

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 06 August 2018

Public Authority: The National Gallery
Address: Trafalgar Square
London
WC2N 5DN

Decision (including any steps ordered)

1. The complainant requested information about the loan of a painting. The National Gallery (the Gallery) refused the request under sections 21 (information accessible by other means), 31(prevention or detection of crime), 36(free and frank provision of advice and exchange of views for the purposes of deliberation), 40(third party personal information), 41(provided in confidence), 43 (commercial interests) and 42(legal professional privilege).
2. The Commissioner is satisfied that sections 36, 40, 41 and 43 are engaged and, where applicable, the public interest favours maintaining the exemptions. The Commissioner does not require the public authority to take any action.

Background

3. The Gallery provided the following as a background.
4. *David contemplating the Head of Goliath* is a painting attributed to Orazio Gentileschi. The painting came on loan to the Gallery in June 2013. It was displayed in the Gallery's 'Making Colour' exhibition between June and September 2014. The initial loan period, of June 2013 to June 2015, was extended first to November 2015 and then to March 2016. Between April 2015 and March 2016 the painting formed part of a small display alongside paintings from the Gallery's own collection and one other loan. When that display came to an end, the painting was returned to its owner as scheduled.

5. During the period up to and during the loan of the painting, the Gallery had no obvious reason to doubt that the work was as attributed. Nevertheless, questions have been raised in the press about the painting's authenticity.

Request and response

6. On 8 August 2017 the complainant requested the following information:
 - *'Any documents, records and/or correspondence relating to the loan of the painting David Contemplating the Head of Goliath by Orazio Gentileschi.*
 - *Any documents, records and/or correspondence relating to technical or art-historical analysis, or provenance research conducted on David Contemplating the Head of Goliath by Orazio Gentileschi from before or after the loan agreement*
 - *Any documents, records and/or correspondence relating to the return of the David Contemplating the Head of Goliath by Orazio Gentileschi to its owner.'*
7. On 6 September 2017 the Gallery responded and cited section 21 for the information in the Annual Review for 2013/14, the Gallery accounts to March 2014 and press cuttings, which were not included as these were available by other means.
8. The Gallery provided a bundle of 463 pages of redacted documents. The Gallery cited a number of exemptions:
 - The Gallery cited section 31(1)(a)(prevention or detection of crime) to withhold information regarding the transportation of the artwork, its permanent location and secure storage areas at the Gallery. *'Releasing the information increases the risk that the artwork, and other artworks borrowed by the Gallery in the future, will be targeted and stolen or damaged whilst in transit, on display or in storage.'*
 - The Gallery cited sections 36(2)(b)(i)(the free and frank provision of advice) and (ii) (the free and frank exchange of views for the purposes of deliberation) to withhold information *'regarding the decision to borrow the painting, undertake due diligence, produce a loan agreement and provide a valuation of the painting for the purposes of the Government Indemnity scheme. In addition, emails regarding the Gallery's discussions concerning responses to press enquiries relating to the painting and the loan have been*

withheld in their entirety and are not included in the PDF document.'

- The Gallery cited section 40(2) to withhold personal information relating to third party individuals - names, addresses (postal and email) and telephone numbers.
 - The Gallery cited section 41(1) to withhold documentation containing information that had been passed to the National Gallery in confidence including the terms of the Government Indemnity scheme (GIS) and confidential information provided to the Gallery by the owner of the painting or those acting on their behalf.
 - The Gallery cited section 43(2) to withhold information including a valuation of the painting and information about the loan agreement as it would prejudice the commercial interests of the National Gallery and the owner of the painting.
9. The complainant requested an internal review on 6 October 2017. He did not dispute the application of section 21. He disputed the broad application of section 31 as the Gallery had published information on the display location of the piece.
10. He provided arguments to dispute the other 4 exemptions used to redact information from the released information.
11. He disputed the application of section 36 as the issue was no longer 'live' and the authenticity of the painting has been called into question. The information regarding the decision to borrow the painting, undertake due diligence, produce a loan agreement and provide a valuation of the painting for the purposes of the GIS related to the loan of the painting and as the loan is now over, it should all be disclosed:
- 'there is a clear and overwhelming public interest in learning how exactly the Gallery established that this was a genuine Gentileschi, rather than a copy by a contemporary or a later imitation'*
12. He also disputed the application of sections 40, 41 and 43 *'particularly but not exclusively as they pertain to the owner of the painting and his agents. A private individual benefits when he lends a painting to a gallery. It is placed in the shop window, so to speak, its value is raised.'*
13. The Gallery sent him the outcome of its internal review on 3 November 2017 upholding its position on the exemptions 31, 36, 40 and 41. In reviewing section 43, the Gallery provided a copy of the GIS document with some redactions under sections 40 and 41.

Scope of the case

14. The complainant contacted the Commissioner on 6 December 2017 to complain about the way his request for information had been handled and to dispute the application of the four exemptions 36, 40, 41 and 43. The complainant did not complain to the Commissioner about the application of sections 21 (information in the Annual Review for 2013/14, the Gallery accounts to March 2014 and press cuttings) or 31 (withheld information regarding the transportation of the artwork, its permanent location and secure storage areas at the Gallery).
15. During the course of the Commissioner's investigation the Gallery applied section 31 to the valuation of the painting. The Gallery also cited an additional exemption. It applied section 42 (legal advice) to the annotations made by the Gallery's in-house legal counsel, written during the loan negotiation. The complainant was informed and he provided his arguments against these exemptions. The Gallery responded with its comments.
16. The Commissioner therefore considers the focus of the investigation to be whether the Gallery was entitled to rely upon the six exemptions (31, 36, 40, 41, 42 and 43) to withhold the redacted parts of the disclosed bundle of information and, if so whether the public interest favours maintaining those exemptions.
17. The Commissioner has been provided with a copy of the withheld information (bundle of 538 pages, including the disclosed 463 pages), clearly marked with which exemption(s) apply to which pages or parts of pages. The Commissioner will only refer to the parts of the withheld information in general terms so that she does not inadvertently disclose some of the detail within the withheld information.
18. The Commissioner will first consider the application of section 36 which has been applied to Gallery staff deliberations on the borrowing of the painting, the due diligence of the painting, the production of the loan agreement and the provision of a valuation of the painting for the purposes of the Government Indemnity scheme (GIS) as well as the Gallery discussions concerning responses to press enquiries.

Reasons for decision

Section 36 – prejudice to the conduct of public affairs

19. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –

(b) would or would be likely to inhibit:

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purpose of deliberation, or

(c) would otherwise prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs.

20. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by the Gallery, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:

- Ascertain who the qualified person is,
- Establish that they gave an opinion,
- Ascertain when the opinion was given, and
- Consider whether the opinion was reasonable.

21. The Gallery confirmed that its qualified person is its Director, Dr Gabriele Finaldi. The Gallery has advised the Commissioner that the qualified person's opinion was sought from its Director on 5 September 2017. During a meeting with the qualified person he was shown the withheld information and made aware of how the exemption operated, as well the arguments for and against its application.

22. The Commissioner is therefore satisfied that the qualified person did provide his opinion that the information in question was exempt under sections 36(2)(b)(i) and (ii).

23. The exemption can be engaged on the basis that the prejudice to public affairs either 'would' or would be 'likely' to occur. In this case the Gallery has applied the exemption on the basis that disclosing the information in question 'would prejudice' the free and frank provision of advice. 'Would prejudice' is the higher standard and means that it is more likely than not (ie a more than 50% chance) that prejudice would occur.

24. The Commissioner now needs to consider whether the qualified person's opinion was reasonable. To do so the Commissioner relies on the Oxford English Dictionary's definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person's opinion. The

qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.

25. The Gallery stated that it is the qualified person's opinion that disclosure of the requested information in this case would inhibit the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation for a number of reasons:
- Disclosure would affect future deliberations and drafting processes and result in a lack of frankness that in turn leads to poorer advice, decisions and final documentation.
 - The issue is still live, both regarding the loan of the painting and the painting's provenance.
 - Connoisseurship as used to judge the value of the painting is subjective and requires careful thought and discussion. It is important to have a safe space for such deliberations to take place and to allow for the expert to make and correct mistakes.
 - The Gallery will certainly engage in the loan of paintings and communication with the press in the future. Therefore, not only would there be an immediate chilling effect, but two processes which are crucial to the effective conduct of the Gallery would be greatly damaged in the future.
26. The Commissioner is satisfied that the qualified person's opinion is a reasonable opinion to hold and having viewed the parts of the information withheld under section 36, the Commissioner is satisfied that it is reasonable for the qualified person to have concerns over the release of this information.
27. The Commissioner accepts that in order to consider and negotiate all the arrangements for the loan of a painting (including the due diligence and the valuation of the painting) or respond to press enquiries on the painting when its authenticity has been questioned the Gallery staff have to be able to provide a candid analysis of the issues, and that it would not necessarily be helpful to share that analysis with a wider audience.
28. For these reasons, the Commissioner finds that the exemptions provided by section 36(2)(i) and 36(2)(ii) are engaged in respect of all the information to which it has been applied.

Public interest test

29. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case

the harm that disclosing the information would cause is greater than the public interest in its disclosure.

30. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the information now under consideration, and therefore will give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring.

Public interest arguments in favour of disclosure

31. The complainant disputed that the matter is still live: *'the decision to take the painting on loan was made over four years ago, when most of the withheld material was produced, but it is self-evident that the loan itself has expired.'*
32. The complainant argued that it is in the public interest for the public to have confidence in the soundness of attributions made by a major gallery: *"thousands of people saw David Contemplating the Head of Goliath on display - there is clearly a much greater public interest in learning why they were told it was by Gentileschi...The attribution was merely asserted and was done so publicly. But serious allegations have now been made about the painting's authenticity and, in light of the gallery's silence, the only way for the public to judge whether or not it has been misled by the Gallery is for material relating to connoisseurship, technical analysis and provenance to be released.'*
33. He also disputed that connoisseurship needs a safe space. He argued that senior staff at the Gallery would not be inhibited in future discussions and that *'the conservators and curators of the National Gallery are trained in academic environments where robust exchanges of views are expected. They take part in conference and symposia, at the National Gallery and elsewhere, where their connoisseurship, art-historical interpretation and technical analysis are questioned and challenged.'*
34. In addition the complainant particularly wanted to view the emails regarding the Gallery's discussions concerning responses to press enquiries relating to the painting and the loan. He believed that *'these will shed important light on the gallery's beliefs about the painting's authenticity and have been illegitimately withheld.'*
35. The Gallery acknowledged that those working for public authorities should expect their decisions to come under scrutiny and should be able to defend their advice and decisions.
36. The Commissioner accepts that there are public interest arguments in favour of disclosure. There is a public interest in understanding how

decisions are made for the loan arrangements of paintings and how responses to press enquiries are drafted.

Public interest arguments in favour of maintaining the exemption

37. The Gallery considered the following public interest arguments in favour of maintaining the exemption.
38. The Gallery maintains that this is still a live issue even though the loaned painting has been returned to the owner. There is a continued interest in the loan of the painting to the Gallery within the current journalistic questions on its authenticity. The Gallery referred to the following article from June 2018 as evidence of this:
<https://www.theguardian.com/news/2018/jun/15/how-to-spot-a-perfect-fake-the-worlds-top-art-forgery-detective>
39. The Gallery considered that the public interest is in ensuring that due diligence is properly carried out. The Gallery explained that the primary purpose of the due diligence process is to ensure that work is not borrowed where the legal ownership is disputed.
40. The Gallery stated *'there is no suggestion that the current owner of the painting is not the lawful holder...'*
41. The complainant argued that the allegations on the painting's authenticity supports the public interest in disclosing the Gallery's arrangements for the loan including the due diligence process. However, the Gallery stated that *'during the period up to and during the loan of the painting, the Gallery had no obvious reason to doubt that the work was as attributed...Due diligence, as carried out in relation to the Gentileschi, was not a process of authentication.'*
42. With regard to the preparation of press statements, the Gallery stated that the disclosed information shows the questions being asked of the Gallery, the Gallery's response and *'the press release presents an accurate reflection of the outcome of the discussions.'* The Gallery argued that there can be only a very limited public interest argument in favour of releasing the record of the Gallery's decision making process and such an argument is greatly outweighed by the need to avoid a chilling effect which would seriously harm the effectiveness of the Gallery's staff.
43. The Commissioner is satisfied that there are public interest arguments in favour of maintaining the exemption and disclosure would be likely to compromise the integrity of the decision making process.

Balancing the public interest arguments

44. The Commissioner has considered both the complainant's and the Gallery's public interest arguments.
45. The Gallery stated that although there is a curiosity about the loan of the painting it believed that *'the public interest is best served by ensuring that the Gallery can undertake properly and successfully some of our core tasks, whether that is carrying out due diligence, negotiating the terms of a loan, or responding to press enquiries.'*
46. The Commissioner is sympathetic to the complainant's arguments that it is in the public interest for the public to have confidence in the soundness of attributions made by a major gallery and the decision to borrow this painting in particular. However, the Commissioner notes that at the time of the loan negotiations in 2013 there were no media questions on the authenticity of the painting. She also notes that the main purpose of the Gallery's process of due diligence was to establish the lawful owner and it was not a process of authentication of the painting.
47. Although the loaned painting has been returned to its owner, the Commissioner is satisfied that this is still a live issue as it is one of the Gallery's core functions to borrow artwork for display in particular exhibitions. The loan documents follow a standard template so negotiating the terms of this loan, including the process of due diligence and the valuation of the painting for the GIS, is relevant to current and future loans to the Gallery. The Commissioner also accepts that the information on the loan of this particular painting is still live as there continues to be questions in the media on the authenticity of *David Contemplating the Head of Goliath* and this has been linked to the Gallery's display of the painting as attributed to Orazio Gentileschi. (see paragraph 38 above)
48. In balancing the arguments for and against the need for a safe space the Commissioner accepts that there is a significant public interest in Gallery staff being free to provide completely honest assessments when considering a proposal to borrow paintings for the Gallery (including the due diligence, the production of the loan agreement and the provision of a valuation of the painting for the purposes of the GIS) and to have candid discussions when drafting responses to press enquiries.
49. The Commissioner is satisfied that the severity or extent of the prejudice would be significant and that the public interest is in favour of maintaining the exemption. Therefore, she finds that the Gallery is entitled to withhold the parts of the information to which it applied sections 36(2)(i) and 36(2)(ii).

50. The Commissioner will now go on to consider the information that has been withheld under Section 40(2) – third party personal data.
51. On most pages of the disclosed information, the Gallery withheld instances of third party personal data (names, contact details, home telephone numbers, etc) of the owner, Gallery staff, fine art transport staff and journalists who contacted the Gallery. However, the complainant's main interest lies in the identity of the lender of the painting and his agents as it was important to know the relationship between the Gallery and the lender: *'a private individual benefits when he lends a painting to a gallery. It is placed in the shop window, so to speak, its value is raised.'* The Commissioner has agreed with the complainant that she will focus her investigation on this aspect.

Section 40(2) – Third party personal data

52. Section 40 of the FOIA specifies that the personal information of a third party must not be disclosed if to do so would contravene any of the data protection principles. Taking into account her dual role as regulator of both the FOIA and the Data Protection Act 1998 (the DPA), this being the relevant legislation in force at the time the Gallery responded to the request the Commissioner has considered whether the Gallery was correct to withhold the requested information.
53. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.
54. Section 1 of the DPA defines personal data as follows:
 - '... data which relate to a living individual who can be identified –*
 - (a) from those data, or*
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.'*
55. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
56. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the withheld information personal data?

57. The first consideration is whether the withheld information is personal data.
58. The complainant argues that the ownership of the painting is not personal data as *'it is vested in a company'*.
59. The Gallery provided the Commissioner with the name of the Company and a link to Companies House which listed just one person and a firm of solicitors acting for the Company. *'Whilst the link between [redacted Company name] and the individual may be public knowledge information about the ownership of the painting is not in the public domain.'*
60. The Commissioner has previously considered whether a one person Company (sole trader) is personal data. The decision notice https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1625381/fs_50639662.pdf concluded that the majority of Postmasters operate as sole traders who live and work from the same physical address and therefore the requested information for the names, postal addresses and email addresses was personal data from which living data subjects would be identifiable.
61. In this case, although the physical addresses are not the same, there is information within the name of the Company, which when combined with other information, is information from which living data subjects would be identifiable.
62. In addition, the name of a gallery which has been associated with the owner of the Gentileschi painting was withheld under FOIA as personal data as it is the name of the owner of the gallery.
63. The Gallery also identified the value of a person's property and their ability to pay for such property as personal data. However the Commissioner has already considered the Gallery's valuation of the painting as correctly withheld under section 36 and therefore will not consider it again here.
64. The Commissioner's guidance on what is personal data¹ states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA:

¹<https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

'A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance that those who may receive the data will be able to identify particular individuals.'

65. Therefore, the Commissioner is satisfied that the name of the one-person Company, the name and contact details of the individual and the value of their property are the personal data relating to a living and identifiable individual. The Commissioner is also satisfied that the name of the gallery is personal data that could quickly lead to the identification of the same living and identifiable individual.
66. The Commissioner has gone on to establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Would disclosure breach the Data Protection Principles?

67. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the one cited by the Gallery, states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
68. When considering whether disclosure would be unfair, and so breach the first principle, the Commissioner takes three factors into account:
- What reasonable expectation do the individuals have about what will happen to their personal data?
 - Have the individuals given their consent to disclosure?
 - What might be the likely consequences resulting from disclosure?
69. Assessing fairness however, also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public. It may still be fair to disclose the information if there is an overriding legitimate interest in doing so. The Commissioner therefore also considered these interests.

Reasonable expectations

70. The Gallery has stated that *'none of the information relates to the individuals' public lives, either because they are not a public official or employee, or because the information is unrelated to their work as a Gallery employee.'*

In the case of the individuals not working for the National Gallery, there was no expectation that their information would be released to the public. The ability to borrow paintings and coordinate loans whilst

maintaining a lender's anonymity is well established. There are decades' worth of precedent for this practice, not just at the National Gallery but at museums and galleries nationally and internationally. The information, i.e. the ownership and location of an expensive work of art, is not trivial information. The information was obtained as part of a process whereby the careful storage and use of personal data is expected. Furthermore, the individual concerned has informed the Gallery that they do not consent to their personal data being released to the public.'

71. The Commissioner is prepared to accept these arguments. She understands that the Gallery would not routinely make public such information and the individual in this case has not consented to such a disclosure.

Consequences of disclosure

72. The Gallery has argued that as disclosure would be contrary to the data subject's expectations and therefore unfair, it considers that disclosure would cause some distress. The release of this information under FOIA would be unfair to the individual, conflicting with their expectations of privacy and potentially harming their future collecting activities.
73. The Commissioner considers that this possible consequence of disclosure is credible. She is satisfied that the data subject would have a reasonable expectation that the information in question would not be placed into the public domain by disclosure under the FOIA. Therefore she considers that disclosure of this information would be an invasion of the privacy of the individual, and as such may cause some distress.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

74. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
75. The complainant has argued that doubt has been cast on the authenticity of a painting that thousands have seen *'and the only way for their confidence to be restored in the painting is to know where the painting comes from and what relationship its owner had with the gallery.'*
76. The Commissioner accepts that there is a legitimate interest in the overall transparency in the way a public authority such as the Gallery conducts its business. However, there is no presumption that this should

automatically take priority over personal privacy. The Commissioner judges each case on its merits.

77. In this case, the Commissioner is not convinced that the specific information requested is of sufficient wider public interest to warrant overriding the protection of the third party personal data of those concerned.
78. Having considered the Gallery's submission and the views of the complainant she is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that the Gallery has put forward for protecting the individuals' personal data, namely:
- the individual's likely expectations about how their personal data will be managed
 - the individual's lack of consent to its release; and
 - the possible negative consequences to the individual of releasing the information.
79. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the data subject and that it would not be fair to disclose the requested information in this case.
80. The Commissioner is therefore satisfied that the Gallery was correct to refuse to disclose this information under section 40(2) of the FOIA.
81. The Commissioner will now go on to consider the information that has been withheld under Section 41 - information provided in confidence.
82. The Gallery cited section 41(1) to withhold documentation containing information that had been passed to it in confidence including the terms of the Government Indemnity scheme (GIS) and confidential information provided to the Gallery by the owner of the painting or those acting on their behalf.
83. The complainant is looking for information surrounding the technical or art-historical analysis, or provenance research of the painting, conducted on the painting from before or after the loan agreement. (part 2 of the request.)

Section 41 – information provided in confidence

84. 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 that 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?

85. The Gallery has confirmed that the provenance information and the condition report was provided in confidence by a third party. Having viewed the withheld information, the Commissioner is satisfied that this is the case.

Would disclosure constitute an actionable breach of confidence?

86. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- whether the information has the necessary quality of confidence;
 - whether the information 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?

87. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
88. The Commissioner notes that the page for the provenance check list (within the Long Loan to ND Information Sheet) was redacted in its entirety under section 36 as forming part of the due diligence constituting staff advice and decision making. Therefore, the Commissioner will focus her investigation of section 41 on the condition report and the other references to the provenance information.
89. The Gallery has stated that the provenance information (including the inscription on the reverse of the painting which is hidden from view) and the condition report (which was commissioned privately by the current owner and arrived unsolicited at the Gallery after the loan, in confidence) '*cannot be said to be trivial in nature and is not otherwise accessible*'. The information potentially impacts on the valuation of the painting.
90. Having regard to the above, the Commissioner would accept that the information is not trivial and cannot be considered to be otherwise

accessible. She is therefore satisfied that the information has the necessary quality of confidence.

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

91. The Commissioner refers to the test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*, specifically:

"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".

92. The Gallery stated that this information relates to a painting in a private collection. The Gallery borrowed the painting from 2013-16. It does not relate to a painting that the Gallery has purchased, or sought to purchase, on behalf of the public.

93. Following this, the Commissioner considers that the circumstances in which the withheld information was supplied to the Gallery by third parties impliedly and expressly confirmed that it would retain a confidential quality and that it will not share the information provided as part of this process.

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

94. The Gallery has stated that the release of this information may have a specific detriment to the owner of the painting: *'it may call into question the valuation of the painting. Furthermore, the information may present interpretation of facts in a form that is not yet finalised or ready for wider dissemination.'*

95. The Gallery also confirmed that it considers that disclosure would be detrimental to its own interests: *'Release of confidential information would do irreparable damage to the Gallery's future ability to borrow paintings and display them to the public.'*

96. The Commissioner accepts that disclosure of the requested information would be of detriment to the confider.

Is there a public interest defence for disclosure?

97. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The

Commissioner is therefore required to consider whether the Gallery could successfully rely on such a public interest defence to an action for breach of confidence in this case.

98. The complainant has disputed that any knowledge about or analysis of the painting would damage the owner's interests: *'any reasonable buyer would be entitled to this information'*.
99. He also argued that it is *'clearly in the public interest to release all the information that fed into the Gallery's attribution of the painting...a demonstration of the Gallery's rigour in handling information regarding the painting will enhance its perception as a trustworthy partner'*.
100. The Gallery stated that *'the information was provided to the Gallery primarily in order to carry out due diligence.'* The Commissioner notes from above (see paragraphs 39 - 41 above) that due diligence is to ensure that a work is not borrowed where the legal ownership is disputed and was not, in itself, a process of authentication.
101. The Gallery also stated that *'should owners withhold information, as they likely would if there was a loss of trust in the Gallery's ability to receive that information in confidence, then the Gallery would be unable to carry out full due diligence and would, consequently, see borrowing activities irreparably harmed. The public interest rests with the Gallery maintaining its borrowing activities.'*
102. The Commissioner accepts that there is a general public interest in the Gallery being open and transparent about the ways in which it borrows artwork but *'there is a public interest in maintaining trust and preserving a free flow of information to a public authority where this is necessary for the public authority to perform its statutory functions'*.²
103. Therefore, in weighing the above public interest arguments for and against disclosure, the Commissioner is mindful of the wider public interest in preserving the principle of confidentiality and the ability of the Gallery to seek due diligence on future loans of artwork.
104. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/SEC41_CONFIDENCE_PUBLIC_INTEREST_TEST_V1.ashx

105. The Commissioner will now go on to consider the information that has been withheld under Section 43 – commercial interests. The Gallery cited section 43(2) to withhold information about the loan agreement and the valuation of the painting.

Section 43(2) - Commercial interests

106. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.

107. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.

108. The Gallery has stated that both the commercial interests of the National Gallery and those of the person who owns the painting would be harmed by the release of information. In particular, the Gallery believes, and has had confirmed, that the lender's commercial interests would be harmed by the release of information regarding the valuation of the painting. The lender's ability to sell the painting or engage in future negotiations about this or other works would be greatly hindered. As the Commissioner has already considered the Gallery's valuation of the painting as correctly withheld under section 36, she will not therefore consider it again here.

109. The loan agreement (both the draft copies and the final version) covers all aspects of the contract for the loan of the painting and includes the annotations from the lawyers on 4 pages of the draft versions. The Gallery has also applied section 42(1)(confidential legal advice) to these annotations.

110. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the Gallery alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
- Secondly, the Gallery must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.

Commercial interests

111. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her guidance on the application of Section 43. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."³

112. The Gallery has argued that disclosure of the requested information would prejudice its commercial interests:

'The Gallery regularly engages in loan negotiations and these are important in showing to the public artworks otherwise hidden in private collections...

The Gallery will, on occasion, negotiate over the length of the loan or photographic rights. The Gallery may undertake to re-frame or glaze a painting. Concessions may be given to allow free or privileged access to exhibitions. Such negotiations are undertaken in order to achieve the most advantageous display of a painting for the public.'

113. The Gallery also argued that the withheld documentation will likely appear to be a series of standard documents to anyone except those with an interest in negotiating loans with the Gallery to their own advantage. Releasing this information would harm the ability of the Gallery to enter negotiations in confidence and would be likely to affect the revenue of the Gallery:

'Were the Gallery to be viewed as an untrustworthy partner – because we have released information regarding the process of negotiations, information which is commercially sensitive to the owner of a painting, or information provided to us in confidence – our ability to borrow paintings from private lenders would be significantly harmed. Not only would this mean we were unable to present such paintings to the public but the Gallery would likely see a drop in revenue from charged-for exhibitions.'

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See here: https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

114. The Commissioner is satisfied that the actual harm alleged by the Gallery relates to its commercial interests. Accordingly, she is satisfied that the first criterion is met.

Causal link

115. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some *causal* link between the potential disclosure and the prejudice. As long as the prejudice is real and not trivial, its severity is not relevant to engaging the exemption – this will be factored in at the public interest test stage.

116. The Gallery believes its commercial activities would be affected by disclosure of the requested information. The Gallery has pointed out that its *'success of charged-for exhibitions often relies, in part, on the Gallery's presentation of privately-owned works alongside those in public collections.'*

117. The Commissioner is satisfied that the Gallery has provided a reasonable argument to suggest that there is a causal link between the requested information (the loan agreement) and its commercial interests (ability to charge for exhibitions which include private loans.)

Likelihood of prejudice

118. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] at paragraph 33 the Tribunal said:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."

119. In this case the Gallery has argued that disclosure would prejudice its own commercial interests and its competitiveness with other galleries. The Commissioner's view is that "would" places an evidential burden on the public authority to show that the risk of prejudice is real, significant and more probable than not.

120. The Gallery argued that it *'does not believe that sufficient time has elapsed since the loan negotiations concluded that the release of the information relating to the negotiations would not be detrimental to current and future negotiations'*.

121. The Gallery explained that it *'regularly engages in loan negotiations and these are important in showing to the public artworks otherwise hidden in private collections. A loan will often be used to contextualise paintings in the National Gallery's collection as was the case, for example, in the recent Murillo exhibition (February – May 2018). Here, two paintings from private collections helped to explain portraits that are held in publically accessible collections. In the case of the Gentileschi, the painting appeared in both a collection display and an exhibition.'*
122. The Commissioner has reviewed the withheld information relating to this exemption and accepts that the Gallery attaches considerable importance to draft and final loan agreements and that prejudice would be caused if it was disclosed. There would be a real and significant risk to the Gallery's ability to secure the loan of artworks from private collections to enhance the charged-for exhibitions and hence affect the economic interests of the Gallery.
123. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and that disclosure of the loan agreements would result in a real and significant risk to the Gallery's economic interests. Therefore she has now gone on to consider the public interest test.

Public interest test

124. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

125. The complainant argued that *'because of the credible allegations regarding the painting, there is a clear public interest in learning what valuation the gallery placed upon the painting.'*
126. The Gallery acknowledged that there is a need to maintain accountability and to ensure transparency when negotiating loans.

Public interest arguments in favour of maintaining the exemption

127. The Gallery explained that it did not pay for the loan (except a small amount for transportation and display of the painting). *'There is therefore no expenditure of public funds to be scrutinised in this case.'*
128. The Gallery also noted that *'whilst there may be some public interest in releasing the information, there is also an element of curiosity in the painting itself which is being generated by journalists ... The Gallery does*

not believe that this curiosity amounts to a compelling public interest argument. Rather, it is our belief that the public interest is best served by ensuring that the Gallery can undertake properly and successfully some of our core tasks'.

Balance of the public interest arguments

129. The Commissioner has first considered the public interest arguments in favour of disclosure and finds that these are limited in this case.
130. Referring to her own guidance (https://ico.org.uk/media/for-organisations/documents/1145/motive_blind_v1.pdf) that FOIA is both identity and motive blind, the Commissioner considers that the merits of the application based on the later allegations surrounding this painting are not strictly relevant. The focus should be on whether the information is suitable for disclosure into the public domain. If the request was for access to the loan agreement of another painting, that did not have any allegation attached to it, it should be considered in the same way.
131. The Commissioner's view is that disclosure would add little to the public understanding of the allegations made about the painting. The terms of the loan (including the valuation which the Commissioner considered was correctly withheld under section 36) were negotiated in 2013 and concerned detailed contractual information (on photographic rights etc) between the lender and the Gallery.
132. The Commissioner does accept that there is a general public interest in disclosure in the sense that any disclosure of public information promotes transparency and accountability, but she finds that on the particular facts of this case the arguments for disclosure carry little weight.
133. As regards the public interest in maintaining the exemption the Commissioner's view is that there is a strong public interest in protecting one of the core tasks of the Gallery: to continue to compete fairly when negotiating for the loan of privately-owned works to exhibit alongside those in public collections. The Commissioner accepts that the display of privately-owned works are an important part of the Gallery's ability to stage charged-for exhibitions which is of commercial interest to the Gallery.
134. Therefore, the Commissioner considers that the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

Section 31 – law enforcement

135. The Commissioner will now go on to consider the information that has been withheld under Section 31. The Gallery initially cited section

31(1)(a) (prevention or detection of crime) to withhold information regarding the transportation of the artwork, its permanent location outside of the Gallery and the secure storage areas at the Gallery. *'Releasing the information increases the risk that the artwork, and other artworks borrowed by the Gallery in the future, will be targeted and stolen or damaged whilst in transit, on display or in storage.'*

136. When the complainant requested an internal review, he acknowledged the need for the Gallery to transport works of art securely but noted that the Gallery had published information on the display location of the painting. The Gallery confirmed that it published information relating to the display location of the painting as being in Room 37. The Gallery explained that all locations of all displayed artworks are available at all times on its website. It had only withheld the information relating to the secure transportation of the artwork, its location when not at the Gallery and its storage in the non-public areas of the Gallery.
137. When the complainant contacted the Commissioner, he did not complain about the information withheld under section 31. Therefore, the Commissioner wrote to both parties to exclude section 31 as part of the scope of the investigation.
138. However, during the course of the Commissioner's investigation the Gallery applied section 31 to the valuation of the painting and informed the complainant. As the Commissioner has already accepted that the valuation of the painting is correctly withheld under section 36, she will not consider it again here.

Section 42 - legal professional privilege

139. During the course of the Commissioner's investigation the Gallery applied section 42 to the annotations made by the Gallery's in-house legal counsel. The Gallery informed the complainant that, written during the loan negotiation, the 4 pages had already been redacted in their entirety under sections 36 and 43.
140. As the Commissioner has already accepted that the loan agreement (both the draft copies and the final version) has been correctly withheld under sections 36 and 43, she will not consider it again here.

Conclusion

141. The Commissioner has reviewed the redacted parts of the disclosed information and considered all the exemptions as they have been applied by the Gallery and concludes that they have been correctly cited by the Gallery.

Right of appeal

142. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

143. 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.

144. 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
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