

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 July 2018

**Public Authority:** Arts Council England  
**Address:** The Hive  
49 Lever Street  
Manchester M1 1FN

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to the Government Indemnity Scheme (GIS) for works of art on loan.
2. The Commissioner's decision is that Arts Council England (ACE) has correctly applied section 41 to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

#### Request and response

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4. On 19 September 2017 the complainant requested information of the following description:

*As you know section 16 National Heritage Act 1980 sets up what is known as the Government indemnity scheme for works of art on loan ("the Scheme").*

*Under the National Heritage Act 1980, section 16A (2) (Reporting of Indemnities) the Secretary of State for Digital, Culture, Media and Sport is required to make a statement to Parliament, every six months, informing them of the total value of all the indemnities in place at that time.*

*Do you hold copies of those statements? If so could I please see the statements for the most recent two years.*

*Please provide details of all claims and payments made under the Scheme since 2012.*

*According to paragraph 2.48 of the Arts Council's Guidelines for national institutions on the Scheme, issued January 2016, there is an "approved profile estimate" which in the case of the National Gallery is set at £10 million. An increase above this £10 million limit which requires the Secretary of State or Department to be informed, and Parliament in turn to be notified. DCMS have told me that, according to Arts Council England no such increase has been applied for (or by implication granted).*

*Can you confirm that that is the case?*

*Can you explain how that can be reconciled with the likely value of the numerous works of art currently on loan to the National Gallery (for example the 20 pictures by Degas borrowed from the Burrell Collection for which an indemnity under the Scheme is credited in the catalogue, quite apart from a number of other loans currently on display)?*

*Could you please provide a copy of the profile with best estimate of the sum of indemnity cover provided most recently by the National Gallery under paragraph 2.47 of the same guidelines?*

5. On 13 October 2017 ACE responded. It stated that it did not hold copies of any statements from the Secretary of State for DCMS, nor did it hold "a copy of the profile with best estimate of the sum of indemnity cover provided".
6. It further stated that it did not apply for an increase above £10 million. Finally it refused to provide details of claims and payments made under the scheme since 2012. It cited sections 40(2) and 31(1)(a) as its basis for doing so.
7. On 12 October 2017 the complainant requested an internal review and highlighted the following points:
  - a. *I asked for details of all claims and payments made under the Government Indemnity Scheme since 2012. You responded by stating that "Details of all claims paid in any year will be included in the Statement made to Parliament." That statement is false: the statements which I have been able to obtain from the House of Lords Library (the most recent of which was for the period ended 31 March 2015 issued in June 2015; there appears to be a statutory failure to keep these statements up to date) includes details only of undertakings issued, and has no information whatsoever regarding claims paid, the subject of my question. Further DCMS have told me formally (if*

*somewhat surprisingly) that "We can confirm that the department does not hold this information. Amounts paid under the Government Indemnity Scheme and details of each claim are reported to Arts Council England."*

- b. Your next ground for non-disclosure in s.31(1)(a). You argue that disclosure of the value of a claim would be "likely to prejudice the prevention and detection of crime". It is frankly ludicrous to suggest that being told that the damage to a painting belonging say to the Ashmolean Museum and damaged in transit to say the National Gallery leading to a restoration bill of £5000 could possibly "prejudice the prevention or detection of crime". Similarly any thief is likely to have a fair idea of the black market value of a painting he steals, and telling me what a damaged or lost painting might previously be (but is no longer) worth can be neither a motive nor an aid to crime. The ICO guidance is quite clear: the prejudice must be real. You must be able to demonstrate a causal link between the disclosure and the harm caused, and the onus before the ICO would be on you to demonstrate that this prejudice test is met.*
- c. You then argue that s.40(2) exempts disclosure. But as you should know this applies only where a natural living person is involved. The overwhelming majority of assets covered by the Scheme belong to institutions or other non-natural persons, and their assets are wholly irrelevant to this exemption. Further you could easily anonymise the response by merely redacting the individual's name.*
- d. It is obvious too that the grounds you cite cannot possibly exempt you from a response giving totals rather than individual claims, although I hope after review you will provide more detail as originally requested. The two grounds you have cited plainly do not justify the complete exemption you claim.*
- e. In my request, I explained the operation of paragraph 2.48 and asked how the £10m profile estimate for the National Gallery was consistent with the obvious breach of that limit at present. You responded confirming that the National Gallery has not applied to increase this limit (although you also state that you do not have the supply estimates, so it is hard to know how you can make that confirmation). You then repeat my explanation of the operation of paragraph 2.4, but say nothing in relation to my question about the apparent breach. It may be that DCMS have mislead me into thinking that the Arts Council has some involvement in the administration of the scheme, but you will understand that it is a matter of considerable (and legitimate) public interest if no arm of government has any role in agreeing limits submitted by museums or galleries using the scheme.*

8. ACE provided the outcome of its internal review on 21 November 2017. It revised its position and provided some of the requested information.
9. However, it maintained that it did not hold copies of statements to Parliament from the Secretary of State for DCMS save for 2015, and provided a link to the DCMS annual report. It further provided links to DCMS's accounts regarding details of claims and payments.
10. It then withdrew its reliance in section 31 and provided some details relating to claims payments. However, it maintained that disclosure of the individual claims was exempt from disclosure by virtue of section 40(2) and 41 of the FOIA.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 19 December 2017 to complain about the way his request for information had been handled.
12. The Commissioner considers the scope of this case is to be to determine if ACE has correctly applied section 40(2) and section 41 of the FOIA to the withheld information. She will further consider if ACE has handled the request in accordance with the FOIA.

### **Background**

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13. ACE explained the GIS and ACE's role in handling claims under it. Government Indemnity is essentially government underwritten insurance for loans to UK museums. The legislative provisions for it are made by section 16 of the National Heritage Act 1980. The rules, or small print, that govern it and any contract issued under it for indemnity are contained in the Guidelines: there is one for national exchequer-funded museums and another one for non-nationals. Both are on Arts Council's website at:  
  
[http://www.artscouncil.org.uk/sites/default/files/download-file/GIS\\_National\\_guidelines\\_2016.pdf](http://www.artscouncil.org.uk/sites/default/files/download-file/GIS_National_guidelines_2016.pdf)  
  
[http://www.artscouncil.org.uk/sites/default/files/download-file/GIS\\_Non\\_national\\_guidelines\\_2016.pdf](http://www.artscouncil.org.uk/sites/default/files/download-file/GIS_Non_national_guidelines_2016.pdf)
14. As with all insurance contracts the details/identity of owners (name and address) i.e. the institution, body or person which owns the object to be lent has to be shown on the schedule sheet of the undertaking (which is the contractual document whereby the Secretary of State undertakes to indemnify the owner lending to the borrowing institution (paras. 1.5 and

- 2.14 & 2.15 of the GIS Guidelines). The Guidelines emphasise at para. 2.14 that "Borrowers may assure owners that all information is treated in the strictest confidence and with attention to security of owner details" (ACE stores details in locked cabinets within secure buildings).
15. The procedures for making a claim under the GIS are set out in Part 5 of the Guidelines and are the same for both national and non-national Borrowers. In addition the role ACE plays in the assessment of claims is governed by the terms of an Agreement for the Provision of Services in relation to cultural objects with DCMS dated 3 February 2015. Para. 18 of Schedule 1 to that Agreement states that ACE is responsible for administering any claims under the scheme in accordance with paragraphs 19 and 20 of that same Schedule.

## Reasons for decision

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### Section 41 – Information provided in confidence

16. ACE have claimed that section 41 applies to all the withheld information.

17. Section 41(1) of the FOIA states that:

*Information is exempt information if–*

*(a) it was obtained by the public authority from any other person (including another public authority), and*

*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

### Was the information obtained from another person?

18. The first step is for the Commissioner to consider whether the information was obtained by ACE from any other person in order to satisfy the requirement of section 41(1)(a).
19. ACE explained that the withheld information has been received from owners and borrowing institutions, or from expert advisers commissioned by the owner, borrower or, Department of Culture Media and Sport (DCMS). Clearly the information has been obtained from 'another person' and the Commissioner is therefore satisfied that this limb is fulfilled.
20. Having established that the withheld information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would

constitute a breach of confidence 'actionable' by that or any other person. In this context the term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity.

**Would disclosure constitute an actionable breach of confidence?**

21. When determining if disclosure would constitute a breach of confidence a public authority will usually need to consider:

- whether the information has the quality of confidence;
- whether it was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information to the detriment of the confider.

*Does the information have the necessary quality of confidence?*

22. Information will have the necessary quality of confidence if it is more than trivial and if it is not otherwise accessible.

23. ACE has argued that the details of the claims are more than trivial as they relate to the loss or damage of important scientific, technological, artistic or historic privately owned objects while on loan to borrowing institutions. The details of the individual claims are not otherwise accessible.

24. The Commissioner is therefore satisfied that the withheld information has the necessary quality of confidence.

*Was the information imparted in circumstances importing an obligation of confidence?*

25. ACE stated that the GIS Guidance states that owners' details will remain confidential (paragraph 2.14 and section 11 of the application form). Paragraph 2.14 states:

*"The identity (both name and address) of the institution, body or person which owns the object to be loaned (namely, the institution, body or person holding full and unconditional title to the object) should be shown on the schedule sheet. This is important, as indemnities are issued to owners and incorrect owner details could render indemnity invalid. If private owners are reluctant to be identified on official documents, the borrower can arrange for the name and address to be omitted from the schedule, but the information nevertheless should be supplied to the Arts Council on a separate sheet and may be limited to name only plus a*

*c/o address. Alternatively, it is possible to inform the Arts Council verbally (but only if absolutely necessary). Borrowers should remind owners that in the event of a claim their full details would be required. Borrowers may assure owners that all information is treated in the strictest confidence and with attention to security of owner details (the Arts Council stores details in locked cabinets within secure buildings)."*

26. Accordingly, details of individual GIS claims are imparted in circumstances importing an express obligation of confidence.
27. The Commissioners' guidance says that there are essentially two circumstances in which an obligation of confidence may apply:
  - The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example the wording of a letter); or
  - The restrictions on use are obvious or implicit from the circumstances, for example information between a client in therapy and their counsellor.
28. The Commissioner is satisfied that the owners' details meet this criterion. The application form and GIS guidance referred to above make it clear that those details will remain confidential.
29. With regard to the other details of the claims, the Commissioner considers that the confidentiality is implicit in this case, given that owners' details are confidential.

*Would disclosure would be an unauthorised use of the information to the detriment of the confider*

30. ACE considers that disclosing the details of the individual claims would constitute an actionable breach of confidence. It advised the Commissioner that the withheld information is in both a hard copy and electronic claim file which includes:
  - Email correspondence between GIS team; Borrower and DCMS
  - A claim report from Borrower
  - Copies of relevant condition reports and photographs or other visual records taken before, during and after any incident
  - Copies of any relevant Conservator or Restorer reports
  - Loss Adjuster report (if applicable)
  - A formal declaration of security and transport conditions
  - A copy of the relevant indemnity and schedule sheet
  - A copy of the loan agreement

- Proof of the owner's good title to the loan
  - Claim report from GIS team
31. ACE stated that unauthorised disclosure of the individual claims would cause a specific detriment to both the owners and borrowing institutions. To the owners, the detriment would be the perception that the object that they own has been devalued. To the borrowing institutions the detriment is the perception that objects damaged while in their care has the potential to damage their reputation and their relationships with their partners, undermining public confidence in their borrowing cultural objects in the future and potentially undermining their negotiating position going forward.
32. The Commissioner's published guidance on section 41 establishes that case law now suggests that *"any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right"*.
33. Section 41 of the FOIA is an absolute exemption and therefore not subject to the public interest test contained at section 2 of FOIA. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).

### ***Inherent public interest test***

#### *Public interest in maintaining the confidence*

34. ACE considered the general public interest arguments that disclosure would enable the public to see the claims that have been made under the GIS and enhance transparency and accountability in the spending of public money.
35. However, as the decision to accept a claim is ultimately made by the Secretary of State, ACE considers that the arguments in favour of maintaining the confidence are stronger than those arguments to release the information, particularly as the overall figures for GIS claims are published by DCMS in their annual accounts. Specifically, GIS exists for the public benefit and aims to enhance and widen access to objects of a scientific, technological, artistic or historic nature by enabling institutions to borrow objects that they could not otherwise afford. If details of specific claims made by the borrowing institutions as a result of any loss or damage to those objects were to become public, this may discourage owners from loaning their objects to the institutions. There is



not a sufficient public interest in disclosure of the information in order to defend an actionable breach of confidence.

*Public interest in disclosing the information*

36. The complainant argued that as a specialist in pastels, lecturing on the hazards of moving these fragile objects the solution to this depends on learning from previous accidents and that is why there is a real, public benefit in sharing histories of GIS claims.
37. The complainant has also argued that there is no realistic risk of a successful action for damages against ACE for complying with a FOIA request to disclose factual information about damage to a picture.
38. The Commissioner acknowledges the complainant's argument that disclosure of the requested information may help learning on moving of fragile objects. However, she is not persuaded that this argument is sufficient to override the inherent public interest in maintaining confidentiality.
39. As the Commissioner is satisfied that all the withheld information is covered by section 41 i.e. all the information, including owners details have been provided in confidence, she has not gone on to consider the application of section 40(2).
40. Turning now to the other concerns raised by the complainant. He was unhappy that:
  - Information was only provided after internal review, i.e. not provided promptly
  - That there were delays with the internal review
  - ACE only applied section 41 at the internal review stage

## **Time for compliance**

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### **Section 10**

41. The Commissioner notes the concern around the late provision of requested information.
42. Section 1(1) of FOIA states 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."*

43. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and "*not later than the twentieth working day following the date of receipt*".
44. In this case, although a response was provided within the 20 working days, the information requested was not provided until 21 November 2017, and therefore exceeded the 20 working days. Consequently, the Commissioner finds that ACE has breached section 10 of the FOIA.

## **Other matters**

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45. The complainant was also of the view that, as the application of section 41 was only cited at the internal review "*At best it was out of time; arguably it cannot now be invoked.*" As explained above, the internal review provides an opportunity for a public authority to review its response and reconsider the application of any exemptions. It is also entirely reasonable to also consider if any new exemptions are applicable, as was done in this case. Therefore the Commissioner considers that ACE was entitled to rely on a new exemption at the internal review.
46. The complainant has also stated that "In ACE's own response it states that "*This is an absolute exemption, therefore, Arts Council is not obliged to consider whether the public interest favours disclosing the information*". Accordingly the additional time for consideration of such a test should not have been claimed.
47. It is unclear what time claimed the complainant is referring to. The only exemption that required consideration of the public interest test was section 31, in the initial response. This was provided within 20 working days and so no additional time was required.
48. The Commissioner is of the view that the public interest the complainant is referring to is the 'inherent public interest' related to section 41. As explained in paragraph 34 this is not the same as the public interest test, but rather relates to the common law duty of confidence which contains an inherent public interest test. The Commissioner acknowledges that ACE could have explained more clearly the difference between the two public interest 'tests'. However, as also noted above, the internal review response was provided on 21 November 2017, and there is no mention of an extension being required to consider the public

interest. The Commissioner is therefore satisfied that ACE has complied with its obligations under the FOIA and handled the request appropriately.

49. The Commissioner notes that the complainant was not provided with any information until the internal review and has referred to the section 45 code of practice<sup>1</sup> which states:

*The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue. Complaints procedures should be as clear and simple as possible. They should encourage a prompt determination of the complaint.*

*Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable. The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint.*

*In all cases, complaints should be acknowledged promptly and the complainant should be informed of the authority's target date for determining the complaint. Where it is apparent that determination of the complaint will take longer than the target time (for example because of the complexity of the particular case), the authority should inform the applicant and explain the reason for the delay. The complainant should always be informed of the outcome of his or her complaint.*

*Authorities should set their own target times for dealing with complaints; these should be reasonable, and subject to regular review. Each public authority should publish its target times for determining complaints and information as to how successful it is with meeting those targets.*

50. The FOIA does not provide a time scale for carrying out an internal review, however, the Commissioner expects them to be completed

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235286/0033.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/235286/0033.pdf)

within 20 working days and in any event no longer than 40 working days. In this case the request for review was made on 13 October 2017 and a response provided on 21 November 2017. Therefore ACE provided its internal review response within 27 working days. As there is no specific requirement for an internal review and is deemed to be good practice, this does not constitute a breach of the FOIA. However, the Commissioner also considers it good practice to advise a complainant *as soon as possible* of any delay and should not leave it until the day the response is due. ACE may wish to consider if there are any steps it can take that may improve this area.

## Right of appeal

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51. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**