

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 03 December 2019

Public Authority: National Portrait Gallery
Address: St Martin's Place
London
WC2H 0HE

Decision (including any steps ordered)

1. The complainant requested information about the fundraising policy. The National Portrait Gallery (the Gallery) refused the request under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) – prejudice to the conduct of public affairs.
2. The Commissioner is satisfied that sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged and the public interest lies in favour of maintaining the exemption. The Commissioner does not require the public authority to take any action.

Request and response

3. On 1 May 2019 the complainant requested the following information:
'Q1) Details and copies of materials relating to how the Gallery's 'Ethical Fundraising Policy' was reviewed, revised and replaced by its 'Grants and Donations Policy'. This should include copies of relevant minutes from participating committees and teams, directly related correspondence, as well as draft versions of the new policy inclusive of any comments or annotations made as part of this process.
Q2) Details and copies of any internal correspondence relating to the form the new Grants and Donations policy would take and, specifically, any materials that reference or outline the decision not to retain the following clauses in the newly created 'Grants and Donations' policy:
'The Gallery reserves the right to reject offers of support that meet any of the following criteria:

- *Where support is known or suspected to derive from the proceeds of a crime*
- *Where the supporting source is known or suspected to be closely associated with a regime known or suspected to be in violation of human rights*
- *Where support would impinge on the artistic or academic freedom of the Gallery or would otherwise compromise its status as an independent institution...'*

Q3) To confirm whether the Gallery has any further policies, guidance or documents relating to its approach to donations and fundraising, such as a due diligence process, research guidance or similar. If yes, I request that you disclose copies of relevant materials.'

4. On 30 May 2019 the Gallery responded that it held information within the scope of the request. For Q3 the Gallery provided a link to its policies. It withheld the information for Q1 and Q2 citing the exemption at section 36 (effective conduct of public affairs) and section 40 (personal data) for the names and email addresses of Gallery staff.
5. The complainant requested an internal review on 4 June 2019. His arguments included: *'...the specific information requested pertains to a decision-making process which is now complete and the outcome of which – the new 'Grants and Donations Policy' – has been approved by the Board of Trustees...'* and *'...the Gallery has not clearly established in its response how processes of deliberation would be inhibited. Also, my understanding is that such a connection needs to be articulated as part of a 'reasonable opinion' rather than a speculation....'*
6. The Gallery sent the outcome of its internal review on 24 June 2019 upholding its decision.

Scope of the case

7. On 3 July 2019 the complainant wrote to the Commissioner to complain about the way his request for information had been handled.
8. During the course of the investigation the Commissioner informed the complainant that it was her initial view that the Gallery was correct to refuse the personal information (the names and email addresses of the Gallery staff within the withheld information) under section 40. This was accepted by the complainant and is not within the scope of this case.
9. With regard to Q3 of the request, the complainant asked that the Gallery further clarify whether these are all of the policies or documents it holds in relation to this area of work. This has been accepted by the Gallery as a separate request and is not within the scope of this case.

10. The Commissioner considers the focus of the investigation to be whether the Gallery was entitled to rely upon the exemptions at section 36 for Q1 and Q2.

Reasons for decision

Section 36 – prejudice to the conduct of public affairs

11. The Gallery relied upon sections 36(2)(b)(i) and (ii) and (2)(c) of the FOIA.
12. 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.
13. 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.
14. In this case, the Gallery explained that the qualified person is Mr Nicholas Cullinan, Director of the Gallery. The qualified person's opinion was sought at the time of the initial request on 20 May 2019. (The Commissioner has seen a copy of the qualified person's reasonable opinion submission.) He was given a detailed descriptive summary of the withheld information and he gave his opinion on 24 May 2019.

15. 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) and 36(2)(c).
16. The Commissioner will first consider the application of section 36(2)(b)(i) and (ii). It will only therefore be relevant to consider the application of section 36(2)(c) if the Commissioner does not find sections 36(2)(b)(i) or (ii) to be engaged.
17. 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 be 'likely' to prejudice the free and frank discussions. This is taken to mean that the qualified person considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk, even if that risk is less than 50%.
18. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
19. The Gallery has explained that the withheld information relates to the internal communications with respect to the re-drafting and amendment of the Gallery's Ethical Fundraising Policy.
20. The Gallery stated that it is the qualified person's opinion that disclosure of the requested information in this case would be likely to prejudice the effective conduct of public affairs for a number of reasons:
 - Those undertaking these discussions required a safe, secure environment in which to engage in free and frank communications without fear of subsequence release. This space is needed, as without it, public officials may have been less candid when engaging in the provision of, often sensitive or even contentious, advice.
 - This would likely result in a re-drafted policy document, which owing to this fear, would have been less than robust. During these internal discussions, it is the Gallery's position, that the use and preservation of this safe, frank and secure environment is particularly relevant when the specific policy under review is

considered. The Gallery's Grants and Donations Policy forms an integral part of how the Gallery is funded and how, ethically, offers of funds should be measured. These considerations on an ethical, moral level require a policy which, by way of a candid internal decision-making process (undertaken in a free and frank discussion environment) has been subjected to the highest standards of scrutiny.

- It is, therefore, the Gallery's position that the internal decision-making process, which underpins and sits behind the final policy, is precisely what the engaged exemption is designed to protect.
 - The Gallery has never sought to inhibit the public's engagement and understanding of its donations policies; this is evident by the fact that policies are made publically available on our website.
21. The Commissioner has reviewed the withheld information and is satisfied that it was reasonable for the qualified person to reach the view that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation. Internal discussions on how to meet evolving demands on the fundraising policy needed a safe space to ensure that there could be a candid analysis of the issues faced and leading to a robust policy. It would not be helpful to publish these discussions to a wider audience.
22. As a result, the Commissioner is satisfied that section 36(2)(b)(i) and (ii) of the FOIA is engaged and has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest test

23. 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.
24. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an

¹ EA/2006/0011; EA/2006/0013

important piece of evidence in her assessment of the balance of the public interest.

25. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the withheld information, and will therefore 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

26. The Gallery stated that it is committed to the underlying element of openness and transparency of FOIA and the release of this information would engage with the public in the workings and considerations undertaken by the Gallery.

Public interest arguments in favour of maintaining the exemption

27. The Gallery considered that it is in the public interest to allow Gallery officials engaged in sensitive discussions a safe space in which they can debate freely and frankly relating to the sensitive, ethical funding issues:
- Gallery officials must be able to provide relevant advice in a protected space (without fear of future disclosure).
 - Without this protected space Gallery officials would likely feel constrained in their ability to advise freely, frankly and fully when providing such advice.

Balancing the public interest arguments

28. The Gallery has stated that the qualified person acknowledges the strong public interest in openness and transparency but considered that there is a stronger public interest in its officials being able to seek advice and deliberate a sensitive topic in a safe place in order to deliver an effective and robust policy.
29. The Commissioner has considered both the complainant's and the Gallery's arguments.
30. The Commissioner notes that the revised policy and other related policies have been provided to the complainant and are published on the Gallery's website.
31. The complainant argues that *'the specific information requested pertains to a decision-making process which is now complete'*. However, the Gallery argues that the *'sensitive discussions, which produced*

meaningful well-balanced decisions, were only possible as public officials were able to engage in them with the knowledge that they would not be disclosed' and 'future discussions with respect to equally sensitive topics would therefore likely be prejudiced as free and frank opinions would be less forthcoming, tempered down or withheld due to a fear of future release'.

32. The Commissioner considers that disclosure in this case is therefore likely to undermine confidence in this preserved safe space for future discussions.
33. The Commissioner recognises the public interest in transparency but also recognises the value in allowing the Gallery the safe space during the decision making process in which to discuss and develop its proposals on this and future policies.
34. On balance, the Commissioner is satisfied that the public interest favours withholding all this information. The Commissioner finds that the Gallery is entitled to withhold the requested information under sections 36(2)(b)(i) and (ii).
35. As the Commissioner finds that sections 36(2)(b)(i) and (ii) are engaged, she has not gone on to separately consider section 36(2)(c).

Right of appeal

36. 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

37. 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.
38. 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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