the Commissioner wrote to the House to begin the investigation. He posed a number of questions to assist his understanding of how the request had been dealt with. He also asked to be provided with a copy of the information withheld from the complainant.
8. On 16 October 2009 the House responded to the Commissioner. It provided a response to his queries and a copy of the withheld information.
9. The Commissioner wrote to the House again on 29 October 2009 with further questions. The House responded on 10 November 2009.

Analysis

Exemptions

Commercial interests

10. The Commissioner has considered whether the House has correctly applied section 43(2) of the Act to the request for information.
11. 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).”
12. The Tribunal, in the case of *Hogan v Information Commissioner and Oxford City Council* (EA/2005/0030), explained that the application of the ‘prejudice’ test involved a number of steps: “First, there is a need to identify the applicable interest(s) within the relevant exemption...second, the nature of the ‘prejudice’ being claimed must be considered...a third step for the decision-maker concerns the likelihood of occurrence of prejudice” (paragraphs 28 to 34).

Identifying the applicable interests

13. In order to engage section 43(2) the Commissioner considers that the information in question would have to relate to or impact upon a commercial activity. He considers that commercial information relates to the activity of buying or selling goods and services. He draws a distinction between commercial interests and the wider concept of financial interests. The Commissioner accepts that the commissioning of a portrait is a commercial activity in that it constitutes the buying of goods and/or services in a competitive environment. He considers the environment to be commercially competitive as the artists are not restricted to only accepting commissions from the public authority, and the public authority has a pool of artists from which it may commission works.
14. The House explained that, in its view, disclosure of the requested information would undermine its negotiating position for this and other, similar, commissions in the future. The Commissioner accepts that an effect on a negotiating position related to the commissioning and purchase of portraits would be an effect impacting upon a commercial activity. He therefore considers that the interest identified by the House is applicable to section 43(2).

The nature of the prejudice

15. The Tribunal, in the case of *Hogan*, commented that “...an evidential burden rests with the decision-maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice...” (paragraph 30).

Artists' names

16. In relation to the names of the artists, the House has explained that the short-listed artists have not been informed which commission they are being considered for. When selected, the chosen artist may not wish to go ahead with the project when informed of the specific commission. To disclose the names of the artists considered, in circumstances where they were not aware of the details of the commission themselves, could attract unwanted publicity for the artist and affect their positions in other negotiations that are currently, or will shortly, be taking place. It may also damage the goodwill between the artists and the House, which is an essential part of the commissioning process.
17. The House has also explained that there are only a limited number of artists that specialise in painting portraits and who would be considered as a suitable for a commission such as this. It has stressed the importance of the House being able to negotiate individually with the chosen artist and that disclosure of the names would allow the proposed artists to discuss the commission, thereby adversely affecting the House's bargaining position in negotiations.
18. The Commissioner has also had regard to a similar complaint he has investigated regarding a request for information to the National Portrait Gallery (FS50190780).
19. The Decision Notice is available online at the following link:

http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50190780.pdf
20. In that case, the National Portrait Gallery argued that at its initial stages the commissioning process is "fragile" and disclosure of information relating to it may undermine confidence in the commissioning process and discourage the sitter or artist, or future sitter or artists, from taking part (paragraph 29). The Commissioner accepted these arguments.
21. The Commissioner has firstly considered the argued effect upon the commercial interests of the artists. In the case of *Derry City Council v Information Commissioner* (EA/2006/0014) the Tribunal rejected the view that a third party's commercial interests would be prejudiced by disclosure of the requested information, on the grounds that there was no evidence the third party itself had provided the arguments raised. The Tribunal stated that it was not prepared to speculate as to the third party's concerns.
22. The Commissioner is aware that the arguments with regard to the artists' commercial interests have been offered by the House and not by the artists themselves. However, as the artists do not know which commission they are being considered for, the House would not be able to consult with them in order to be able to put specific arguments regarding their concerns to the Commissioner, without revealing details of the commission itself. The Commissioner has no alternative other than to take arguments from the House in respect of this matter.
23. However, the Commissioner's view in this case is that, although the House has argued that unwanted publicity might affect an artist's position in other ongoing or

forthcoming negotiations, it has not explained how or why this effect might occur. The Commissioner therefore concludes that the House has not adequately identified a causal link between the disclosure of the names of the artists and an effect upon the commercial interests of the artists. He will not, therefore, consider this argument any further.

24. The House has made two arguments relating to the potential causal link between disclosure of the artists' names and a prejudice to the commercial interests of the House.
25. The House has explained that disclosure of the artists' names, before a final decision is made as to which artist should be selected for the project, would be likely to undermine the goodwill that is essential to the commissioning process and would therefore adversely affect the negotiations. The Commissioner accepts that the relationship between the House and the short-listed artists may become strained if their names were disclosed in advance, and that this might, as argued in the National Portrait Gallery case, lead to artists being deterred from accepting commissions. The Commissioner accepts that reducing the pool of potential artists in this way (the House has explained that there is a limited number of individuals that specialise in painting portraits) might affect the price the House would have to pay to secure a commission as the remaining suitable candidates may be able to drive the prospective fee up.
26. In relation to this argument therefore, the Commissioner considers that the House has provided sufficient evidence to demonstrate a causal link between the disclosure of the artists' names and an effect on its own commercial interests.
27. In relation to the argument that the proposed artists would be likely to discuss the commission with each other if it became known who the proposed artists were, which would weaken the House's ability to negotiate a good price with those artists, the Commissioner again accepts that a causal link between the information and the argued prejudice has been shown.
28. The Commissioner will consider the likelihood of the above prejudice occurring later in this Notice.

Fee

29. In relation to the estimated fee, the House has explained that disclosure of the information would encourage artists to request a similar fee, in respect of future commissions, when a lower fee may otherwise have been considered. Further, the House considers that disclosure of the fee payable to an artist could affect that artist's negotiating position in respect of future commissions. The Commissioner accepts this causal link between the disclosure of the information and the argued prejudice. He also accepts that in relation to the specific commission in question disclosure of information about the fee the House would be willing to pay for the commission might influence an artist to set a higher price than they might otherwise have accepted.

30. The House has explained to the Commissioner that at least one artist has stated in past negotiations that he would refuse the commission if his fee were disclosed in advance. This demonstrates that it is possible the House's ability to successfully negotiate commissions would be prejudiced if the estimated fee were to be disclosed and the Commissioner accepts that this causal link has been demonstrated.

The likelihood of prejudice

31. The House has specified that it believes disclosure of the requested information would be likely to prejudice the commercial interests of both the House and the short-listed artists. The Tribunal, in the case of *John Connor Press Associates v Information Commissioner (EA/2005/0005)* (the John Connor case), stated that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15). The Commissioner has interpreted this to mean that, in order for a public authority to satisfy him that disclosure of the requested information would be likely to prejudice parties' commercial interests, it must demonstrate that the risk of prejudice need not be more likely than not, but it must be substantially more than remote.

Artists' names

Prejudice to commercial interests of the House

32. The House has argued that disclosing the names of the short-listed artists before the artists themselves knew they had been short-listed, would be likely to undermine goodwill between the House and the artists which would in turn affect the House's bargaining position in commercial negotiations. The Commissioner considers that there is a real and significant risk of this prejudice occurring. In reaching this conclusion the Commissioner has taken account of the evidence presented in the *National Portrait Gallery* case about the fragility of the commissioning process.
33. The House has argued that if the names were disclosed the proposed artists would be likely to discuss the commission with each other, which would weaken the House's ability to negotiate a good price. The Commissioner does not accept that the likelihood of this occurring is substantially more than remote. Rather the Commissioner considers it more likely that individual artists would be deterred from discussing the commission with their competitors, for fear of undermining their own negotiating positions.
34. For the reasons given above the Commissioner concludes that the exemption at section 43(2) of the Act is engaged in relation to the artists names.

Fee

35. The Commissioner has considered the matter of disclosure of the fee in isolation rather than assuming that the fee and the names of the artists would both be disclosed together. This is because he has concluded, as set out above, that

section 43(2) is engaged in relation to the short-listed artists' name, and he will go on, later in this Notice, to conclude that the public interest in maintaining the exemption for the artists names outweighs the public interest in disclosure.

Prejudice to commercial interests of the House

36. The House has explained that, at the time of the request, the short-listed artists had not been informed which commission they were being considered for. Therefore, negotiations as to fees with an individual artist had not commenced. The Commissioner considers that there is a real and significant risk of an artist asking for a higher price than they might otherwise have accepted if they knew in advance the figure that the House was willing to pay.
37. The House has also explained that at least one previous artist had indicated his intention to refuse a commission if his fee was to be disclosed in advance. The Commissioner is also aware of the evidence presented in the National Portrait Gallery case about the fragility of the commission process. The Commissioner agrees that, if the fee were to be disclosed at this stage, the risk that artists would refuse the commission in advance, thereby limiting the pool of artists available and allowing the remaining suitable candidates to drive the prospective fee up is substantially more than remote.
38. The House has also argued that disclosure of the information would encourage artists to request a similar fee, in respect of future commissions, when a lower fee may otherwise have been considered. In the Commissioner's view, in order to accept that the likelihood of such prejudice occurring is real and significant he would need to be convinced that future commissions would be similar enough to mean that a similar fee would be payable. As he has not been presented with any evidence on this point he does not accept that the likelihood of such prejudice occurring has been shown to be real and significant.

Prejudice to commercial interests of the artists

39. The House has argued that artists believe disclosure of their fee in respect of one commission could affect their negotiating position in respect of other work.
40. The Tribunal, in the John Connor case, accepted that contracting parties' commercial interests "might" be prejudiced in respect of future negotiations if information relating to one transaction were to be disclosed, however, that whether or not prejudice was likely "would depend on the nature of the information and the degree of similarity between the two transactions." (Paragraph 15).
41. The House has not provided any information to demonstrate the similarity between this and potential future transactions to the Commissioner, and he therefore does not accept that the likelihood of this prejudice has been shown to be real and significant.
42. In any case the Commissioner does not consider that disclosure of the prospective fee would be likely to damage the commercial interests of the short-

listed artists if these artists remain anonymous. This is because the prejudice to the artists argued by the public authority depends upon the disclosure of the fee being linked to the short-listed artists' names.

43. To summarise, the Commissioner considers that the House's commercial interests would be likely to be prejudiced by the disclosure of the proposed fee and the artists' names. The section 43(2) exemption is therefore engaged in respect of this information. The Commissioner has therefore gone on to consider whether the public interest in disclosure of the proposed fee and the artists' names is outweighed by the public interest in maintaining the exemption.

The public interest test

Public interest arguments in favour of disclosing the requested information

44. The House has identified the following arguments in favour of disclosing the requested information:
- the public interest in being able to demonstrate that public money is being used effectively, that the public authority is getting value for money and that the public authority's approach the spending of public funds is generally transparent; and
 - the public interest in demonstrating that the procurement process is being used in an open and honest way.

Public interest arguments in favour of maintaining the exemption

45. The House has identified the following arguments in favour of maintaining the exemption:
- the public interest in allowing the public authority to protect its bargaining position whilst negotiations are ongoing;
 - the public interest in allowing the House to protect its commercial interests in obtaining value for money and high quality works of art; and
 - the public interest in allowing the House to commission, collect and display works of art concerning the political history of the country.

Balance of the public interest arguments

46. The Commissioner has considered the arguments put forward by the House, along with the complainant's view that the information he has requested should be in the public domain.
47. In relation to the third argument given by the public authority in favour of the public interest in maintaining the exemption the Commissioner does not consider that this is relevant to the application of section 43(2). This is because it relates to the public interest in maintaining a collection of art, rather than the public interest in protecting the commercial interests of any party. He has not, therefore considered this argument any further.

Artists' names

48. The complainant has argued that the public have a right to know which artists are being considered for this type of work. The Commissioner must draw a distinction between information that is of interest to the public and information that is genuinely in the public interest. In this case, the Commissioner considers that whilst the public may be interested to learn which individuals are being considered for the particular portrait, he does not consider there is great public interest in the names of the artists under consideration being disclosed, before the artists themselves have been informed what commission they are being considered for. He has been presented with no specific arguments to suggest that disclosure of the names would demonstrate that public money is being used effectively. Therefore, whilst he has afforded some weight to the general public interest in openness and transparency of the procurement process, he affords no additional weight specific to the disclosure of the particular information in question in this case.
49. The Commissioner considers that the public interest in guarding against the risks to the bargaining positions of the House outweighs the public interest in the information being disclosed. The Commissioner gives considerable weight to the House's argument that it is in the public interest for the House to be able to obtain the best possible value for money when spending public funds. He considers this is particularly relevant in this case because, as at the date of the request, the negotiations for the commission in question were still ongoing.

Fees

50. As explained above, the Commissioner considers that disclosure of the prospective fee at this stage would be likely to undermine the House's negotiating position. In light of the fact that the negotiations for the commission were ongoing as at the date of the request, the Commissioner gives particular weight to the public interest in the House being able to obtain the best possible value for money when spending public funds.
51. As the negotiations are ongoing (and therefore a final fee has not been decided), the Commissioner does not consider that disclosure of the fee information held at the time of the request would enlighten the public as to whether public money is being used effectively, or whether the House is getting value for money. The Commissioner considers that the very existence of a procurement process, the offices involved and the lengthy deliberations in this matter so far owe a testament to the checks and balances that are already in place. Whilst the Commissioner does not consider that the existence of such checks and balances in a process will always mean that there is no public interest in the disclosure of further information, the Commissioner's view in this case is that the release of the figures would add little to the ability of the public to form an assessment to the efficacy of the process. He therefore affords little weight to this argument and concludes that the public interest in maintaining the exemption outweighs the public interest in disclosure of the fee.

Personal information

52. As the Commissioner has determined that the requested information is exempt in its entirety under section 43(2) of the Act and that the public interest in maintaining the exemption outweighs the public interest in disclosure, he has not gone on to consider whether section 40(2) of the Act applies to the names of the short-listed artists.

Procedural requirements

53. The Commissioner has considered whether the House has complied with the various procedural requirements of the Act.
54. In line with the decisions of the Tribunal in *King v the Information Commissioner and the Department for Work and Pensions (EA/2007/0085)* and *McIntyre v the Information Commissioner and the Ministry of Defence (EA/2007/0065)* the Commissioner has recognised that the internal review procedure exists to allow public authorities the opportunity to put right mistakes they may have made when first responding to a request. The Commissioner will not usually find a public authority in breach of a procedural requirement of the Act where the breach was remedied after the statutory time limit for compliance, but before or by the date of the internal review being completed. Clearly, public authorities are not able to remedy breaches of the time for compliance itself and therefore the Commissioner will record such breaches in appropriate cases.

Refusal Notices

55. The House initially refused to provide the requested fees information by virtue of section 43(2) of the Act and the artists' names under section 40(2). At the internal review stage, the House stated that it considered section 43(2) also applied to the names. By applying the section 43(2) exemption to the names outside the twenty working day time limit for complying with the Act, the public authority has breached section 17(1).
56. The Commissioner is satisfied that the House has complied with all other procedural requirements of the Act.

The Decision

57. 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:
- It correctly applied section 43(2) of the Act in refusing to provide this information
58. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- section 17(1) in that the public authority's refusal notice relying on section 43(2) to withhold certain requested information, was issued outside the twenty working day period for compliance.

Steps Required

59. The Commissioner requires no steps to be taken.

Right of Appeal

60. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 7th day of December 2009

Signed

**Lisa Adshead
Senior Policy Manager**

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

Legal Annex

Refusal of Request

Section 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim –
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that –

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

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) he 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).”