

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 3 December 2009

**Public Authority:** The National Gallery  
**Address:** Curator's Office  
Trafalgar Square  
London  
WC2N 5DN

### Summary

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The complainant requested information about who provided £40,000 anonymously towards the public authority's acquisition of Holbein's painting *Christina of Denmark, Duchess of Milan* (item number NG2475) in 1909. The public authority provided some information about the circumstances of how the painting was acquired, but explained that it did not have relevant recorded information about the donor. It explained that the painting was given to it by the National Art Collections Fund (NACF, now known as The Art Fund) and that it may hold the information about the donor. It explained that it did previously have a note sealed in two envelopes attached to its dossier about the painting about who the owner was, but that it had returned this information to the Art Fund on 8 February 2008; and so did not hold this information anymore. The complainant argued that the information was held by the Art Fund on the public authority's behalf and should therefore be provided. The Commissioner has considered the facts of this case and is satisfied that the public authority was correct that it did not hold any relevant recorded information at the date of the request. He requires no remedial steps to be taken in this case.

### The Commissioner's Role

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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.

## Background

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2. Hans Holbein (1497/8–1543) is regarded as the first great British painter and to have brought the renaissance to Britain. His painting *Christina of Denmark, Duchess of Milan* was painted in 1538 and is his only surviving full portrait of a woman. It is a full-length portrait, silhouetted against a background of dark blue. It was painted from a sketch-book made in Brussels where Holbein was sent to record her likeness in order that Henry VIII might decide whether to propose to her. She went on to decline his offer. Prior to 1909, it had been on loan to the public authority for thirty years from its owner the Fifteenth Duke of Norfolk.
3. In 1909 the owner gave the public authority notice that he wished to withdraw the painting and put it on the market. The money that was raised was to be used to support Roman Catholic schools.
4. The painting was then sold by him to a dealer, Messrs P. and D. Colnaghi for £61,000 (today's equivalent is approximately £4.7 million using the retail price index). The public authority originally was provided with an offer to acquire the painting for the same price but only had nine days to find the money. It was unable to raise the funds in that time.
5. The dealer offered the public authority a second chance to buy the painting for £72,000 (now approximately £5.6 million) and provided the public authority with some time to get the money together (setting a deadline of 31 May 1909). This was an unheralded price for a portrait. Otherwise it was rumoured that they would sell the painting abroad to an American millionaire, Mr Frick, who was reported to be very interested.
6. There was a large media appeal in 1909 to raise funds. It was felt important that the painting remained in the country. The press provided coverage but the donations were insufficient at first. A second S.O.S. appeal was therefore launched. More money was raised but there was still a shortfall of £46,000 and it seemed the painting would be lost.
7. On the penultimate day, prior to the option expiring, a benefactor contacted the Art Fund. They informed it that they were prepared to provide the shortfall (£40,000) on the condition that they remained anonymous. The painting was thus acquired by the Art Fund and given to the National Gallery. It is the name of the benefactor that is the subject matter of this case.
8. A publication from the public authority in 1924 explained that the letter offering the funds was from a lady at a health resort in Germany and that her offer 'relies upon the National Art-Collections Fund keeping her name completely private.' It also stated that the transfer was through the bank manager in order to preserve her anonymity. It also explained that the lady had already passed away.
9. The Art Fund's website informed the debate and stated that the lady was English and that the £40,000 amounted to a third of her fortune.

10. It also stated that the original envelope containing the donor's details remains sealed and is passed from Chairman to Chairman and that it still possesses it. The Art Fund is not a public authority for the purposes of the Act.

## The Request

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- 11 On 15 April 2009 the complainant requested the following information in accordance with section 1(1) of the Act:

*'I am asking the gallery for the unreleased part of the art historical dossier on item NG 2475, Christina of Denmark by Hans Holbein. The unreleased part of the dossier consists, as I understand it, of notes discussing the name of the anonymous donor who provided money for the painting's acquisition from the Duke of Norfolk in 1909.'*

- 12 On 8 May 2009 the public authority provided a response to the request. It informed the complainant that it was the Art Fund that gathered the funds to acquire the painting and provided its contact details. It said that it did formerly have a note dated 1950 which speculated about the name of the donor, but that it had decided in 2008 that the 'inclusion of this note... was inappropriate and it was transferred to the Art Fund. It therefore stated that it did not hold the requested information.

- 13 On 27 May 2009 the complainant requested an internal review:

*'Despite the transfer of the envelope containing the note in question to the Art Fund, it appears that it is being held by the Art Fund on behalf of the National Gallery and so remains the Gallery's property. In your reply dated October 2007 to an appeal by my former colleague [Individual redacted], you described the item twice as the Gallery's "own envelope" and not being held on behalf of anyone else. It was only after the refusal of [Individual redacted] appeal that the Gallery moved its envelope to the Art Fund.'*

- 14 On 17 June 2009 the public authority communicated the result of its internal review. It stated it did not hold the information at the date of the request. It explained that it had provided a document that recorded the transfer of the information to the Art Fund. It explained that it had taken the advice of the Commissioner before doing so. It stated that the complainant was correct that it decided to transfer the envelope after receiving an earlier request for information for it. It said that the Act applies to those who hold the information and was not an issue about ownership. It explained that the transfer was absolute, and made without any intention whatsoever to refer to it or retrieve it at any future date. It said that the public authority believed that the information was the property of the Art Fund. It confirmed that it had already referred the complainant to the Art Fund.

## The Investigation

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### Scope of the case

- 15 On 14 August 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 following points about why he believed that the information was held by the Art Fund on the public authority's behalf (and therefore was held by virtue of section 3(2)(b) of the Act):
- i. The note of transfer includes the following words: "In 2007 it [referring to the envelope] was opened following a Freedom of Information request. The information was not released and after a period of four months following the request, was passed to the Art Fund for safe-keeping." He stated that an ordinary person reading the note would infer from this wording that the Art Fund are only the custodians of the document, not its owners.
  - ii. He disputed the Gallery's assertion that it was "inappropriate" to retain the note. He explained that the Gallery retains an entire file, open for inspection, on the provenance of the Holbein. They call it their "art historical dossier on item NG 2475". It therefore does not see anything inappropriate in holding material on this painting. The document that he requested used to be part of this dossier – the only unreleased part – until it was sent to the Art Fund last year.
  - iii. The Gallery's communications with both [Individual redacted] and with the complainant referred to the document in question on several occasions as its "own envelope". He explained that this is not disputed by the public authority, although it claims nothing about ownership should be inferred from this phrasing. He argues that this wording does indicate the Gallery's assumption of owning the document.
  - iv. The document requested was written in 1950 by Cecil Gould. The document suggests the identity of the anonymous donor based on information given to Mr Gould. At the time, Mr Gould was a senior official of the Gallery – its Assistant Keeper – and was writing a note about a picture that was in the possession of the Gallery and the note was then stored by the Gallery in its own dossier on the picture. He explained that this all adds to the argument that the document is the Gallery's "own envelope" in many senses.
  - v. The public authority stated in its internal review that the question of ownership is irrelevant under the Act. He explained that he felt that this is wrong. The Act covers information "held by another person on behalf of the authority" (section 3(2)(b)).
  - vi. The decision to send the document to the Art Fund was made by the Gallery in response to the 2007 FOIA request. He explained that this is clear from the public authority's internal emails. There is no evidence that the Gallery ever

even thought of getting rid of the document until it had been requested under FOI.

He also provided a number of arguments about why he believed that section 41(1) does not apply to the information in the event that the information was held.

## Chronology

- 16 On 9 September 2009 the Commissioner wrote to the public authority to explain that he had received a complaint and asked it to provide him with an explanation about its position in this instance. On 24 September 2009 the public authority provided a response.
- 17 On 14 October 2009 the Commissioner wrote to the Art Fund to obtain its understanding about its role in holding the envelope. He did not receive a response.

## Findings of fact

- 18 The envelope that was sent to the Art Fund on 8 February 2009 had the following information on it:

*'NOT TO BE OPENED – CONFIDENTIAL*

*This envelope contains a note suggesting the identity of the anonymous donor who gave the money which secured Holbein's 'Christina of Denmark' (NG2475) for the nation. It was written by Cecil Gould, who had been given the information informally, in 1950. The envelope was later opened by an unidentified person and replaced in another envelope. In 2007 it was opened again following a Freedom of Information request. The information was not released and after a period of four months following the request, was passed to The Art Fund for safe-keeping.'*

## Analysis

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### Substantive Procedural Matters

*What is the relevant recorded information that is relevant to this request?*

- 19 For clarity it is important to establish from the outset the information that the Commissioner has considered in this case. The information is the envelope containing the 1950 note. It does not necessarily contain the name of the beneficiary but contains Mr Gould's speculative views about who it is.

*Is this information held by the Art Fund on behalf of the public authority?*

20. Section 3(2)(b) of the Act provides that information is held by a public authority when it is held by another person on behalf of the authority.

21. The Commissioner has therefore focussed this investigation on whether the envelope can be said to be held by the Art Fund on behalf of the public authority at the date of the request 15 April 2009. This issue is a question of fact.
22. The public authority believes that the Art Fund does not hold the information on its behalf. It explained that it did not believe it owned the envelope anymore and that it would never expect it to be returned to it. The Commissioner contacted the Art Fund to obtain its understanding about why it held the envelope. It did not reply to the Commissioner's email.
23. The public authority provided the background about why it passed the envelope to the Art Fund. It explained that it had received an earlier request for it and realised at that stage that it did not feel it was appropriate to keep it. It explained that as a result of that request it wanted to pass the envelope to the Art Fund who were the body who it believed should have held the information. It consulted the Commissioner at this time and was told to keep the envelope for as long as the appeal process was (for the earlier request), but that after then it could either dispose of it or pass it to another entity. It explained that it then waited four months and then passed the envelope to the Art Fund.
24. It also explained it believed strongly that the Art Fund was the correct body to hold this information because it (in its earlier form) had made an undertaking to the donor to keep her name anonymous and the donation of a large sum of money was made on the basis of that condition. It explained that it viewed the transfer as absolute and that the information should have belonged to the Art Fund at all times.
25. The complainant made the six comments in paragraph 15 about this issue. The Commissioner will consider each in turn:
  - i. The Commissioner agrees that the natural reading of the note suggests that the public authority retains an interest in it. This is because the note specifically says that the envelope was passed for safe keeping. This indicates that the envelope was held by the Art Fund as custodian for the National Gallery. This is a strong factor that favours the fact that the information was being held on behalf of the public authority.
  - ii. The Commissioner is unable to comment about the appropriateness of keeping the information. However, he understands that the public authority had no legal, business or any other need to retain the artefact that it passed to the Art Fund.
  - iii. The Commissioner believes that this argument lacks strength as it comments about incidents that happened before the request. The Commissioner must consider the situation at the date of the request.
  - iv. The Commissioner believes this argument lacks strength for the same reason as in iii. above. However, the source of the information is relevant.

- v. The Commissioner agrees that ownership can be an important consideration when considering whether it is held under the Act. However, as explained above, he is limited in his investigation to determining whether the information was held at the date of the request.
  - vi. The Commissioner believes that the past motivation cannot be relevant as he must consider the situation at the date of the request.
26. The Commissioner must therefore balance the factors. The factors that suggest the information is held on its behalf are the wording on the envelope and the original source of the information. The factors that suggest the information is held by the Art Fund on its own behalf are the circumstances of the transfer, the reasons for it and its submissions about the intent at that time.
27. Balancing the factors, the Commissioner has determined that the information was owned at the date of the request by the Art Fund and that it was not held on behalf of the public authority. Instead the information was held on its own behalf. He believes that the source of the note and the wording on the envelope does not conclusively prove otherwise and he has been persuaded by the submissions in paragraphs 23 and 24 in this case.
28. The Commissioner has considered the evidence above and is satisfied that on the balance of probabilities the public authority did not hold the relevant recorded information that was requested. It has therefore complied with section 1(1)(a) in correctly denying that it held the relevant information.

## **The Decision**

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

## **Steps Required**

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30. The Commissioner requires no steps to be taken.

## Right of Appeal

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31. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 3<sup>rd</sup> day of December 2009**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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



## Legal Annex

### The Freedom of Information Act 2000

#### Section 1 - General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

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#### Section 3 - Public Authorities

(1) “in this Act “public authority” means –

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which –

(i) is listed in Schedule 1, or

(ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6.

(2) For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person,  
or

(b) it is held by another person on behalf of the authority.