

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 8 December 2008

**Public Authority:** The British Museum  
**Address:** Great Russell Street  
London  
WC1B 3DG

#### Summary

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The complainant asked the British Museum for information relating to its dealings with the artists Banksy and Damien Hirst. The Museum provided a copy of one email, but said that it did not hold any other information which fell within the scope of the complainant's request. The Commissioner decided that no additional information was held by the Museum and that, accordingly, it had discharged its general obligations under section 1 of the Act. However, the Commissioner also found that the Museum had contravened the requirements of sections 1(1)(a) and 10 (1) of the Act in failing to respond to the information requests within 20 working days.

#### 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. Relevant legislation is set out in full in the Legal Annex to this Notice.

#### The Request

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2. On 23 January 2008 the complainant requested the following information from the British Museum ('the Museum'):

"(1) all internal Museum documentation which in any way relates to the artist known as Banksy or any of the artist's work;  
(2) all correspondence between the Museum and the artist or any representative and/or gallery acting on his behalf;

- (3) all works by the aforementioned artist which have been displayed by the Museum voluntarily; and
- (4) a list of occasions when works by the aforementioned artist have appeared or have believed to have appeared on Museum premises. These works will not have been solicited by the Museum or any of its representatives. Could you provide the dates the work appeared as well as any associated documentation (including emails), correspondence, (including emails) and images.”
3. On 24 January 2008 Mr Hastings asked the Museum for similar information in relation to its dealings with Damien Hirst, namely:
- “(1) all correspondence (including emails) between the Museum and Damien Hirst which in any way relates to a work called ‘For the Love of God’ aka ‘the Skull’;  
(2) all correspondence (including emails) between the Museum and any gallery and/or representative of Damien Hirst which in any way relates to the aforementioned work;  
(3) all internal documentation (including emails) which relates to the aforementioned work.”
4. The Head of Press and PR at the Museum responded on 5 March 2008. She said that, as regards Banksy, “there is no documentation or correspondence on this issue in the British Museum (points 1 and 2), no works have been displayed voluntarily (point 3) and there is no documentation or correspondence as requested in point 4”. She said that “the object did not enter the collection so there is no documentation”. As regards Damien Hirst/For the Love of God, she said that “There is just one item of correspondence (an email from Damien’s pa, point 2) which is attached. There is no correspondence under points 1 and 3”. She said that there was nothing that the Museum had not disclosed.
5. On 5 March 2008 the complainant asked the Museum to review its decision, on the grounds that he believed that the Museum held more information than it had disclosed. He said that, as far as Banksy was concerned, the artist had deposited a fake cave painting in the Museum in 2005, and he assumed that, at very least, there must be documentation which related to that event. As to the Diamond Skull, he believed that the email that the Museum had released to him appeared to confirm press reports that staff at the Museum were in discussion with Damien Hirst or his representatives about the item, so there was every reason to believe that the Museum must hold further information.
6. On 1 April 2008 the Museum’s Head of Press and PR replied, saying that she had checked again with all relevant departments and there was no written material on either the Diamond Skull or Banksy (other than the email sent to the complainant previously). She said that the Museum could not undertake an internal review in this instance as there was no documentation available to consider issuing. She said that she dealt primarily with the Banksy installation when it occurred, and all communication was conducted over the telephone. She recognised that it was open to the complainant to refer the matter to the Information Commissioner, but she said that it was not that the Museum was withholding information for reasons stipulated in the Act but that the documentation simply did not exist.

## The Investigation

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### Scope of the case

7. On 9 April 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant said that he was unhappy both with the amount of information supplied to him by the Museum, and the Museum's failure to offer an internal review. He said that it was his understanding that a public body covered by the Act was obliged to offer an internal review. He was also concerned that the decision not to proceed with a review seemed to have been taken by the person who handled the initial information request, which he understood to be contrary to the Act.
8. A public authority is not required by the Act to carry out an internal review. Rather, the only statutory requirement in relation to such a review is set out in section 17(7)(a), which provides that a refusal notice issued under sections 17(1), (3) and (5) (which is not the case here) must contain details of any procedures provided by the public authority for dealing with complaints about the handling of requests for information. That being so, the Commissioner is not able to investigate the grievance raised by the complainant about the conduct of an internal review (or a lack of a review) within the scope of this Decision Notice and must restrict himself to an investigation of whether or not the request for information had been dealt with in accordance with the requirements of Part 1 of the Act. The Commissioner's comments on this matter are, however, documented in the other matters section of this notice.

### Chronology

9. On 15 October 2008 the Commissioner contacted the Museum seeking full details of the scope of the searches it had made for the information sought by the complainant. It also asked the Museum for its comments on the complaint made to the Commissioner.
10. On 20 October 2008 the Museum's Information Manager responded, providing a detailed description of its search processes.
11. He said that, for Banksy, this included searches of files, correspondence, mailboxes and network drives:
  - held or managed by the Director's Office, including correspondence to the Director, Deputy Director and copies of correspondence forwarded to other senior Museum managers;
  - of the Visitors Operation Department, specifically incident logs and reports ( these being manual logs, which are only retained for one year under the Museum's retention schedules);
  - of the Heads of the Museum's curatorial departments and their staff.

It also searched minutes and reports to its management groups at the time of the incident in May 2005 held by the Governance Manager.

The Information Manager said that all of the above were searched by reference to 'Banksy', or to the incident of May 2005 (in which Banksy hung an unsolicited artwork at the museum), or any similar incidents, but no such information was found. He said that the publicity surrounding the incident in 2005 had been handled by the Museum's Head of Press and PR. She had searched her own files, correspondence, mailbox and network drives; she would not in any case retain this type of information beyond a maximum of two years in line with the Museum's retention schedules. There was no record of any contact with Banksy or any of his representatives at the time, or subsequently, other than as described in information widely published at the time in the press. He said that, as with most such press work of this nature, the incident was dealt with by phone and as the Museum does not record or transcribe phone calls, there is no written record of this.

12. As to Damien Hirst, the Information Manager said that searches were made of records held or managed by the Director's Office, including correspondence to the Director, the Deputy Director and other senior managers, held in files and correspondence, mailboxes and network drives. It was understood that the Director had been approached by the artist's agent (by telephone) to view the work by Mr Hirst. The Museum does not record or transcribe phone calls so there was no record of this. The only record was therefore that which was supplied to the complainant – an email (dated 2 July 2007) following a phone conversation with Mr Hirst's agent. There was no record of the Director having viewed the work or discussed it: any further arrangements made with Mr Hirst's agent would similarly have been by phone.

Searches were again made of records held or files, correspondence, mailboxes and network drives held by the Heads of the Museum's curatorial departments and their staff, by reference to 'Damien Hirst' or the work 'For the Love of God', but no such references were found.

## Analysis

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### Procedural matters

#### Time for compliance with request

13. Section 10(1) of the Act states that "a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt".
14. The Commissioner notes that the Museum's response to the complainant's information requests of 23 and 24 January 2008 was not sent until 5 March 2008, thus exceeding the time limit for response.

## General Right of Access

15. Under section 1 of the Act, any person making a request for information is entitled to be informed in writing by the public authority whether it holds the information (section 1(1)(a) ) and, if so, to have it communicated to him (section 1(1)(b)).
16. In the light of decisions of the Information Tribunal in the cases of *Linda Bromley and others v the Environment Agency* (Tribunal Reference: EA/2006/0072) and *Fowler v Brighton & Hove City Council* (Tribunal Reference: EA/2006/0071), the Commissioner considers that the normal standard of proof to apply in determining whether a public authority holds any requested information is the civil standard of the balance of probabilities. Relevant factors in considering where that balance lies are the scope, quality, thoroughness and results of the searches, and any other explanations offered as to why the information is not held.
17. Having considered the detailed description provided by the Museum of its search for information relating to the artists Banksy and Damien Hirst, and to its explanation of its record retention policy (paragraphs 11 to 12 above), the Commissioner is satisfied that the Museum does not hold any information about the artists and their works (other than the email relating to Mr Hirst, which has already been provided to the complainant). He therefore concludes that the Museum did not breach section 1 of the Act in respect of its general obligations under the Act.

## **The Decision**

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18. The Commissioner's decision is that the public authority correctly complied with its general obligations under section 1 of the Act. However, the Commissioner has also decided that the Museum breached the requirements of sections 1(1)(a) and 10(1) of the Act in that it failed to respond to the complainant's information request within 20 working days.

## **Steps Required**

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19. The Commissioner requires no steps to be taken.

## **Other matters**

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20. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern.

21. Part VI of the section 45 Code of Practice recommends that public authorities should have in place a procedure for dealing with complaints about its handling of requests for information.
22. Although the complainant explicitly asked the Museum to conduct an internal review of its handling of the request, the Museum did not instigate its complaints procedure and informed the complainant that it could not undertake an internal review in this instance because "...there is no documentation to consider issuing". The Commissioner considers that this practice does not conform to the recommendations of paragraph 39 of the section 45 Code which states:

"Any written reply from the applicant...expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint...These communications should be handled in accordance with the authority's complaints procedure, even if, in the case of a request for information under the general rights of access, the applicant does not expressly state his or her desire for the authority to review its decision or its handling of the application."
23. It transpired during the Commissioner's investigation that, following the complainant's request for internal review, the Museum did reconsider its handling of the request, conducting further searches for the requested information. However, this review of the request was not undertaken by someone senior to the original request handler. The Commissioner considers that the manner in which the Museum handled the complaint did not conform to paragraph 40 of the section 45 Code which recommends that complaints about the handling of a request should "...be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable".
24. In failing to advise the complainant that it had conducted a review of its handling of the request, the Museum also failed to conform to paragraph 41 of the section 45 Code which recommends "In all cases, complaints should be acknowledged promptly and the complainant should be informed of the authority's target date for determining the complaint".
25. The Museum has told the Commissioner that, in future, it will make clear to any person making a request for information that any review of a complaint will be undertaken by someone not previously involved with the original request. The Museum has confirmed that this procedure was already set out in its internal guidance and has given an assurance that this guidance will be applied to any future complaints received about its request handling. The Commissioner welcomes that assurance and expects that the Museum's future handling of complaints about its handling of a request for information, whether it relates to the application of an exemption or not, will conform to the recommendations of the section 45 Code.

## Right of Appeal

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26. 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)

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 8th day of December 2008**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex

### General Right of Access

**Section 1(1)** provides that -

“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.”

**Section 10(1)** provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

### 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(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(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(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.”