

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 September 2017

Public Authority: Tate
Address: Millbank
London
SW1P 4RG

Decision (including any steps ordered)

1. The complainant has requested Tate to disclose minutes of meetings relating to the Tate Modern extension project and the terms and appointment with Mace; the Construction Manager. Tate disclosed some information but refused to disclose other information citing sections 42 and 43 of the FOIA.
2. The Commissioner's decision is that the request should have been considered under the EIR. Tate stated that if the Commissioner decided the request is EIR, it wished to rely on regulations 12(5)(b) and 12(5)(e).
3. The Commissioner has considered these exceptions. She has decided that regulation 12(5)(b) of the EIR does apply to the information withheld under this exception. However, the Commissioner has decided that regulation 12(5)(e) of the EIR does not apply to the remaining withheld information.
4. The Commissioner therefore requires the public authority to take the following steps to ensure compliance with the legislation.
 - Tate should disclose all remaining information withheld under regulation 12(5)(e).
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 27 May, 6 and 7 June 2016, the complainant wrote to Tate and requested information about the Tate Modern extension in the following terms:
- "1) What was the selection process by which Herzog de Meuron were chosen as architects for the project?
 - 2) What were the criteria for the selection of the architects?
 - 3) How many architectural firms were shortlisted?
 - 4) What has the £50m from central government been spent on, specifically?
 - 5) What has the £7m from the LDA been spent on, specifically?
 - 6) What has the £2m from Southwark Council been spent on, specifically?
 - 7) What is the current formal role of Stanhope in relation to the project?
 - 8) Please would you provide the original approved budget for the extension of the Tate Modern?
 - 9) Please would you provide the information provided by the Tate Modern Working Group for the quarterly meetings with the government's Major Projects Authority?
 - 10) Please would you provide the Tate's corporate risk register?
 - 11) Please would you provide the parts of the internal audit by Baker Tilly for the Tate in relation to the Tate Modern extension?
 - 12) Please would you confirm which individual at the Tate is responsible for managing the Tate Modern extension project?
 - 13) Please would you provide unredacted minutes from the meetings of the Tate Modern Project Board?
 - 14) Please would you provide a breakdown of the major contractors and partners involved in the Tate Modern extension and the number of staff working on the project?

- 15) Why is the project four years late?
- 16) Why is the project £45m over budget?
- 17) What is the current formal role of Gardiner & Theobald in relation to the project?
- 18) Please would you provide unredacted minutes from the meetings of the board of trustees of the Tate on 3 July 2013, 19 November 2014, and 1 July 2015?
- 19) How much of the remaining capital funding needed for the project has been raised by the Tate, and from whom?
- 20) How much additional cost was incurred as a result of changing the original design of the building from a glass to a brick façade?
- 21) Please would you provide copies of correspondence between Tate and Mace (and its sub-contractor) in relation to the cost and timescales of the brick façade?
- 22) How many bricks have been used to create the façade?
- 23) How many different types of brick have been used?
- 24) How much was the original budget for the brick façade, and what is it now?
- 25) Why has the clay for the brickwork been sourced from Germany and not Britain?"

The complainant also requested a copy of the terms of appointment for Mace.

7. Tate responded on 5 July 2016. It provided some information but refused to disclose other information citing sections 14, 22, 31, 36, 38, 40 and 43 of the FOIA.
8. The complainant requested an internal review on 2 August 2016. She requested Tate to review the handling of questions 18, 19, 21 and 24 and the request for a copy of the terms of appointment for Mace.
9. Tate completed its internal review and notified the complainant of its findings on 14 September 2016. It released some additional information but informed the complainant that it does not hold any recorded information falling within the scope of question 21 of the request and remains of the opinion that section 40 and 43 of the FOIA applies to some of the information.

Scope of the case

10. The complainant contacted the Commissioner on 18 November 2017 to complain about the way her request for information had been handled.
11. The Commissioner agreed with the complainant that the scope of her investigation would be to review the redactions made to the meeting minutes disclosed dated 3 July 2013, 19 November 2014 and 1 July 2015 and to the pdf file Tate provided on 14 September 2016 in relation to the terms of appointment for Mace, with the exception of personal data. The complainant confirmed that she did not wish to challenge Tate's application of section 40 of the FOIA in this case.
12. During the Commissioner's investigation further information was disclosed to the complainant. As a result Tate advised the Commissioner that it now only wished to rely on sections 42 and 43 of the FOIA.

Reasons for decision

Is the EIR or the FOIA applicable to this request?

13. There has been some disagreement between Tate and the Commissioner as to which legislation applies to this request. It is the Commissioner's decision that the EIR is applicable and the requested information falls within the definition of environmental information at 2(1)(a) and (c) of the EIR and she will now explain in a little more detail why.
14. The requested information is information on a project or plan, as defined in regulation 2(1)(c) of the EIR. It is information on or relating to the Tate Modern extension and is only in existence as a result of this project. The Tate Modern extension was a project or plan that affected the elements of the environment outlined in 2(1)(a) of the EIR, namely the land, landscape and soil.
15. Tate considers the remaining withheld information is too far removed from environmental information to fall within EIR and so it considers the FOIA is more applicable in this case. It has argued that the information is of a more commercial nature relating to its relationships with its contractors and the management of the project rather than any information which directly affects the elements or factors of the environment. The Commissioner does not agree. She is of the opinion that the requested information is not too far removed to be considered non-environmental. The information is on or relating to the Tate Modern extension and only exists as a result of this extension. An extension will

obviously affect the elements of the environment outlined in regulation 2(1)(a) of the EIR.

16. Tate has confirmed that if the Commissioner does decide that the request should be considered under the EIR it wishes to rely on regulations 12(5)(b), 12(5)(e) of the EIR.

Regulation 12(5)(b)

17. The Commissioner understands that this exception has been applied to the redactions made to the minutes dated 1 July 2015.
18. Regulation 12(5)(b) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
19. In accordance with regulation 12(2), the public authority should apply a presumption in favour of disclosure. So, a public authority should only refuse to disclose the information if it considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.
20. Tate explained at the time of the request it was in a live and sensitive dispute with Mace over the delivery of the Tate Modern Project. The withheld information in the minutes of 1 July 2015 discusses Tate's settlement negotiations and strategy for a legal dispute. It stated that the withheld information reveals part of this strategy and makes direct reference to issues on which legal advice was sought and the broad nature of that advice. It considers disclosure at the time of the request would have adversely affected the course of justice and Tate's ability to resolve this legal dispute equitably.
21. The Commissioner has considered the contents of the withheld information and she is satisfied that it does fall within the definition of regulation 12(5)(b) of the EIR. It clearly references a live dispute with Mace over the delivery of the Tate Modern Project and legal proceedings were a reasonable possibility at this time. The withheld information discusses Tate's legal strategy and settlement negotiations and disclosure at the time of the request would have adversely affected Tate's ability to receive a fair trial and the course of justice. It would have revealed Tate's hand at a particularly sensitive time during the dispute with Mace and would have placed Tate at a disadvantage in these negotiations had Mace known of its strategy or settlement options.
22. The Commissioner will now go on to consider the public interest test.

23. The Commissioner recognises the public interest in transparency and accountability and in providing members of the public access to information to enable them to better understand the decisions made by public authorities. She also understands that there is a public interest in the Tate Modern extension project and its delivery considering the significant amount of public funds this involved and the delays that occurred.
24. However, in this case she notes that there was a live and sensitive legal dispute ongoing with Mace at the time of the request and the public interest in maintaining Tate's ability to resolve this or indeed challenge it further in more formal proceedings was greater. Disclosure would have revealed candid discussions within Tate about this dispute, its strategy and appetite for legal proceedings. It would have also revealed information about settlement negotiations. Had this information been disclosed at the time of the request this would have placed Tate at a severe disadvantage and affected its ability to negotiate the best possible outcome for Tate and the general public. It would have revealed Tate's hand during these ongoing discussions and created a biased and un-level playing field. The Commissioner considers in this case that there is a stronger public interest in ensuring that each and every party has access to a fair trial and therefore access to justice. Disclosing information which would have adversely affected Tate's ability to achieve this is not in the interests of the wider public. It would have adversely affected Tate's ability to receive a fair trial based on a level playing field and adversely affect the overall course of justice.
25. For the above reasons, the Commissioner is satisfied that regulation 12(5)(b) of the EIR applies to the remaining redactions to the minutes of 1 July 2015.

Regulation 12(5)(e)

26. This exception has been applied to the redactions (f) and (n) of the minutes dated 29 November 2014 and 1.4, 1.8 and 4.1 of the pdf file disclosed to the complainant in relation to her request to receive the terms of appointment with Mace.
27. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
28. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, Tate must demonstrate that:

- the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
29. Again in accordance with regulation 12(2) the public authority should apply a presumption in favour of disclosure. So, a public authority should only refuse to disclose the information if it considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.
30. The Commissioner notes that the withheld information relates to the commercial arrangements with Mace and other contractors for the delivery of the Tate Modern extension. It involves the delivery of particular services for a fee and so the Commissioner is satisfied that the first bullet point referred to above is met.
31. Concerning the second bullet point, the Commissioner has not been made aware of any explicit contractual clause concerning confidentiality between Tate, Mace and other contractors. However, she is satisfied that due to the nature of the remaining withheld information it is covered by a common law duty of confidence. It is not trivial in nature, has the necessary quality of confidence and was provided in circumstances where it was expected that the contents would be treated as private and confidential.
32. Turning now to the third and fourth bullet point, dealing with the terms of appointment first, Tate confirmed that although the project itself is completed the agreement is still very much a live agreement and its terms continue to be legally binding on both Mace and Tate. For example, at clause 11.1 Tate has a right of audit for 12 years from completion (completion occurred in 2016). It stated that it regards the limited redactions to this information to relate to fees and this information is commercially sensitive.
33. In its internal review response to the complainant Tate referred to ongoing discussions and commercial negotiations relating to the delivery of this project and that disclosure would adversely affect the commercial interests of both Tate and Mace.
34. In further correspondence to the Commissioner Tate explained that the ongoing dispute/discussions with Mace at the time of the request related to the amount payable to Mace.

35. Despite the Commissioner giving Tate her preliminary view of the application of regulation 12(5)(e) to this withheld information on 8 June 2017, based on the submissions she had received from Tate by this date, no further more detailed submissions have been made. On 8 June 2017 the Commissioner explained to Tate that the terms of appointment dated back to 2009 and was therefore 7 years old by the time of the request. She confirmed that the terms of appointment may be similar to other contracts used with other contractors and even Mace itself, but she was of the opinion that each contract is different and based on differing aims, terms and cost. The Commissioner considers the fee paid or payable to Mace is a fee for its part of the delivery of the Tate Modern extension project. The fee is not directly transferable to another contract as this would be to construct, for example, a completely different building based on different factors.
36. The Commissioner is aware that Tate and Mace were in sensitive ongoing discussions at the time of the request relating to this project and its delivery. However, without any further more detailed arguments to explain, the Commissioner cannot see how the fee, which was agreed between Tate and Mace in 2009 and therefore known to the two parties involved in this dispute, could damage either of their commercial interests.
37. Redactions 1.8 and 4.1 relate to agreed terms with Mace over the managements of increasing costs during the project and when the fee agreed would be paid or how the timeframe for paying instalments of this fee could be recalculated. No arguments have been presented to date to explain how the disclosure of this information would have adversely affected the commercial interests of Tate or Mace at the time of the request; some 7 years on from when they were agreed and at a time when the extension was finished. The Commissioner has reviewed these redactions herself and cannot see off the face of it, or in conjunction with the circumstances at the time of the request, how this is particularly unique for this project or could be used by the parties subject to the contract or their rivals to the commercial detriment of Tate and/or Mace.
38. For the above reasons, the Commissioner has decided that regulation 12(5)(e) of the EIR does not apply to the remaining redactions in the terms of appointment between Tate and Mace. She therefore requires this information to be disclosed.
39. Turning now to the minutes of 1 November 2014, the Commissioner considers a confidential annex is necessary here to discuss fully Tate's arguments in support of regulation 12(5)(e). The Commissioner does not consider that it is possible to address the application of this

exception without making reference to the contents of the information which Tate considers is commercially sensitive.

40. However, she is able to confirm here that for similar reasons as explained above bullet points one and two are met. However, the Commissioner does not consider that disclosure of this information would adversely affect the commercial interests of Tate or another third party and so the exception is not engaged. Again she requires Tate to disclose this information to the complainant.
41. As the Commissioner has found that regulation 12(5)(e) of the EIR is not engaged, there is no need for her to consider the public interest test. This only needs to be considered if it is found that the exception is engaged.

Other matters

42. The Commissioner has found Tate's willingness to co-operate with her investigation and provide the necessary information, in the depth that is required, to be unsatisfactory at times. The Commissioner explained several times exactly what information is required and the level of detail that is required in the submissions Tate supplies. Despite this submissions lacked content and detailed explanation and there appeared to be a reluctance to address this request and afford it the time that it needed.
43. The Commissioner would therefore like to take this opportunity to remind Tate of its obligations under the FOIA/EIR and to reinforce the need for detailed submissions to be presented in support of a particular exemption/exception to enable the Commissioner to perform her role and investigate fully under section 50 of the FOIA.

Right of appeal

44. 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

45. 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.
46. 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

Samantha Coward
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