

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 November 2021

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

Decision (including any steps ordered)

1. The complainant has requested information relating to any amendments made to the sponsorship agreement for the BP Portrait Award.¹
2. The National Portrait Gallery ('the Gallery') refused to disclose the requested information citing section 43(2) (commercial interests) of the FOIA.
3. The Commissioner's decision is that section 43(2) does not apply to all of the information that the Gallery is withholding. The Commissioner therefore requires the public authority to take the following steps to ensure compliance with the legislation:
 - To disclose the information which does not engage the exemption provided by section 43(2). This information is identified in a confidential annex which has been provided solely to the Gallery.
4. The Gallery 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.

¹ [BP Portrait Award 2020 - Exhibition \(npg.org.uk\)](http://npg.org.uk)

Request and response

5. On 13 November 2021, the complainant wrote to the Gallery and requested information in the following terms:

"Under the Freedom of Information Act 2000, I would like to request the following information:

(1) Has the Gallery ended its 'Sponsorship Agreement for BP Portrait Award 2018-22' or amended the terms of the agreement in order to accommodate the Gallery's decision to cancel the BP Portrait Award in 2021 and 2022?

(2) If the answer to (1) is yes, please provide a copy of the written notice provided by either the Gallery or BP (as required by section 7 of that Agreement) where any new terms are formally agreed or notification is given that the agreement is to be terminated. Please also disclose any direct replies to that written notice made by the receiving party.

6.1 of that Agreement notes that 'The Sponsor shall appoint an individual who shall be responsible for coordinating the Sponsor's obligations hereunder. The Gallery shall appoint an individual who shall be responsible for coordinating the Gallery's obligations hereunder...'

Searches should, in the first instance, be undertaken for correspondence between the individuals that have been appointed by the Gallery and by BP for this purpose.

If a higher level of authority is required to make official notifications in relation to the agreement, searches should then be undertaken for notice which has been given by a representative of the Gallery who holds the necessary authority.

This might logically include: The Head of Corporate Partnerships/the Development Team The Director and/or Deputy Director The Chair of Trustees

(3) Please also disclose copies of subsequent correspondence between the parties specified above which discuss with BP the Gallery's plans for sponsorship of the Award in 2023 or beyond."

6. The Gallery responded on 8 December 2021. It confirmed that it held information in relation to part (2) of the request. The Gallery confirmed that this information was exempt under section 43(2).
7. The Gallery confirmed that it held no information in relation to part (3) of the request.

8. Following an internal review the Gallery wrote to the complainant on 16 February 2021. It upheld its original position.

Background information

9. The BP Portrait Award ('the Award') is an annual portraiture competition held at the Gallery. The Gallery's website refers to it as '*the most prestigious portrait painting competition in the world.*'²
10. The Award has been sponsored by oil and gas company BP since 1990.³
11. The Award was suspended for 2021-2022 whilst the building in St Martin's Place is closed for the Gallery's Inspiring People redevelopment⁴. In the Gallery's refusal notice of 8 December 2021 it confirmed '*The Gallery has amended the terms of the Sponsorship Agreement for the BP Portrait Award*' following the Award's suspension.

Scope of the case

12. The complainant contacted the Commissioner on 31 March 2021 to complain about the way that their request for information had been handled.
13. During the course of this investigation, the Gallery identified information, a letter from the Gallery to BP, held in relation to part (3) of the request.
14. The Gallery confirmed this to the complainant on 7 October 2021 and confirmed that the letter was exempt from disclosure under section 43(2).
15. The Gallery also confirmed that it believed all withheld information was exempt under section 43(2). It also changed its position and stated that all personal information contained within, such as third party names, email addresses and other identifiable information, was exempt under section 40(2) (personal information) of the FOIA.

² [BP Portrait Award 2019 - Exhibition \(npg.org.uk\)](http://npg.org.uk)

³ [BP Portrait Award 2020 - Sponsor \(npg.org.uk\)](http://npg.org.uk)

⁴ [BP Portrait Award 2020 - Update 2021-22 \(npg.org.uk\)](http://npg.org.uk)

16. On 12 October 2021 the Commissioner wrote to the complainant and asked them to confirm if they would like the Commissioner to investigate the Gallery's new reliance upon section 40(2). The Commissioner explained that, if she did not hear otherwise, this investigation would focus solely on the Gallery's application of section 43(2).
17. The complainant did not respond and therefore the Commissioner believes the scope of her investigation to be to determine whether the Gallery is entitled to rely upon section 43(2) as a basis for withholding the requested information.

Reasons for decision

18. Section 43(2) of the FOIA states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)'

19. The Commissioner's guidance⁵ 'Section 43(2) - Commercial interests' states 'A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.'
20. In order for a prejudice based exemption such as section 43(2) to be engaged there must be likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,

⁵ [Section 43 - Commercial interests | ICO](#)

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e disclosure *'would be likely'* to result in prejudice or disclosure *'would'* result in prejudice.

21. Consideration of the exemption at section 43(2) is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
22. The Commissioner has been provided with a copy of the withheld information which totals nine pages. It includes letters exchanged between staff at the Gallery and BP who have responsibility for coordinating this sponsorship agreement ('the letters') and a copy of an agreement variation ('the agreement variation').

The applicable interests

23. Returning to paragraph 20, the Gallery has outlined how it believes disclosure of the requested information, which includes details of the amendments made to the sponsorship agreement between BP and the Gallery following the Award's suspension in 2021, would damage the Gallery's own commercial interests. Amendments to the sponsorship agreement between BP and the Gallery are commercial in nature because they outline the financial details, benefits, details of sale and negotiations as a result of these amendments.
24. The Commissioner is satisfied that the arguments presented by the Gallery outline how disclosure would prejudice the applicable interests within the relevant exemption.

The nature of the prejudice

25. The Commissioner must now consider if there is a causal link between the information that is being withheld and the prejudice that section 43(2) is designed to protect.
26. The complainant is concerned with the lack of evidence produced by the Gallery in support of its application of this prejudice based exemption.
27. The Commissioner notes that, as the prejudice represents something that has not happened, it is often difficult to provide evidence in support of the prejudice. To do so would require disclosure which would undermine the purpose of the exemption. However, the Commissioner must be satisfied that a causal relationship exists between the disclosure of the information being withheld and the prejudice which the exemption is designed to protect.

28. As part of her investigation the Commissioner asked the Gallery to clearly indicate where the exemptions applied in relation to the withheld information. The Gallery confirmed that it was applying the exemption to all nine pages of the withheld information in its entirety.
29. Having reviewed the withheld information, the Commissioner acknowledges that the agreement variation details the benefits that BP may recoup in accordance with the sponsorship agreement. It also contains reference to the payment schedule in place as does one of the letters.
30. The Gallery has explained that *'If benefits and terms are made public by way of a release of the requested information then future funders, donors or sponsors would likely begin negotiations with these terms in mind'*. The Gallery notes this would then place it in a weakened negotiating position with potential funders, donors and sponsors in a competitive marketplace.
31. Expanding on this, the Gallery has confirmed that it *'relies on a mixed funding model approach, balancing public funding, earned income from commercial operations and private and corporate funding in order to fund its programmes.'* The Gallery has explained that it is increasingly reliant upon alternative revenue streams, most notably high profile sponsors, in order to perform its public task of making portraiture accessible to the nation.
32. The Commissioner notes that within the Gallery's internal review outcome of 16 February 2021 it explained *'In the 2019-20 accounts, Grant in Aid (from DCMS) accounts for only 42% of the unrestricted income required to support the activities of the Gallery. In order to fulfil our statutory duties (in the 1992 Museums and Galleries Act), it is vital that the Gallery does act as a commercial enterprise.'*
33. The Commissioner accepts that the Gallery is required to *'enter sponsorship negotiations with high-profile companies from the world of corporate business who would, naturally, seek to obtain the best deal and use all resources and available information to do so.'*
34. The Commissioner also accepts that, should details of payment schedules and sponsor benefits be disclosed, this essentially releases a price list into the public domain for the types of benefits offered to potential or existing sponsors. This could lead to existing and future sponsors requesting similar terms for similar prices which would hinder the Gallery's ability to negotiate fairly and obtain the most favourable deal. In turn, this is likely to have a negative effect on the services that the Gallery can offer to the public.

35. However, the Commissioner does not accept that all of the information that is being withheld would prejudice potential negotiations between the Gallery and its sponsors.
36. For example, some of the withheld information only acts as confirmation that BP is a high profile sponsor of the Gallery and the award. This information is already in the public domain and furthermore, publicised by both the Gallery and BP.
37. The Gallery believes that disclosure would discourage future sponsors, stating *'Potential future funders, donors or sponsors would be less likely to engage with the Gallery as there would be a fear that information relating to their particular sponsorship deal would be released.'*
38. The Commissioner does not accept this generic argument. Should an individual donor wish to remain anonymous they can do so but it is likely that corporate sponsorship agreements are entered into on the basis that the existence of the relationship is made public for mutual benefit. A certain level of scrutiny is to be expected from such relationships where this relates to the operations of a public authority.
39. Furthermore, some of the withheld information is so general and common sense to anyone aware of the relationship between BP and the Gallery, and the suspension of the Award, that there is no causal link between disclosure and the prejudice that section 43(2) is designed to protect.
40. With this in mind, the Commissioner has provided the Gallery with a confidential annex which separates the information that the Commissioner believes to engage the exemption and that which does not. The confidential annex has been produced to identify what information should be disclosed in response to this request but has only been provided to the Gallery in order to reserve its right to a fair appeal.

Likelihood of the prejudice

41. The Gallery has confirmed to both the complainant and the Commissioner that it has applied the exemption on the basis of the lower threshold of prejudice, that disclosure *'would be likely'* to result in prejudice.
42. There appears to be confusion as to what this lower threshold of prejudice represents. In its submission to the Commissioner the Gallery has explained *'the Gallery's position is that the risk in releasing this information with respect to the likely prejudice caused to commercial interests is also more likely than not, but also substantially more than remote.'*

43. At this stage the Commissioner would like to reemphasise the definition of the lower threshold of prejudice as outlined in her guidance, *'there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.'*
44. In support of its application of the lower threshold of prejudice, the Gallery has explained that the contracts and agreements to which the request relates are still ongoing. The Commissioner acknowledges that, in a commercial environment, the timing of a disclosure is of critical importance.
45. The Commissioner also notes that BP is not the Gallery's sole, permanent sponsor. It is still necessary to protect the Gallery's ability to negotiate effectively with potential funders, donors and sponsors which is vital in supporting the activities of the Gallery. The Commissioner considers this especially important in the context of the Gallery's recovery from the effects of the coronavirus pandemic.

Is the exemption engaged?

46. To reiterate, the Gallery has confirmed to the Commissioner that section 43(2) covers the withheld information in its entirety. However, the Commissioner disagrees.
47. In support of its decision to apply section 43(2) to the entirety of the withheld information, the Gallery has explained *'The nature of the commercial sensitive information held within the record is best described as unstructured and integral to the understanding of the record.'*
48. The Gallery has cited the Commissioner's previous decision relating to The National Archives⁶ in support of its application of section 43(2) in this manner. In that case the requested information was a historic, closed file held for archiving purposes. Such files are often held in mixed formats and are large in size. Due to the nature of these closed, historic records, the Commissioner accepts that the redaction of exempt information is often difficult to do in a way which retains the records inherent value.
49. The Gallery has asserted that *'Commercially sensitive information is present on all most every page.'* However, the Commissioner is mindful

⁶ https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1624559/fs_50617945.pdf

that the withheld information is only nine pages as opposed to an entire closed file.

50. The Gallery has also stated '*Should this information be redacted the remaining contextual information could, in the hands of skilled determined researchers, lead to the release of information the exemption is designed to protect.*' However, the Gallery has provided no further detail surrounding this concern.
51. The FOIA handles requests for information, not entire documents, that a public authority holds and public authorities must be wary not to apply exemptions in a blanket fashion. The Commissioner is concerned that the above, vague argument could be used in support of withholding entire documents under the FOIA, rather than looking at information contained within those documents in isolation.
52. This is echoed in the Commissioner's guidance on section 43(2) which states '*Where the information requested is a contract, rather than applying section 43(2) in a 'blanket' fashion and viewing the contract as a whole, you need to consider each clause within the contract individually, with a view to identifying whether it may be disclosed.*'
53. The Commissioner does not believe that all of the information that is being withheld is captured by the exemption and does not accept the Gallery's arguments as to why redactions cannot be made. Therefore she orders disclosure of the information identified within the confidential annex.

Public interest test

Public interest in disclosing the information

54. Where the Commissioner is satisfied that the exemption is properly engaged, she must consider the public interest arguments.
55. The Gallery has acknowledged the general principles of accountability and transparency that underpin the FOIA as factors in favour of disclosure.
56. Expanding on this, the Gallery has acknowledged the disclosure of the requested information would improve public understanding on the internal workings and funding of the Gallery.
57. The Commissioner also notes that some individuals and groups disagree with British Arts Institutions that receive sponsorship from oil

companies⁷. As part of this wider debate, there is a specific interest in the relationship between BP and the Gallery.

58. The Commissioner notes that the Gallery has failed to acknowledge such concerns in its public interest arguments. Disclosure of the requested information would help to inform such debates and allow detailed scrutiny of the relationship between BP and the Gallery.

Public interest in maintaining the exemption

59. The Gallery has reemphasised its belief that there is a public interest in public authorities not being disadvantaged by their FOIA obligations when in commercial negotiations with the private sector.
60. The Gallery also believes that disclosure would discourage future sponsors, stating '*Potential future funders, donors or sponsors would be less likely to engage with the Gallery as there would be a fear that information relating to their particular sponsorship deal would be released.*'
61. The Commissioner accepts the first argument but does not accept the second. She considers it too generic and an insufficient justification as to why commercial information can be automatically withheld under section 43(2).

Balancing the public interest arguments

62. The Commissioner considers the balance of the public interest very fine in this case. She acknowledges the complainant's concerns that other cultural institutions, such as the Tate, have ended their affiliations with BP and disclosed information relating to the previous sponsorship that it had received.⁸ However, the circumstances here are different. The Tate disclosed details of past, expired arrangements and sponsorship amounts. Whereas in this case the exempt information is not historic but relates to fees and arrangements that are due to be finalised in Autumn 2022.
63. The complainant is concerned that the public is not being allowed access to specific information relating to the BP's sponsorship of the Gallery, such as the duration, scale, value or conditions of the agreement.

⁷ [Why British artists say oil money shouldn't fund the arts: Its furthering of the climate crisis is unacceptable | The Independent | The Independent](#)

⁸ [BP to end Tate sponsorship after 26 years | Tate Modern | The Guardian](#)

64. However, it is that exact information that would be likely to prejudice the commercial interests of the Gallery and the Commissioner must balance the competing public interest arguments to determine whether disclosure is appropriate.
65. On the one hand, the Commissioner acknowledges the complainant's concerns that *'There is a strong and demonstrable interest in the ethics of corporate sponsorship of cultural institutions... Many major cultural institutions have downgraded or ended high-profile partnerships with fossil fuel companies in recent years, which has also been the subject of extensive media coverage.'*
66. The Commissioner acknowledges that individuals and groups may be interested to compare how the ethics of two organisations that are affiliated align. However, the Commissioner believes that the exempt information is not required for an individual to draw their own conclusions on this matter.
67. The Commissioner also acknowledges that the influence of fossil fuel companies upon cultural institutions is an emotive subject. However, it is not the details of the sponsorship that is the concern here but the fact that the sponsorship exists at all and the Commissioner believes that this debate will endure without the disclosure of the exempt information. As previously stated, the Commissioner has ordered the disclosure of any information that does not engage the exemption.
68. Ultimately, whilst it is an important cultural institution the Gallery is also a commercial enterprise which is increasingly dependent on corporate sponsors in order to stay operational.
69. The Commissioner accepts that the exempt information could potentially be used to the commercial detriment of the Gallery. She considers that such consequences are not in the public interest and is satisfied that any exempt information may be withheld.

Right of appeal

70. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

71. 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.
72. 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

Alice Gradwell
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