



IN THE FIRST TIER TRIBUNAL

Appeal Nos: EA/2014/0040, 70-71

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notices Nos FS50493467 dated 10 December 2013 and FS50493468 dated 4 March 2014

Before

Andrew Bartlett QC (Judge)

Anne Chafer

Nigel Watson

Heard at Field House, London EC4

Date of hearing 18 September 2014

Date of decision 22 December 2014

APPELLANT in 0040 and 0071/

SECOND RESPONDENT in 0070:

BRENDAN MONTAGUE

FIRST RESPONDENT in all three appeals:

INFORMATION COMMISSIONER

SECOND RESPONDENT in 0040 and 0071/

APPELLANT in 0070

TATE GALLERY

Attendances:

For Mr Montague Julianne Kerr Morrison, instructed by Leigh, Day & Co

For the Commissioner Elizabeth Kelsey, instructed by the Commissioner

For Tate Gallery Robin Hopkins, instructed by Farrer & Co

Subject matter:

Freedom of Information Act 2000 – qualified exemptions – commercial interests – health and safety – inhibition of free and frank exchange of views for purposes of deliberation – inhibition of free and frank provision of advice

Freedom of Information Act 2000 – absolute exemption – confidential information

Cases:

Derry City Council v IC [2011] 1 Info LR 1105

BUAV v IC and Newcastle University [2012] 1 Info LR 52

Department for Work and Pensions v IC [2014] UKUT 0334 (AAC)

Department of Health v IC EA/2013/0087, 17 March 2014

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows in part Mr Montague’s appeal against Decision Notice FS50493467. Tate shall disclose within 35 days from the date of this decision the BP sponsorship figures from 1990 to 2006 inclusive.

The Tribunal dismisses Mr Montague’s appeal against Decision Notice FS50493468.

The Tribunal allows in part Tate’s appeal against Decision Notice FS50493468. Contrary to the Decision Notice, Tate was entitled to withhold disclosure of more of the Ethics Committee information than as decided by the Commissioner, as set out in the table below, in which ‘W’ indicates entitlement to withhold the information and ‘D’ indicates that the information should have been disclosed. (The table does not include the redactions which were not in issue on the appeal.)

Redaction number	Commissioner’s Decision	Tribunal’s Decision
1.1	W – s43(2)	W – s43(2)
1.2	W – s43(2)	W – s43(2)
1.3	D	D
1.4	D	W – s36(2)(b)
1.7	D	D 1 st sentence W 2 nd and 3 rd sentences – s36(2)(b) and s43(2)
1.8	D	D

1.9	D	D
2.2	D	D except as below W 1 st bullet point – s43(2)
2.3	D	W – s43(2)
2.4	D	D
3.1	D	W – s43(2)
3.2	D except as below W financial figure and words in square brackets – s43(2)	D except as below W financial figure and words in square brackets – s43(2) W last (4 th) sentence – s36(2)(b)
3.3	D	D
4.1	W – s43(2)	W – s43(2)
4.2	W – s43(2)	W – s43(2)
4.3	W – s43(2)	W – s43(2)
4.5	D	D
4.6	D	W - s36(2)(b) and s43(2)
4.7	D	D
4.8	D	W 1 st redacted sentence – s36(2)(b) D 2 nd redacted sentence
4.9	D	D
4.10	D	D
4.11	D except as below W figures – s43(2)	First five words of the sentence have been disclosed. W from the 6 th word of the sentence as far as the comma – s43(2) D the words after the comma
4.12	D	D
4.13	D	W - s36(2)(b) and s43(2)
4.14	D	D
5.1	D	W – s43(2)
6.1	D	W – s43(2)
6.2	D	W - s36(2)(b) and s43(2)

The parts of the Ethics Committee information listed for disclosure in the right hand column of the above table shall be disclosed by Tate within 35 days from the date of this decision.

REASONS FOR DECISION

Introduction

1. These appeals are concerned with whether certain information about BP's sponsorship arrangements with the Tate Gallery ("Tate") should be disclosed under the Freedom of Information Act ("FOIA").

The three appeals

2. The first appeal (EA/2014/0040) may be called the sponsorship figures appeal.
3. Mr Montague made an information request to Tate on 12 April 2012 for:
 - (1) The total amount of sponsorship provided by BP to Tate for each of the past 23 years.
 - (2) Any confidentiality agreement contained within the contracts between BP and Tate for each of the years where sponsorship was provided.
4. Tate withheld the sponsorship figures requested under part (1), citing FOIA s41 (information provided in confidence) and s43(2) (prejudice to commercial interests).
5. With BP's consent, Tate disclosed the confidentiality clause as contained in the sponsorship contract from 2007 onwards, stating that this was the information which it held under part (2) of the request.
6. Mr Montague complained to the Information Commissioner regarding the sponsorship figures. In Decision Notice FS50493467 (10 December 2013) the Commissioner upheld Tate's reliance upon s43(2). Much of his reasoning was contained in a confidential annex to his decision. He did not go on to consider s41. Mr Montague appeals from this decision, contending that the sponsorship figures should be released. In the course of the appeal proceedings the Commissioner has reconsidered the extent of the confidentiality of the reasoning in the annex and has disclosed much of the confidential annex to Mr Montague, subject to redactions to protect sensitive information.
7. The second and third appeals (EA/2014/0070-71) may be called the Ethics Committee appeals.
8. On 13 April 2012 Mr Montague wrote to Tate making two information requests in the following terms:

Request 1

[Name redacted] made a Freedom of Information request to Tate on 28 December 2011 for:

1. The date the decision was made by Tate Trustees to accept BP's offer of renewal of sponsorship as announced on 19 December 2011.
2. The minutes of the meeting of the Trustees at which this decision was taken and the minutes of any other meeting at which renewal of BP sponsorship now announced was discussed along with any record of the deliberation(s) taken by Trustees on this matter.
3. The minutes of the Tate Ethics Committee at which BP sponsorship renewal was discussed and the recommendation(s) and any associated report by the Ethics Committee, or any other body, made to the Tate Board on or related to the matter of BP sponsorship renewal after 19 May 2010 and up to the date of subsequent announcement (19 December 2011).
4. Any other assessment of BP and Tate's Ethical Fundraising Policy in 2011 and any information or reports regarding environmental, reputational or similar audits and/investigations conducted by Tate (or parties contracted by Tate) relating to BP sponsorship in the period of the present sponsorship (that decided by Tate management in 2006 to be until 2012) including any assessments with regard to the impacts on fulfilment of Tate's mission.
5. The emails Nicholas Serota, Director of Tate sent to Tate staff with regard to the acceptance of BP's offer of renewal of sponsorship when it was announced.

Tate responded to the request by releasing documents and providing information on 16 February 2012. The information was redacted citing several exemptions including under section 36, section 40(2), section 42 and section 43(2) of the Freedom of Information Act.

I write today to request that Tate re-examine the use of the exemptions with a view to releasing the information in response to this request.

Request 2

1. A list of the dates when the Tate Ethics Committee has met.
 2. Copies of each of the minutes for the Tate Ethics Committee meetings.
9. In response to these two requests, Tate disclosed some information and withheld some. The information disclosed included a list of dates when the Ethics Committee had met and redacted versions of the Ethics Committee minutes. The exemptions relied on were s36(2)(b) (disclosure would inhibit provision of free and frank advice and/or free and frank exchange of views for the purposes of deliberation), s40 (personal data), s41 (information provided in confidence), s42 (legal professional privilege), and s43 (prejudice to commercial interests).
10. Mr Montague complained to the Information Commissioner. During the Commissioner's investigation it was agreed that he would only review any withheld information which

related to or discussed BP and its sponsorship of Tate. The focus of concern was Tate's consideration in 2010-2011 of whether it should renew its sponsorship relationship with BP. Tate's Ethics Committee discussed this topic at a series of meetings held on 6 May 2010, 1 November 2010 and 27 June 2011; the Committee decided to recommend renewal; on 6 July 2011 Tate's Board of Trustees accepted that recommendation; and renewal was announced on 19 December 2011.

11. The application of s40 was not in dispute. The exemptions relied upon by Tate before the Commissioner were ss36(2)(b), 38, 42 and 43. In Decision Notice FS50493468 (4 March 2014) the Commissioner held that s36 was engaged, but the public interest in maintaining the exemption was outweighed by the public interest in favour of disclosure¹. He decided that s38 was not engaged. He held that three documents were protected by s42, and that certain information should be withheld under s43. He decided that the remainder of the information should be released. Much of his reasoning was contained in a confidential annex to his decision.
12. Tate and Mr Montague each appeal to the Tribunal against the Decision Notice relating to the Ethics Committee information. In the course of the appeal proceedings the Commissioner has reconsidered the extent of the confidentiality of the reasoning in the annex and has disclosed much of the confidential annex to Mr Montague, subject to redactions to protect sensitive information.

The issues before the Tribunal

13. The information which is the subject of the sponsorship figures appeal consists of the annual amounts of BP's sponsorship of Tate over the 23-year period preceding 2012.
14. On the sponsorship figures appeal we are required to consider the application of the exemptions in s41 (information provided in confidence) and s43(2) (prejudice to commercial interests). The latter is subject to the public interest test in s2(2)(b).
15. The withheld information which is the subject of the Ethics Committee appeals consists of a considerable number of redacted passages in six documents, three of which are reports to the Committee and three of which are Committee minutes. (The redactions are numbered so that the first number identifies the document and the second number identifies where in the document it is positioned.) The Commissioner's position remains that some of the redacted passages should be disclosed. Mr Montague contends that they should all² be disclosed. Tate contends that none of them should be disclosed.

¹ There is a mistake in paragraph 7 of the Decision Notice, which says he decided that s36 was not engaged. Our understanding of what he decided in regard to s36 derives from paragraphs 26-27 of the Notice.

² By 'all', we mean all those at issue in the appeal. There are further redactions which are not at issue, whether because the information is not about BP, is personal data withheld under s40(2), or is withheld under s42 (legal privilege).

16. On the Ethics Committee appeals we are required to consider the application of the exemptions in s36(2)(b) (disclosure would inhibit provision of free and frank advice and/or free and frank exchange of views for the purposes of deliberation), s38(1) (safety), s41 and s43(2). Other than the s41 exemption, these are subject to the public interest test. Mr Montague accepted that the s42 exemption had been properly applied.

The hearing and the evidence

17. The hearing was listed for one day on 18 September 2014. We do not know how it came about that a one day time estimate was given. The time was seriously inadequate for three appeals involving lengthy evidence, reliance on four different exemptions, and a significant quantity of withheld information with many disputed partial redactions. On that day we received the parties' evidence, but closing submissions had to follow in writing. The last submission was received on 5 November 2014. The Tribunal was able to reconvene on 8 December 2014 to consider its decision.
18. Mr Montague provided a long witness statement (24pp), with many exhibits (over 130pp). He was cross-examined by Ms Kelsey on behalf of the Commissioner. Mr Hopkins put no questions to him on behalf of Tate. Written and oral evidence on behalf of Tate was given by Mr Aydon, Head of Legal Services since 2010. Mr Aydon was cross-examined on behalf of the other parties at some length. He also gave oral evidence in closed session (from which Mr Montague and his representatives, and the public, were necessarily excluded) from 1.45pm to 5pm, with a short break of a few minutes at mid-afternoon. In the closed session Ms Kelsey put questions to him on behalf of the Commissioner, and also raised with him a number of matters which Mr Montague had requested that he be asked about. The Tribunal also asked him some questions. A summary of the closed session was afterwards made available to Mr Montague, in terms agreed by the Commissioner and Tate, and approved by the Tribunal.
19. In broad terms, Mr Montague's evidence informed us of-
- a. Tate's status as a national institution and its sources of income,
 - b. the benefits claimed to be associated with sponsoring Tate (illustrated by Tate's own assertion: "We have a long history of generating significant return on investment for our supporters"),
 - c. general issues of concern in regard to climate change, oil companies, and arts sponsorship,
 - d. BP's Deepwater Horizon disaster, and its need to repair damage to its reputation,
 - e. examples of disclosure by other institutions of amounts received from BP or others,
 - f. examples of disclosures by Tate of amounts received from Unilever and from Hyundai,

- g. evidence of public concern about the BP-Tate sponsorship relationship,
- h. the need, as he saw it, to have more detailed figures published so that Tate's claims as to its dependence on BP's sponsorship could be scrutinized by the public,
- i. controversy over Tate's 2011 decision to renew its sponsorship agreement with BP, and details of protests made,
- j. concerns about Lord Browne's links with BP and with the oil industry (Lord Browne being chair of the Tate Trustees and the 'qualified person' for the purposes of s36),
- k. public interest factors in favour of disclosure.

20. Mr Aydon's evidence further informed us about-

- a. Tate's part in and contribution to the public cultural life of the UK, and its economic significance, as the most visited modern and contemporary visual arts organisation in the world,
- b. its sources of funding, and the positive influence of sponsorship on other forms of income such as Tate's shops and catering activities,
- c. the nature of corporate sponsorships, and how they are negotiated,
- d. the history and significance of the relationship with BP,
- e. protests at Tate, connected with the BP sponsorship,
- f. the composition and role of Tate's Ethics Committee,
- g. Tate's approach to handling Mr Montague's FOI requests, and the reasons for the application of exemptions,
- h. the balance of public interests, as he saw it, in relation to the exemptions.

21. We accept Mr Montague's evidence that arts sponsorship can legitimately be understood as a means of maintaining BP's 'social licence' to operate and of enhancing, maintaining or repairing BP's brand. This was confirmed for us by Mr Aydon's evidence. Mr Aydon's explanations of how the sponsorship system operates show that it is understood on both sides as an essentially commercial relationship. In our view it was clear from the evidence that Tate needs financial support, that BP needs ways of enhancing, maintaining or repairing its brand, and that sponsorship brings these two needs together, via a commercial negotiation.

22. The concerns expressed by Mr Aydon about the need of the Ethics Committee for confidentiality for sensitive aspects of its deliberations require assessment in the context of several statements made on Tate's behalf concerning the value of transparency:

- a. Tate's Ethics Policy states at paragraph 2.1:

Tate was founded as a national institution on the premise of public service. In addition to our mission, which is to promote public knowledge, understanding and enjoyment of British and modern and contemporary art, to care for and add to the Collection and to secure that it is made available, we also have a duty to the public to be transparent and accountable, and always to act in the public interest. Our ability to maintain a strong relationship of trust with our public is critical to our ability to fulfil our mission.

- b. The report to the Ethics Committee headed “BP’s Sponsorship of Tate”, for discussion at the meeting on 6 May 2010, contained the following in its concluding paragraph:

The deliberations and decision of the Ethics Committee on this issue may be used in responding to external requests for information, to demonstrate scrutiny of the sponsorship relationship.

- c. The same concluding wording appeared in the report “Sponsorship Renewal – BP”, for discussion at the meeting on 27 June 2011.

23. In line with these documents, Mr Aydon said that Tate had sought to disclose as much information as possible about BP’s sponsorship of Tate and about the Ethics Committee’s assessment of that sponsorship. It had withheld only specific pieces of information which, upon careful consideration, it concluded should not be disclosed to the public. Under cross-examination he emphasized that Tate had not taken a broad brush approach but had gone through the requests painstakingly and had bent over backwards to be as open as it could, and had disclosed a great deal of information. While we need to consider to what extent we agree with the particular applications of exemptions which Tate made, we accept that Mr Aydon’s evidence fairly describes Tate’s intent, which is commendable.

24. Mr Aydon said in open session (and we accept) that BP did not consent to the disclosure of the sponsorship figures requested by Mr Montague.

25. Tate argued³ that we should give substantial weight to Mr Aydon’s views, given his direct experience, and the Tribunal’s lack of experience, of the operation of the Ethics Committee. We have kept this submission in mind, and have given his evidence the weight that it appears to us to deserve. It was common ground between Tate and the Commissioner that the Tribunal is not bound to defer to his views.

Sponsorship figures: s41

26. By s41, information is exempt if (a) it was obtained by the public authority from another person, and (b) the disclosure of the information to the public (otherwise than under FOIA) by the public authority holding it would constitute an actionable breach of confidence.

³ in paragraphs 21-22 of its opening skeleton 9.9.14

27. We agree with the analysis of s41 in *Derry City Council v IC* [2011] 1 Info LR 1105 at [32](b), (c) and (e). We would add that in our view the word “obtained” is used advisedly in this section. Public authorities often *obtain* confidential information in the course of carrying out their functions. This exemption is intended to apply in such circumstances. It is not intended to enable a public authority to make an agreement with another person that particular information stated in an agreement shall be treated as confidential, with the result that the s41 exemption applies *simply by reason of the information being stated in the agreement*; this would create a far-reaching exception outside the intent of s41. In our view the section is intended for protection of existing confidential information held by the third party, which the public authority obtains.
28. Mr Aydon stated that in negotiations for sponsorship the figures tended to come from the sponsor’s side. But he made clear that he was not personally involved in the sponsorship negotiations between BP and Tate. In our view the evidence did not establish that any particular amounts of sponsorship negotiated and contractually agreed between BP and Tate were information obtained by Tate from BP within the meaning of s41. Accordingly, in agreement with the Commissioner, we hold that s41 is not engaged as regards the sponsorship figures. This is because the agreed sponsorship figures are those stated in the sponsorship agreements, and in our view it has not been shown that they were pre-existing information obtained by Tate from BP.⁴
29. In further support of this conclusion we would emphasize that the information request, by its terms, was not directed at what offers of sponsorship had been made by BP to Tate, or even what amounts BP had promised (in the sponsorship agreements) to provide, but sought to discover the actual amounts of sponsorship which in the event were provided. The answer to the request therefore depended upon what sums were actually received by Tate. In our view it would be artificial and inappropriate to describe information of the amounts received by Tate as information which Tate obtained from BP. Section 41 is not engaged.

Sponsorship figures: s43(2)

30. By s43(2), information is exempt if its disclosure under FOIA “would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)”. We proceed in accordance with the accepted interpretation of this subsection, as briefly referred to in *Department for Work and Pensions v IC* [2014] UKUT 0334 (AAC) at [26].⁵

⁴ This is our view despite Mr Hopkins’ ‘Closed Proposition 1’. We add that, if we had held that s41(1)(a) applied to the sponsorship figures, we would not have upheld Mr Montague’s contention that the application of s41(1)(b) would be defeated by a public interest defence to a breach of confidence action. We also record that after the hearing Tate disclosed for the first time a confidentiality clause from a 2003 sponsorship agreement; in the event this does not impact on our decision.

⁵ The material points are the meanings of “would”, “would be likely to” and “prejudice”.

31. Tate's case was advanced on the basis of the prospects of prejudice to Tate's commercial interests. No case was advanced concerning prejudice to commercial interests of BP.
32. Mr Aydon contended that disclosure of the figures would create a real and substantial risk of upsetting BP so as to prejudice its relationship with Tate, or of deterring other commercial organisations from becoming sponsors. We found this aspect of his evidence unpersuasive. Mr Aydon's concern here was based in part on a belief that in the relevant sector there was a general practice of non-disclosure of amounts, a belief which Mr Montague's evidence demonstrated was mistaken. Moreover, we have no reason to doubt that BP and other potential sponsors would be aware that Tate is a public authority subject to FOIA, so that disclosure pursuant to FOIA would represent Tate's obedience to the law rather than any mis-handling of information about sponsorship.
33. Mr Aydon explained in evidence that, because most of the sponsorship benefits are in the public domain, disclosure of the sponsorship figures would in effect amount to publication of a 'price list' for the sponsorship package. This, he said, would materially weaken Tate's bargaining position in its negotiations with other sponsors. Having reviewed the evidence given in both open and closed sessions, we accept this part of his evidence, and find that s43(2) is engaged, as regards the current and recent sponsorship figures (viewed as at the time of the information request). In this respect we agree with the Commissioner's assessment.
34. Ms Morrison mounted a powerful counter-argument to this conclusion⁶. Mr Montague's evidence showed that Unilever had announced the amounts of its sponsorship of Tate's Turbine Hall for the periods 2000-2004, 2005-2007 and 2008-2012, and that this did not prevent Tate subsequently obtaining record sponsorship by Hyundai of the Turbine Hall, as announced in January 2014. On this basis Ms Morrison argued that disclosure of the figures was shown not to have the effect which Tate feared. But this is a single example, which in our view does not undermine the general principle. If Unilever's disclosure did not impact on the outcome of the negotiations with Hyundai, it does not follow that such disclosures would not be likely in some cases to have a negative impact on Tate's bargaining position. Moreover, there is nothing in the evidence to show whether, in the absence of Unilever's disclosure, Tate might or might not have done better in their negotiations with Hyundai.
35. At the time of the information request a sponsorship agreement for the years 2007 to 2011 inclusive had recently expired. Mr Aydon said that Tate's concern about the weakening of its bargaining position applied to historic information; Tate would not wish other potential sponsors to know what changes, if any, had taken place in BP's level of support under successive agreements. Having considered his open and closed evidence, we find wholly unpersuasive the proposition that knowledge of BP's historic level of support from 1990 to 2006 would or would be likely to impact adversely upon negotiations with other possible sponsors in 2012 or later. Neither Mr Aydon's evidence nor Mr Hopkins' or the

⁶ In particular, at paragraphs 11-19 of Mr Montague's Reply Submissions of 5 November 2014.

Commissioner's submissions gave any convincing justification of how this would come about. When one considers how many relevant factors may change over time, including the state of the general economy, the state of the public finances, the extent of support for the arts from public funds, and the circumstances of commercial sponsors, it does not seem to us to be justifiable to assert that the release of figures from 2006 and earlier would risk a material impact on Tate's commercial interests in negotiations conducted in 2012 or later. To this extent we accept the arguments advanced on behalf of Mr Montague.

36. We conclude that we ought to order disclosure of the sponsorship figures from 1990 to 2006 inclusive because they are not protected by the s43(2) exemption.
37. Whether the more recent figures should also be disclosed depends upon the balance of public interest, which we consider below.

Sponsorship figures: the public interest balance

38. Sponsorship is undoubtedly important to Tate, particularly in the current climate of reductions in public funding. The public interest in maintaining the s43(2) exemption is directly concerned with the real risk of prejudicial impact upon Tate's commercial interests.
39. The Commissioner set out his views on the public interest balance in paragraphs 26-32 of the annex to Decision Notice FS50493467. As regards the factors favouring maintenance of the exemption, in regard to the sponsorship figures from 2007 onwards, we agree with the Commissioner's assessment of the practical importance of maintaining the exemption. As regards factors favouring disclosure, we do not agree with his reliance in paragraph 26 on the 'huge public interest' in BP's relationship with cultural institutions, in so far as this is a reference to the degree of public curiosity, rather than to whether disclosure would be for the public good. We also disagree with his statement in paragraph 31 that disclosing the annual amounts of sponsorship would not assist public understanding of the sponsorship relationship. In our view, as Mr Montague submits, disclosure of the sponsorship figures for each year from 2007 onwards would add something of value to public understanding and accountability⁷.
40. Nevertheless, the extent to which disclosure would be in the public interest must be judged in the context of what is already publicly known, ie, that BP's sponsorship is important to Tate, and that Tate is one of four cultural institutions which are together receiving £10 million from BP over a five year period. Weighing the limited contributions to the public interest that would be made by disclosure on one side and the potential importance to Tate of maintaining the exemption on the other side, we conclude that the Commissioner was correct to find that the balance was in favour of maintaining the exemption.

⁷ We have in mind in particular paragraph 25 of Mr Montague's Reply Submissions dated 5 November 2014.

Ethics Committee information: s38

41. We turn to Tate's reliance on s38 in its Ethics Committee appeal. As regards the legal ingredients of s38, counsel reminded us of the discussion in *BUAV v IC and Newcastle University* [2012] 1 Info LR 52, [15]-[19].
42. We listened with care to Mr Aydon's evidence that there would be a risk to health and safety if more information about BP's sponsorship were disclosed, but we were wholly unpersuaded by it. Mr Aydon expressed a concern about an increased risk of accidental injury, such as by slips or trips. We accept that, in the course of peaceful protests, there can sometimes be a risk of unintended personal harm, but we see no sufficient reason to conclude that disclosure of additional information would make a material difference to that risk. We do not consider that disclosure of the withheld information would or would be likely to endanger the physical or mental health of any individual, or endanger the safety of any individual. In agreement with the Commissioner, we hold that the s38 exemption is not engaged.

Ethics Committee information: s36(2)(b)

43. The exemption in s36(2)(b) depends upon the reasonable opinion of a "qualified person" that disclosure would or would be likely to have the prejudicial effect referred to in the section. For Tate, the relevant definition of a qualified person is that in s36(5)(o)(iii), namely, "any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown". Tate contended that its qualified person was Lord Browne of Madingley, the Chair of the Board of Trustees.
44. At the hearing there was insufficient evidence that Lord Browne had been authorised for the purposes of s36(2). The Tribunal made it clear that it required proper evidence on this point, and Tate was given further opportunity to provide it. After considerable correspondence, and protracted, misguided reliance by Tate on a document which was plainly not an authorisation, the evidence of authorisation was finally provided on 5 November 2014.
45. Tate relied on two opinions given by Lord Browne on 6 and 8 June 2012. These were given in relation to certain redacted passages in the reports to and minutes of the Ethics Committee. Lord Browne opined:

As these reports and discussions are both relatively recent and their implications ongoing, I consider that the release of this information would inhibit the ability to provide free and frank advice and/or to have free and frank exchange of views for the purposes of deliberation within Tate (Subsection (2)(b)(i) and (ii)).

46. Mr Montague attacked the reasonableness of Lord Browne's opinions on the ground that, given Lord Browne's relationship with BP, including various public comments made by him expressing sympathy for his former employer, a fair-minded and informed observer would conclude that there was a real possibility of bias in the giving of his opinion. We do not consider that this attack is legally relevant. In our view s36(2) contemplates that qualified

persons will usually have a direct interest in the matters on which they give their opinion: see s36(5). Typical examples of opinions given under s36(2) are the opinions of Ministers concerned to protect the effectiveness of their own departments. That Lord Browne had a connection with BP in addition to his position as chair of the Tate Trustees does not in our view disqualify him under s36(2).

47. Ms Morrison argued on behalf of Mr Montague that Lord Browne's opinions were unreasonable in substance. She placed particular emphasis on Tate's own explicit recognition of the value of transparency and its advance acknowledgment that the deliberations of the Ethics Committee might be used to demonstrate the scrutiny given to the relationship with BP. While we understand the relevance of those points, it does not seem to us that her argument sufficiently recognises the difference between whether an opinion is correct and whether it is reasonable. Her argument would have been persuasive if Lord Browne had expressed the opinion that, despite all that Tate had said about transparency of scrutiny, the whole of the reports and the minutes should be kept under wraps. But that was not the opinion which he expressed. We were impressed by the fact that s36 was not relied on in some blanket or scatter-gun fashion, but instead was applied only to certain selected passages in the reports and minutes. While on close examination it transpires that some mistakes may have been made in the selection of passages for the application of s36, our view is that in general the selection was made judiciously.
48. By reference to various Tribunal decisions Mr Hopkins submitted it was well established that the reasonableness of the qualified person's opinion can only be challenged on *Wednesbury* grounds. We do not agree with that view of the law, but it is unnecessary for us to discuss the applicable law in detail, since in our view Lord Browne's opinions, that the disclosure of certain pieces of Ethics Committee information would have the stated inhibiting effect, were both reasonably arrived at and (in general) objectively reasonable in substance.
49. Conversely, where there are some limited exceptions to this general view, we cannot support the reasonableness of the redactions on any view of the relevant legal test under s36(2). In these latter instances we think s36(2)(b) must have been applied by mistake. We cannot regard Lord Browne's s36(2) opinion as reasonable in relation to redaction 1.9 (because this item is an anodyne statement in accordance with what anyone would expect), redaction 4.5 (because it is a short statement of a suggested general approach to the function of the Ethics Committee), redaction 4.7 (because it is an unremarkable factual assertion about a letter in a newspaper), or redaction 4.12 and the first sentence of redaction 1.7 (because they are references to the scope of Tate's charitable objectives). Given the nature of the other materials which Tate has (very properly) disclosed, we can see no reasonable basis for regarding the disclosure of these particular passages as having the effect stated in Lord Browne's opinion.⁸

⁸ In reaching this conclusion we have taken fully into account Mr Aydon's evidence in closed session on these redactions. We consider that his support for them can fairly be described for the most part as muted.

50. Because of the arguments about aggregation of exemptions, we consider the public interest balance in regard to s36(2) later in this decision, after consideration of the engagement of the remaining exemptions.

Ethics Committee information: s41

51. In relation to the Ethics Committee information s41 is relied upon only with respect to mentions of sponsorship figures. Tate’s reliance on s41 in this context fails for the same reasons as we have stated above in the context of the sponsorship figures appeal. Protection of this information therefore depends upon the extent of application of other exemptions.

Ethics Committee information on sponsorship figures: s43(2)

52. Given his views on the withholding of the sponsorship figures, the Commissioner accepted in Decision Notice FS50493468 that s43(2) was engaged as regards redactions 1.1, 1.2, 4.1, 4.2, the figures in redaction 4.11 and the financial information marked by square brackets under redaction 3.2. All of these items are directly or indirectly concerned with the levels of sponsorship from 2007 onwards. We therefore agree with the Commissioner that s43(2) is engaged to this extent, for the same reasons as we have set out above in relation to the sponsorship figures appeal. Although not specifically mentioned by the Commissioner, the same considerations apply to redactions 5.1 and 6.1. In addition, we consider it necessary for consistency to define the extent of justified redaction at 4.11 more precisely.

53. Our remarks about the public interest balance on disclosure of the recent sponsorship figures in paragraphs 38-40 above apply equally here. The balance is in favour of maintaining the exemption.

Ethics Committee information other than in relation to sponsorship figures: s43(2)

54. The Commissioner accepted in Decision Notice FS50493468 that s43(2) applied to redaction 4.3, because it concerned specific details of commercial negotiations which were in progress at the time of the information request. In the light of the evidence concerning the nature of negotiations between Tate and sponsors, we accept the Commissioner’s view that s43(2) applied to this item.

55. Tate contends that s43(2) is also engaged for the following items, where the Commissioner’s conclusion was that s43(2) was not engaged:

<i>Redaction</i>	<i>Nature of disputed information</i>
1.3, 3.2 1 st sentence, 4.9, 4.10	information about BP
2.3, 3.1, 3.3, 4.6,	assessment of risk to Tate

4.13, 6.2	
1.7, 1.8 1 st bullet, 4.14 1 st bullet	reasoning on whether to continue the sponsorship relationship
1.9	recommendation for the future
2.2	rationale for giving consideration to the issue of whether to continue the sponsorship relationship
2.4	discussion of Tate's approach to the question of whether to continue the sponsorship relationship

56. Where the redacted material consists of information about BP, the thrust of Mr Aydon's concern was that Tate would not want BP to see its activities placed under explicit scrutiny, in case BP was thereby offended in some way that might prejudice the relationship. We are bound to say that we consider this concern to be somewhat fanciful. We have no doubt that BP is well aware of how its activities are reported in the public domain, and of the nature of the controversies arising around them. It would be most surprising if BP expected Tate not to give careful consideration to whether any of the controversies arising from BP's activities should impact on the continuance of the sponsorship relationship. We therefore agree with the Commissioner that the s43(2) exemption is not engaged by the material under redactions 1.3, 3.2 1st sentence, 4.9 and 4.10. We take the same view on the related item 2.4, which discusses the Ethics Committee's approach, on Tate's behalf, to the question of whether to continue the sponsorship relationship. The reasoning advanced by Mr Aydon in closed session on this item was weak, in our view, and we hold that s43(2) is not engaged by this item.
57. We agree with the Commissioner that s43(2) is not engaged by item 1.9; in our view this is an anodyne statement in accordance with what anyone would expect. Disclosure of it would not be likely to harm Tate's commercial interests. We also agree with the Commissioner that s43(2) is not engaged by item 3.3, because we can see no real detrimental impact from the disclosure of this item. Mr Aydon accepted in closed session that the information in the upper part of item 3.3 had effectively been disclosed anyway by other text which had already been released; the information in the lower part would not in our view reveal anything of substance so as to cause detriment.
58. We disagree with the Commissioner on the application of s43(2) to items 2.3, 3.1, 4.6, 4.13 and 6.2. In contradiction of the Commissioner's view that s43(2) did not apply to these items, Mr Aydon contended in his evidence that s43(2) applied, because of the potential harm that might flow to Tate's commercial interests if they were disclosed. We accept his evidence in that respect, which we found cogent and persuasive. For the same reason we disagree with the Commissioner as regards the 2nd and 3rd sentences of redaction 1.7, the first bullet point of redaction 1.8, and the first bullet point of redaction 4.14.

59. As regards item 2.2, having considered the evidence, the Tribunal is in agreement with the Commissioner that s43(2) was not engaged, except as follows:

- a. We agree with Tate that the first bullet point of redaction 2.2 is protected by s43(2), because of the potential harm that might flow to Tate's commercial interests if it were disclosed.
- b. One member of the Tribunal (Mr Watson) agrees with Tate also on part of the second sentence⁹ of redaction 2.2, but the majority agrees with the Commissioner.

Ethics Committee information – public interest balance, s36(2)(b), s43(2)

60. As regards the withholding of sponsorship figures and related information in redactions 1.1, 1.2, 4.1, 4.2, 4.11, 5.1, 6.1 and the financial information marked by square brackets under redaction 3.2, we have set out our conclusions above.

61. In view of our other findings regarding the applicability of exemptions to Ethics Committee information, the public interest balance requires to be considered in relation to various items and exemptions as set out in the following table:

Item	s36(2)(b)	s43(2)
1.4	Yes	n/a
1.7, 2 nd and 3 rd sentences	Yes	Yes
1.8	Yes	1 st bullet only
2.2, 1 st bullet	n/a	Yes
2.3	n/a	Yes
3.1	n/a	Yes
3.2, 2 nd to 4 th sentences	Yes	n/a
4.3	n/a	Yes
4.6	Yes	Yes
4.8	Yes	n/a
4.13	Yes	Yes
4.14	Yes	1 st bullet only

⁹ from the third to the thirty-seventh word

6.2	Yes	Yes
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62. We have considered the parties' identification and assessments of the relevant evidence and of the public interest arguments either in favour of maintaining the exemptions or in favour of disclosure, as set out in their written submissions.¹⁰
63. In our view, the major considerations in favour of disclosure are the public interests in transparency of Tate's decision-making, and meaningful public accountability (we have cited above Tate's Ethics Policy, and the advice given to the Ethics Committee that their deliberations might be used to demonstrate proper scrutiny of the sponsorship relationship). On the other side of the balance, the major public interest considerations against disclosure arise from the particular sensitivity of certain items protected by s36(2)(b) and/or by s43(2). It is in the public interest that we give all appropriate weight to taking care not to undermine the important work of the Ethics Committee, and not to damage Tate's commercial interests. The lesser points made by the parties do not in our view affect which way the balance tips. In assessing the balance we have taken into account the extent of disclosures already made, or to be made pursuant to our decision.
64. With these considerations and our evidential findings in mind, taking first s43(2), we agree with Tate that the risks of damage to Tate's commercial interests by disclosure of redaction 4.3 outweighed the public interests in favour of disclosure, because it concerned specific details of commercial negotiations which were in progress at the time of the information request. Based on 'closed proposition 7', we take the same view, in regard to the 2nd and 3rd sentence of item 1.7, the 1st bullet of item 2.2, item 2.3, item 3.1, item 4.6, item 4.13, and item 6.2.¹¹ In contrast, we consider that the public interest in transparency and accountability outweighs the public interest in maintaining the s43(2) exemption for the 1st bullet of redaction 1.8 and for the 1st bullet of redaction 4.14, because we consider that the s43(2) interests, although engaged, are weak.
65. Moving on to s36(2)(b), we give some weight to Lord Browne's opinion that the release of the identified items of information would inhibit the ability to provide free and frank advice and/or to have free and frank exchange of views for the purposes of deliberation within Tate. In our view some of the items have clear sensitivity in this respect, to a degree which means that the public interest requires them to be protected rather than disclosed, so as not

¹⁰ Tate skeleton 9.9.14 paras 28-36, 42, 54-63; Montague skeleton 12.9.14 paras 57-61, IC skeleton 15.9.14 paras 27-28, 35, 41-42, 58; Tate closing (open) 20.10.14 paras 51, 68-79, Montague closing 21.10.14 paras 5-11, 71-76; IC closing (open) 30.10.14 paras 3, 25, 33, 44-47, 51-53, Tate's reply submissions 5.11.14 para 24; Montague reply submissions 5.11.14 paras 36, 38, 40.

¹¹ Mr Hopkins set out seven closed propositions in his 'Closed' closing submissions on behalf of Tate 20.10.14. We consider closed proposition 7 relevant under s43(2) because of its implications for potential practical impacts upon Tate's operations in a variety of ways.

to prejudice the functions of the Ethics Committee, which require free and frank exchange of views for purposes of deliberation and free and frank provision of advice. This applies to item 1.4, the 2nd and 3rd sentences of item 1.7, the last sentence of item 3.2, item 4.6, the 1st redacted sentence of 4.8, item 4.13, and item 6.2. However, we agree with the Commissioner that the sensitivity of other items, in regard to the interests protected by s36(2)(b), is not such that the maintenance of the exemption outweighs the public interests in disclosure for reasons of transparency and accountability; this applies to item 1.8, the 2nd and 3rd sentences of item 3.2 (except the words in square brackets which relate to sponsorship figures), the 2nd redacted sentence of item 4.8, and item 4.14.

66. The parties made conflicting legal and factual submissions concerning aggregation of exemptions in the present case for the purposes of considering the public interest balance. In our view, aggregation is appropriate to the extent and for the legal reasons set out in *Department of Health v IC EA/2013/0087*, 17 March 2014, at [49]-[58]. In the particular circumstances of the present case, where both s36(2)(b) and s43(2) are engaged in relation to a particular item (or a particular part of one item), the interests protected by those exemptions appear to us to be sufficiently closely related in a practical way that it is meaningful for us to aggregate the exemptions and consider the overall balance.¹² However, the aggregation exercise makes no difference to our decision, because it does not in any instance alter which way the balance falls.

Conclusions

67. For the reasons set out above:

- a. we allow in part Mr Montague's appeal, as regards sponsorship figures, to the extent of ordering disclosure of the figures for the years before 2007,
- b. we dismiss Mr Montague's appeal as regards the Ethics Committee information,
- c. we allow in part Tate's appeal as regards the Ethics Committee information, to the extent tabulated at the head of this decision.

Signed on original

/s/ Andrew Bartlett QC, Tribunal Judge

¹² We are conscious that this is not self-evident and, without knowledge of the closed material, it may be surprising. We cannot explain it further in an open decision. Given that aggregation makes no practical difference to our decision in this case, it is not necessary for us to do so.