

# Decision Notice

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## **Decision 179/2016: Mr Joe Stenson and the Board of Trustees for the National Galleries of Scotland**

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### **Insurance values of art works**

Reference No: 201502433

Decision Date: 25 August 2016



## Summary

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On 14 October 2015, Mr Stenson asked the Board of Trustees for the National Galleries of Scotland (NGS) for information about items damaged or lost from the collection of the National Galleries of Scotland from 1 January 2000. NGS provided some information, but withheld other information. Following a review, Mr Stenson remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that NGS had incorrectly applied two exemptions in FOISA to the information. She required NGS to provide Mr Stenson with the information it had withheld.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 35(1)(a) (Law enforcement)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 14 October 2015, Mr Stenson made a request for information to NGS. He asked how many items in the entire NGS collection had been lost or damaged, since 1 January 2000. Mr Stenson asked for specific details of each lost or damaged item, including the name of the piece and its estimated worth and insurance value.
2. NGS responded on 11 November 2015 and informed Mr Stenson that no items from its collection had been lost during the period in question. It provided information on works of art which had been damaged in this period. NGS provided Mr Stenson with a list of the artworks and objects giving details of the artist, title, date of creation and recorded year of damage, together with a summary of the damage and a summary of the action/repair/outcome. (NGS explained that information on the estimated cost of the damage was not available prior to 2009.) It withheld insurance values “for security reasons”, under section 35(1)(a) of FOISA (Law enforcement).
3. On 16 November 2015, Mr Stenson wrote to NGS requesting a review of its decision. He believed disclosure of the information about insurance values would not substantially prejudice the prevention of crime. The art works were known to be valuable by virtue of being in the collection, and therefore it was unlikely that giving exact valuation figures would substantially increase the risk of attempted theft. Mr Stenson said that the exemption “...is not intended to be used to block information which could motivate or inform hypothetical criminals in some oblique way.” He also referred to having obtained similar information from other Scottish public authorities about the value of assets.
4. NGS notified Mr Stenson of the outcome of its review on 17 December 2015. It upheld its reliance on section 35(1)(a) of FOISA to withhold information about the insurance values of art works. NGS explained that security breaches and theft of art and artefacts are on the

increase throughout the country in heritage organisations, with a number of high profile thefts from museums and galleries in recent years. NGS said that the financial value of an art work does not add to the public appreciation of the collection, and its role as a national gallery is to encourage the cultural, rather than financial, value of art works.

5. NGS argued that disclosure of information about the insurance value of the damaged art works would prejudice the prevention of crime. NGS recognised that the public has a legitimate interest in the acquisitions made on its behalf, but thought the public interest favoured withholding the information in order to prevent criminal activity in relation to the art works in question: it was not in the public interest for the safety and security of the art works in the NGS collection to be jeopardised unnecessarily.
6. On 17 December 2015, Mr Stenson applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Stenson stated he was dissatisfied with the outcome of NGS's review for the reasons stated in his requirement for review.

## **Investigation**

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7. The application was accepted as valid. The Commissioner confirmed that Mr Stenson made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to her for a decision.
8. On 21 January 2016, NGS was notified in writing that Mr Stenson had made a valid application. NGS was asked to send the Commissioner the information withheld from Mr Stenson. NGS provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NGS was invited to comment on this application and answer specific questions including justifying its reliance on any provisions of FOISA it considered applicable to the information requested.
10. NGS confirmed that it wished to rely on section 35(1)(a) of FOISA, and provided similar reasoning to that already given to Mr Stenson and summarised above. On 2 May 2016, NGS stated that it also wished to rely on section 30(c) of FOISA to withhold the information. Mr Stenson was informed of this on 11 May 2016 and was invited to provide comments on the applicability of section 30(c) and on the public interest in disclosure of the information. Mr Stenson did not respond to this request.

## **Commissioner's analysis and findings**

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11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Stenson and NGS. She is satisfied that no matter of relevance has been overlooked.

### **Section 35(1)(a) of FOISA - Law enforcement**

12. In order to accept that the exemption in section 35(1)(a) applies, the Commissioner has to be satisfied that the disclosure of the information would, or would be likely to, prejudice substantially the prevention or detection of crime. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the authority would have to identify harm of real and demonstrable significance. The harm would also have to be at least likely, and more than simply a remote possibility.

13. As the Commissioner's guidance<sup>1</sup> on this exemption highlights, the term "prevention or detection of crime" is wide ranging, encompassing actions taken to anticipate and prevent crime, or to establish the identity and secure prosecution of people suspected of being responsible for committing a crime. This could mean activities in relation to specific (anticipated) crime or wider strategies for crime reduction and detection.
14. NGS submitted that security breaches and thefts of art and artefacts are on the increase throughout the country in heritage organisations, with a number of high profile thefts from museums and galleries in recent years. Disclosure of the values would, in NGS's view, prejudice the prevention of crime by placing information about the insurance value of art works in the public domain. NGS referred to media reports<sup>2</sup> of similar concerns raised by other UK museums and galleries.
15. NGS explained that disclosure of the insurance values of the damaged art works would increase the likelihood that the works in question would be targeted for theft or vandalism, which could then put other items in the collection at risk, and would perhaps lead to increased security requirements at greater cost to NGS, a publicly-funded body. At review, NGS had referred to its duty to maintain the safety of the art works in its care. While the information in question here related only to art works which had been damaged or lost and not to the full collection, NGS said it "would apply the same principle to financial information held about any items within the collection". NGS gave examples of other organisations providing similar rationale for withholding values of art works. NGS said that "there has been a worrying trend in security breaches and artwork thefts in recent years and we believe the threat to be very real."
16. The Commissioner accepts that the exemption in section 35(1)(a) can cover information held by Scottish public authorities which do not have any specific law enforcement responsibilities. In this case, the information withheld by virtue of this exemption comprises the insurance values of some art works. NGS has argued that this information could or would assist those intent on crimes such as theft or vandalism. Art theft and vandalism fall within the definition of "crime" in section 35(1)(a).
17. For the exemption to apply, NGS must show that disclosure of the information would, or would be likely to, prejudice substantially the prevention or detection of such crimes. In this context, NGS must show that disclosing the insurance values would (in general terms) make it substantially more vulnerable to art theft or vandalism, or would substantially increase the likelihood of such theft or vandalism.
18. NGS has not provided the Commissioner with evidence to show that this outcome is anything other than a possibility, if the information is disclosed. Before she can accept that the exemption applies, the Commissioner must be persuaded that the harmful effects of disclosure anticipated by NGS are likely, and not just a hypothetical possibility.
19. In its review response, NGS said that disclosure of insurance value of the art works can assist those intent on criminal actions. However, NGS has not made clear the nature of this assistance. Similarly, although NGS has submitted that disclosure of insurance values

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<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section35/Section35.aspx>

<sup>2</sup> <https://www.pressandjournal.co.uk/fp/news/597506/security-aberdeen-art-gallery-stepped-break-fears/>

increases the likelihood of certain items being targeted for such crimes (vandalism and theft), again, the arguments advanced by NGS were lacking in detail. No explanation or evidence was given as to how disclosure of the insurance values would increase the likelihood that the works in question would be targeted for theft or vandalism, which could then put other items in the collection at risk.

20. NGS supplied Mr Stenson, and the Commissioner, with a media report of incidents of theft from museums. The article suggests that disclosure of values allows would-be thieves to locate accurately the most valuable works in a collection. This article simply indicates a view, and does not provide any supporting evidence.
21. In this case, the information relates to the insurance value of a small number of art works or objects which were damaged, not to the collection as a whole. The Commissioner been not presented with any examples of cases where disclosure of such information has been a factor in theft or vandalism from an art gallery. While NGS has pointed to reporting of increased art theft (which may well be the case), it has not established any direct causal link between this increase in crime and increased availability of information about insurance values (or other values, for that matter).
22. As the Commissioner has not been provided with evidence to show that disclosure of the information in question would, or would be likely to, prejudice the prevention or detection of crime, by making theft or vandalism more likely, she has found that the exemption in section 35(1)(a) of FOISA was incorrectly applied to the withheld information. Given that the exemption does not apply, she is not required to go on to consider the public interest test in section 2(1)(b).

### **Section 30(c) – Prejudice to effective conduct of public affairs**

23. The Commissioner will now consider whether the information was correctly withheld under section 30(c) of FOISA.
24. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
25. The prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances, which may include the timing of the request.
26. NGS submitted that disclosure of the information requested would be in breach of the Museums Association Code of Ethics<sup>3</sup> ("the Code"). NGS said that it had signed up to this Code as an Institutional Member. The Code states that:

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<sup>3</sup> <http://www.museumsassociation.org/download?id=1155827>

*“All those who work in and with museums should... 3.4 Refuse to place a value on items belonging to the public.”*

27. NGS explained that “the general intention is that the cultural worth of collections should be seen as having greater importance than financial worth”. Disclosure would be a breach of the Code and:

*“...would severely affect our relationship with the Museums Association, potentially invalidating our membership (we are required to sign a declaration which states that ‘The Museums Association expects its members to uphold, promote and abide by the Code of Ethics in spirit and in letter’)...”*

28. NGS explained that it benefited from membership of, and association with, the Museums Association. The benefits include advocacy and access to training, and NGS said it would not wish to jeopardise this by going against the Code. It commented that the Museums Association works to guard the interests of museums and galleries, and is the oldest museums association in the world.
29. The Commissioner must consider whether disclosure of the information would cause the level of harm required to justify its exemption from disclosure under section 30(c) of FOISA.
30. It is not clear to the Commissioner whether refusing to disclose the insurance value of damaged items can be equated with the Code’s recommendation that Museum Association members should refuse “to place a value on items belonging to the public”. In its public interest arguments, NGS acknowledged this distinction, noting that the information includes “insurance figures only (not reflecting market value or purchase price)”. NGS said that “the release of financial data, which in several cases will be out of date and therefore inaccurate, and which are insurance figures only (not reflecting market value or purchase price) is not, in our opinion, in the public interest”. These arguments indicate that the withheld information should not be considered to represent the “value” of items belonging to the public, in the fullest sense: it is simply information about the insurance value.
31. However, for the purpose of this decision the Commissioner will accept NGS’s view that disclosing an insurance value may be seen as a breach of the Museum Association Code. The question is then whether the outcome is likely to cause substantial prejudice to the effective conduct of public affairs. The Code says (at page 21):

*“Alleged breaches of the code can be considered by the ethics committee. In some cases, where a museum or museum professional is alleged to have acted unethically, the ethics committee will investigate a matter in order to provide a considered opinion. The committee is also able to report a breach to the director of the MA, who may in turn report the matter to the MA board and disciplinary committee for further investigation and possible sanction.”*

32. The Commissioner notes that the Code sets out what may follow an alleged breach, rather than action which is bound to follow. She also notes that the Code clearly says:

*“All museums are bound by national laws and international conventions relevant to museums. The code supports this legal framework and sets a standard for all areas of museum practice”.*

The Code does not have the force of legislation, and cannot override legal obligations created by legislation, such as those contained in FOISA. Nonetheless, the Commissioner accepts that the Code is regarded by the NGS to be a binding document in terms of the

NGS's behaviour and actions, and that Museum Association members who breach of the Code may be sanctioned.

33. However, NGS has not provided any evidence to show that the Museums Association would be likely to impose the kind of sanction which would jeopardise NGS membership of the association. If it had done so, the Commissioner would have given greater weight to its arguments. It is also questionable whether the Museums Association would view disclosure of information about insurance values as placing a value on items belonging to the public; again, the NGS has not provided any evidence to show that the Museums Association would be likely to take this view. Given the lack of evidence, the Commissioner does not accept that NGS has shown that disclosure would be likely to cause the level of harm it anticipates. She does not accept that disclosure of the withheld information would, or would be likely to, damage NGS's relationship with the Museums Association to the extent it has indicated, or to have all the detrimental consequences suggested by NGS.
34. In all the circumstances, the Commissioner does not accept that NGS has justified its decision to apply the exemption in section 30(c) of FOISA to the withheld information, and finds that the exemption was wrongly applied.
35. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. However, as the Commissioner has not accepted that NGS has discharged its burden in showing that exemption applies, she is not required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
36. In the absence of any exemption being correctly applied, the Commissioner therefore finds that NGS was not entitled to withhold the information under the exemption in sections 30(c) or 35(1)(a) of FOISA. She therefore requires NGS to supply the withheld information to Mr Stenson.

## Decision

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The Commissioner finds that the Board of Trustees for the National Galleries of Scotland (NGS) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Stenson.

The Commissioner finds that NGS wrongly applied the exemptions in sections 35(1)(a) and 30(c) of FOISA to the information it withheld from Mr Stenson.

The Commissioner therefore requires NGS to provide Mr Stenson with the information withheld from him by **11 October 2016**.

## Appeal

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Should either Mr Stenson or NGS wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## **Enforcement**

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If NGS fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that NGS has failed to comply. The Court has the right to inquire into the matter and may deal with NGS as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**25 August 2016**



### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

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

#### 35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

- (a) the prevention or detection of crime;

...

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**