

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 November 2023

Public Authority: Arts Council England
Address: The Hive 49
Lever Street
Manchester
M1 1FN

Decision (including any steps ordered)

1. The complainant has requested information about a painting; the Portrait of Mai (Omai). Arts Council England (ACE) disclosed some relevant information and initially relied on section 40 (personal data), section 41 (information provided in confidence) and section 43 (commercial interests) of FOIA to withhold a valuation report and other information.
2. ACE later also applied section 36 (prejudice to the effective conduct of public affairs) of FOIA to the majority of the information it confirmed that it's withholding. ACE then confirmed that it's withholding the remainder of the information in scope under section 21 (already accessible to the applicant), section 22 (intended for future publication) and 40.
3. The Commissioner's decision is that ACE correctly applied sections 36(2)(b)(i) and 36(2)(c) of FOIA to information it's withholding under those exemptions ie:
 - the Mould valuation report
 - The majority of the information in Annex A1 ('Annex A Information required by the Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest in order to consider case

referred') and Annex B together with the Applicant's application, Annex A2 ('Annex A Reviewing Committee on the Export of Works of Art and Objects of Cultural Interest (RCEWA)'); and

- the Applicant's valuation report.
4. The majority of the information in the expert adviser's statement, which forms part of Annex A2, is exempt under section 21 of FOIA; however, some of that information doesn't engage section 21.
 5. The remaining information in the expert adviser's statement isn't exempt from disclosure under section 22 or 40(2).
 6. There was no breach of section 10(3) or 17(3) in respect of the timeliness of ACE's response.
 7. The Commissioner requires ACE to take the following steps to ensure compliance with the legislation:
 - Disclose the application questions in Annex A1 and Annex B.
 - Disclose the small amount of information in the expert adviser's statement in Annex A2 that the Commissioner has found section 21 can't be applied to. This information is given in a Confidential Annex to this notice.
 - Disclose the expert adviser's name, role and institution in the expert adviser's statement in Annex A2.
 8. ACE 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.

Background

9. The Portrait of Mai (Omai) was painted in around 1775 by the English artist Sir Joshua Reynolds. It depicts a Pacific Islander (Mai) who arrived in London in 1774, having travelled with Captain Cook on his second voyage of discovery to the Pacific.
10. In March 2022, the Government placed an export bar on the painting, preventing it from being transported abroad for 12 months, allowing time for a UK buyer to put together a bid to purchase the painting. On 25 April 2023, the National Portrait Gallery and the Getty Museum in Los Angeles announced a joint acquisition of the painting – which will now be shared between the two galleries.

11. In a submission to the Commissioner, ACE has provided the following general background about UK export licencing for cultural goods.
12. The purpose of the export control system is to provide an opportunity to the UK to retain cultural goods judged to be of outstanding national importance that would otherwise be exported, and to provide a guarantee of the legality of the export. The system is designed to strike a balance, as fairly as possible, between the various interests concerned in any application for an export licence: the protection of national treasures; the rights of the owner selling the goods; the exporter or overseas purchaser; and the position and reputation of the UK as an international art market.
13. The Secretary of State for Culture, Media and Sport (DCMS) makes decisions on individual export licence applications.
14. Individual export licences are required where the cultural object does not fall within either the Open General Export Licence (Objects of Cultural Interest) (OGEL) or Open Individual Export Licence (OIEL). The Secretary of State has established OGEL and OIEL in order to reduce the burden on would be exporters of cultural objects.
15. The Secretary of State has authorised ACE to exercise certain cultural property functions on their behalf. These are Articles 2 and 3 of the Export of Objects of Cultural Interest (Control) Order 2003.
16. The Secretary of State, by agreement with ACE, requires ACE to provide secretariat functions for the Reviewing Committee on Export Works of Art (RCEWA). The RCEWA is a non-statutory independent body which advises the Secretary of State.
17. In addition to the eight permanent members of the RCEWA, each of whom has expertise in one or more types of object of cultural interest, the RCEWA is assisted by, wherever possible, three Independent Assessors.
18. Where an object of cultural interest meets certain criteria, it's referred to an Expert Adviser; usually a director, senior keeper or curator in a national museum or gallery for scrutiny as to whether the object is of national importance. In turn, the Expert Adviser refers the object to the RCEWA should they find it meets one or more of the three Waverley criteria¹.

¹ https://www.artscouncil.org.uk/sites/default/files/download-file/Export_criteria_March_2015.pdf

19. The RCEWA isn't a valuation committee. Its objective is to recommend a valuation which is fair and reasonable to the owner and national heritage interests alike by examining carefully the elements included in the value stated in the licence application. Therefore, there's a process in place to guarantee that the applicant provides enough evidence to support their value.
20. There's also an independent valuation process that RCEWA can recommend to the Secretary of State if it's not satisfied that enough evidence has been provided to substantiate a value.
21. As is generally recognised by the courts in relation to property valuations, valuations are not an exact science. It's possible to have two or more expert valuers arrive at different conclusions as to value and for those valuations to be "correct". By which ACE means the values haven't suffered from some fatal flaw and/or mistake of the valuer in reaching their conclusion.
22. As is now publicly known, and discussed above, the Portrait of Mai (Omai) by Sir Joshua Reynolds required an individual export licence application.
23. The Expert Advisor considered that the painting is of national importance and referred the object to the RCEWA. The RCEWA concurred and recommended the same to the Secretary of State to defer the individual export licence application. This deferral was to attempt to "save for the nation" the painting as it was considered a national treasure; meeting three Waverley criteria.
24. The Secretary of State accepted the RCEWA's recommendation, and instructed an independent expert, Anthony Mould of Anthony Mould Ltd. ACE carried out this administrative work for and on behalf of the Secretary of State.
25. Anthony Mould Ltd provided Anthony Mould's independent advice and guidance to the Secretary of State (through ACE). The Secretary of State shared the same with the RCEWA and the applicant.
26. The outcome of the expert and the RCEWA's recommendations (which includes the three Independent Assessors) is that the Secretary of State made their decision as to the fair market value of the painting. That fair market value is £50million.
27. According to the process agreed with DCMS for all cases, the RCEWA and ACE made the case notes public. As part of producing case notes for the cultural object in question, ACE consult with all parties to determine what information provided in confidence and/or what information that may be commercially sensitive may be shared and published externally.

Request and response

28. On 2 April 2023, the complainant wrote to ACE and requested information in the following terms:

"[1] I should be grateful if you would kindly supply me with a copy (pdf or scan by email is simplest) of any condition reports (ie documents discussing the technical state of the painting) on Sir Joshua Reynolds's portrait of Omai currently the subject of export deferral.

I have seen the RCEWA report <https://www.artscouncil.org.uk/media/20359/download?attachment> where there is a very brief allusion to condition (on p.4) but not a full report as such.

"[2] I should also like to see the letter of instruction to Anthony Mould and his report."

29. On 25 April 2023 ACE wrote to the complainant to advise that it needed additional time – up to a further 20 working days – to consider the public interest test associated with section 43 of FOIA.

30. ACE provided a substantive response on 19 May 2023. It provided condition reports carried out in 2012 and 2018 (with personal data redacted) and withheld the most recent report ('the Mould valuation report') under sections 41 (information provided in confidence) and 43 of FOIA. In relation to the letter of instruction, it provided most of the information but withheld the fee that had been agreed. It relied on both section 40(2) (personal data) and section 43 of FOIA to withhold that information.

31. Following an internal review ACE wrote to the complainant on 14 July 2023. In respect of the Mould valuation report, ACE maintained its position that section 41 was engaged. ACE confirmed that section 43 was also engaged for the reasons it gave in respect of the withheld information in the letter of instruction ie the fee. Regarding the fee, ACE no longer considered that section 40(2) of FOIA would apply but maintained that section 43 of FOIA would and explained why that was the case.

Scope of the case

32. The complainant contacted the Commissioner on 15 July 2023 to complain about the way their request for information had been handled.

33. With regard to the letter of instruction, whilst they didn't agree with ACE's reasons for withholding the fee, the complainant confirmed to the Commissioner that they didn't wish to pursue this point further.
34. During the course of the investigation, ACE confirmed that it also wished to rely on section 36 of FOIA in respect of the Mould valuation report. It confirmed this to the complainant in correspondence dated 14 September 2023.
35. However, as well as the Mould valuation report, it emerged that the information that ACE withheld includes the 2018 condition report, and other information. The 2018 condition report and the other information was sent with the letter of instruction to Anthony Mould. The complainant has already been provided with the 2018 condition report and so the Commissioner doesn't intend to consider that information.
36. The other information comprises the Annex A1, Annex A2 and Annex B document, the Applicant's valuation report and the expert adviser's statement that forms part of the Annex A2 document.
37. The other information doesn't fit the request's description of being on the "technical state of the painting". However, the Commissioner is satisfied that it falls within the scope of the request because, like the 2018 condition report, it was sent with the letter of instruction. The letter of instruction itself states that "A background summary of the case and relevant case material are attached." The information forms part of that "relevant case material" and the complainant has confirmed that they're interested in this material.
38. ACE confirmed its final position to the Commissioner in correspondence dated 3 November 2023.
39. ACE confirmed that it didn't consider that the application questions that form part of the Annex A1 and Annex B documents are exempt information and will disclose these questions on request. The Commissioner hasn't identified any questions in Annex B but, in the circumstances, the Commissioner advises ACE to disclose to the complainant the application questions to which it's referring and doesn't intend to consider that matter further.
40. The Commissioner considers that the scope of his investigation is to determine whether the Mould valuation report, the remaining information in the Annex A1 document including the application answers, the Annex B document and the Applicant's valuation report are exempt from disclosure under section 36, 41 or section 43 (or all of these exemptions).

41. The Commissioner will also consider whether information in the expert adviser's statement – in the separate Annex A2 document - is exempt under section 21 of FOIA, and section 22 or 40.
42. Finally, the complainant disagreed that ACE was entitled to have a further 20 working days to consider the public interest test and the Commissioner will consider that matter.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

43. Under section 36(2)(b)(i) and 36(2)(b)(ii) information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, respectively.
44. Under section 36(2)(c) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the effective conduct of public affairs. Section 36 is subject to the public interest test.
45. ACE has applied the above three exemptions to the Mould valuation report. ACE has also applied these exemptions to information in the Annex A1 and Annex B documents (these two documents together with the Applicant's application), Annex A2 and the Applicant's valuation report which was sent with the letter of instruction to Anthony Mould.
46. As noted, the exemptions at section 36(2) can only be engaged on the basis of the reasonable opinion of a qualified person. In its submission to the Commissioner ACE advised that its qualified person (QP) was Darren Henley, ACE's Chief Executive. The Commissioner is satisfied that this individual is authorised as the QP under section 36(5) of FOIA.
47. ACE has provided the Commissioner with a copy of its communications with the QP about the request. The QP gave their opinion on 14 September 2023. From these communications the Commissioner accepts that the QP gave their opinion that the exemptions were engaged.
48. The QP was provided with a copy of the request with the background and context; a description of the information in scope of the request including that being withheld; an explanation of the three exemptions and why they're engaged and arguments both for withholding and disclosing the information. On the basis of the submission provided to

them, the QP's opinion was that disclosing the information both would cause the prejudice envisioned under section 36(2)(b) and section 36(c) **and** would be likely to cause that prejudice.

49. Regarding sections 36(2)(b)(i) and 36(2)(b)(ii), the QP was advised that the withheld information reflects third party, expert advice and guidance on the history, condition and valuation of the painting. The third-party advice and guidance includes discussion of the art market and the rationale for a proposed valuation.
50. The submission to the QP advised that part of the withheld information – the Mould valuation report – includes free and frank provision of advice to the Secretary of State. The advice and views for the Secretary of State to consider concerned the question of the fair market value for the painting. The QP submission noted that, ultimately, it's for the Secretary of State to determine the question of fair market value. The free and frank comments in the information were shared under the assumption they wouldn't be released to the world at large.
51. The QP was advised that the remainder of the withheld information – ie other information sent with the letter of instruction - was [originally] prepared to be submitted to the RCEWA and that disclosing it "would or would be likely to" inhibit the free and frank provision of advice. This would mean that similar enterprises may be inhibited from providing their full advice "in the knowledge that it will be made available to the public." The information isn't available to the public and contains propriety knowledge of the art market.
52. Regarding the withheld information as a whole – the Mould valuation report and the other information - and section 36(2)(b), the QP was advised that:
 - The text in the documents is identified as free and frank advice. Opinions shared were supplied under the assumption they wouldn't be released to the world at large. Furthermore the export licencing process is subject to a duty of confidentiality.
 - The information was written and presented for the RCEWA to advise and guide the Secretary of State. The outcome was the recommendation to appoint an independent expert. The Secretary of State appointed the expert to assist them in the question of fair market value for the painting. As such the information contains sensitive market information.
 - The possibility of disclosing the information would result in a "chilling effect" that would be likely to impact the work of ACE (on behalf of DCMS) in the future.

53. Regarding section 36(2)(c), the QP was advised that the Mould valuation report and the other information engaged this exemption for four reasons.
54. First, ACE, DCMS and RCEWA were having preliminary discussions about whether to improve transparency. This included (but wasn't limited to) DCMS's independent expert opinion and expert guidance on condition and fair market valuation. The QP was advised that releasing the information at that point would prejudice those discussions and outcomes. Disclosure may result in the same or similar category of information being more susceptible to release under FOIA. This would mean ACE, DCMS and RCEWA don't have the opportunity to reach transparency decisions, including possibly discussing transparency matters with experts.
55. Second, the QP was advised that ACE and DCMS are conscious that for certain cultural objects it may be difficult to obtain suitably qualified and independent experts. For the painting in this case, ACE's Museum and Cultural Property team explained that, as the painting had been subject to the export licence process on multiple occasions, the pool of qualified and independent experts was further depleted. This is because the experts had previously been involved either with the applicant/s or in that previous application process and declined the instruction owing to conflict of interests. (This matter is discussed further from paragraph 71.) Disclosing the Mould valuation report under FOIA would or would be likely to impact the export license process because fewer experts would be available. This in turn would impact the export licencing process in the event that the RCEWA or DCMS, or both, determined that an independent expert's opinion was necessary. It was explained to the QP that this was part of the reason why ACE, DCMS and RCEWA wished to discuss transparency to better understand its impact on experts and the wider export license process.
56. Third, the QP was advised that disclosing the other information would or would be likely to impact the export license process. Applicants (and their experts) may determine that they should provide less (and not more) information because of their concern about disclosure. The effect would be less cooperation and more delay to the export license process because there will be more points where ACE (on behalf of DCMS or RCEWA, or both) needs the applicant to provide information.
57. Finally, the QP was advised that disclosure would or would be likely to impact the longstanding trust necessary for effective collaboration between third parties and ACE, DCMS and RCEWA.
58. In correspondence to ACE and the Commissioner dated 29 September 2023, the complainant stated that ACE can't make a late application of section 36. They referred to the Commissioner's guidance on section 36

which they said overrules general guidance that allows a public authority to raise new issues with the Commissioner. The complainant considered that this is not only to stop public bodies abusing FOIA by continually introducing new material; but also, in the case of section 36, the relevant circumstances would have been foremost in the mind of any information officer if they'd been relevant.

59. Assuming it's "a professional document prepared in accordance with the letter of instruction" the complainant didn't consider that the withheld information could be categorised as "detailed minutes of disagreement or handwritten notes taken in meetings" which might stifle debate if they weren't protected.
60. The complainant considered that the withheld information is information that the author must have been prepared to defend if he'd been challenged on its contents by the Secretary of State or the RCEWA. It would be couched in language accordingly. It won't have been a record of indecision or vagueness and it wouldn't have included tentative views later withdrawn in the heat of debate. The complainant argued that a professional valuation produced for a fee simply does not involve the "free and frank exchange of views for the purposes of deliberation". It should be carefully drafted in a formal manner that doesn't easily fit within the phrase "free and frank provision of advice".
61. The complainant went on to say that since the advice provided is a hard number representing a considered opinion that the valuer is prepared to defend to the Secretary of State and RCEWA, it's impossible to see how a wider audience would change that number and so "inhibit" the advice. A valuation which isn't defensible to a wider audience wouldn't meet acceptable standards.
62. For these reasons, the complainant considered that the QP's opinion can't be a reasonable opinion.
63. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
64. The section 36 guidance from 2013 that the complainant referred to in their correspondence of 29 September 2023 has been superseded by

updated guidance published in August 2023². Taking account of the updated guidance, the Commissioner will address the complainant's first point. Although it's not ideal for public authorities make a late application of any exemption, including section 36, it isn't unusual for them to do so, and they're entitled to. For example, the Department for Education also applied section 36 for the first time during the course of the Commissioner's investigation in IC-248363-L3Y6³. However, in all cases the QP must consider the circumstances as they were at the time of the request.

65. Regarding the complainant's second point as to what constitutes views and advice, in relation to the exemptions under section 36(2)(b), the Commissioner's updated guidance explains that:

"Examples of 'advice' include recommendations made by junior staff to more senior staff, professional advice tendered by professionally qualified employees, **advice received from external sources**, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views. [The Commissioner's emphasis.]

The 'exchange of views' must be as part of a process of deliberation."

66. Furthermore, ACE has also applied section 36(2)(c) which concerns disclosure that would otherwise cause prejudice to occur ie that exemption doesn't concern advice or views.
67. The Commissioner has reviewed the QP's submission, and it seems to him that the submission is focussed on possible prejudice to the provision of advice and on other prejudice ie the exemptions under section 36(2)(b)(i) and 36(2)(c). There isn't a strong case that section 36(2)(b)(ii), which concerns the exchange of views, is engaged. As such, the Commissioner isn't persuaded that section 36(2)(b)(ii) is engaged. This is because he doesn't consider that the QP had sufficient information about that exemption in order to form an opinion that was substantively reasonable.

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4026943/ic-248363-l3y6.pdf>

68. However, the Commissioner does consider that the QP had sufficient information to enable them to make a decision on the matter of section 36(2)(b)(i) and 36(2)(c).
69. Regarding section 36(2)(b)(i), the QP's opinion was that disclosing the Mould valuation report and the other information would or could prejudice the free and frank giving of advice about the art market. This is because, in the QP's opinion, if they thought their advice could be disclosed to the wider world, individuals would be more inhibited in the advice they give – to the Secretary of State directly with regard to the valuation report and to the Secretary of State via the RCEWA with regard to the other information.
70. Regarding section 36(2)(c), the QP's opinion was that disclosure would or could otherwise prejudice the effective conduct of public affairs because it would or could 1) frustrate ongoing discussion about approaches to transparency, 2) negatively impact the export licencing process by making it more difficult to engage independent experts and 3) through applicants being less willing to provide as much information, and 4) by undermining trust between the bodies involved.
71. In its submission to the Commissioner ACE has explained that it's exceedingly difficult to find suitable experts because of the cultural objects' intrinsic values. The pool of experts that ACE, DCMS, and RCEWA (together with the applicant, applicant's agent, the buyers (which are often but not exclusively museums) may all draw upon is limited.
72. Furthermore, this limited pool is further reduced by the requirement that the expert, for ACE's, DCMS, and RCEWA's purposes, must be independent. For example, they must not have already acted as one of the three Independent Assessors which the RCEWA invites to join them in consideration of each case.
73. And it's also not guaranteed that when ACE, DCMS, and/or RCEWA, identifies a suitable expert, that the expert will want to accept the instruction.
74. ACE says that it expects independent expert valuers appointed by the Secretary of State to be forthright and candid with the Secretary of State (this is also expected of Independent Assessors). This is so that the Secretary of State is provided with suitable information so that they may form their opinion. ACE doesn't wish to diminish or curtail the candour that the independent expert valuers give through their advice to the Secretary of State. ACE would also not wish to weaken the debate that goes into providing the Secretary of State with suitable information.
75. As part of the independent expert valuers' valuation reports, they may state things in their reports that undermine that expert's future

relationships with the art market, agents, the owners of the cultural objects, and museums. They may also state things that cast doubt on the provenance of the object (which may impact valuation), which again would disrupt their future work and relationships with the art market, agents, the owners of the cultural objects, and museums. This would be detrimental to the expert(s) (together with any independent expert valuers).

76. ACE goes on to say that applicants and agents of applicants expect their experts to be forthright and candid with them. They, and the export licence process, is reliant that the information they provide will be kept in confidence and/or not released in a manner that would undermine their ability to operate and/or provide expertise, knowledge, and/or knowhow to competitors.
77. In this case specifically, ACE says, the detrimental effect to Anthony Mould Ltd and/or Anthony Mould, is that it would be releasing information that's subject to a duty of confidence. Disclosure would undermine that confidence between the expert, the Secretary of State, and ACE. In turn, that would undermine the ability to effectively discharge the public duties in connection with export licencing. This is because experts may refuse to become experts because releasing the information would be in breach of confidence. Alternatively, potential experts wouldn't want their knowledge and expertise of the art market, which they charge for, to be made available, for free and to the public beyond the agreed publicly available case notes.
78. The detrimental effect to ACE, DCMS and RCEWA is that by requiring ACE to release the Mould valuation report in full [and the other information], would mean that its ability to withhold other reports from experts (together with independent expert valuers) under FOIA in this case, or any other licence application (whether granted, refused, or withdrawn) would be weakened.
79. In addition, ACE says, releasing 'simple' and 'uncontroversial' independent expert valuation reports would imply that any valuation reports ACE withholds are 'complex' or 'controversial'.
80. Finally, ACE has also argued that releasing the Mould valuation report [and the other information] would make it more difficult for it, DCMS or RCEWA, or both, to ensure that those involved in the export licencing process are open and forthright with ACE (and DCMS or RCEWA, or both). This in turn would impact the ability to process export licence applications in a timely manner in accordance with the Export Licence process. And this would weaken the process.
81. The Commissioner is satisfied that the prejudice the QP claims relates to the specific subsections of section 36(2) namely sections 36(2)(b)(i) and

36(2)(c) and that the QP had sufficient knowledge about the issues concerned. Furthermore, and with regard to section 36(2)(b)(i) the issue was 'live' at the time of the request on 2 April 2023 as the announcement about the painting's acquisition hadn't been made at that point. This meant there needed to be a safe space in which to provide free and frank advice and for the export licencing process to proceed smoothly.

82. As such the Commissioner accepts that the QP's opinions about withholding the disputed information section 36(2)(b)(i) and 36(2)(c) were reasonable ones.
83. However, as noted, the QP's opinion appears to be that the envisioned prejudice both would occur and would be likely to occur through disclosing the withheld information. It can't be both. In the absence of clarity, the Commissioner will accept that the lower threshold – that prejudice would be likely to happen – is a credible level of likelihood ie that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring.
84. On the basis of the above reasoning the Commissioner is satisfied that the Mould valuation report, information in Annex A1 and Annex B together with the Applicant's application, Annex A2, and the Applicant's valuation report engage the exemptions under section 36(2)(b)(i) and section 36(2)(c) of FOIA. He's gone on to consider the associated public interest test.

Public interest test

Public interest in disclosing the information

85. For both section 36(2)(b)(i) and 36(2)(c), the QP's submission noted generic public interest arguments ie the submission advises what public interest arguments for disclosure and for maintaining the exemptions are generally identified: transparency, participation, passage of time, increased understanding.
86. The complainant provided the Commissioner with a link to a published comment made by the Chair of the RCEWA in RCEWA's annual review and said that this comment "goes right to the heart" of the public interest test. The RCEWA Chair remarks on the £50million valuation and notes that the painting hadn't passed through the auction rooms. But the Chair stresses that they recommended to the Secretary of State that the painting had an independent valuation and that the independent valuation subsequently carried out supported the figure claimed.

Public interest in maintaining the exemption

87. As above, for both section 36(2)(b)(i) and 36(2)(c), the QP's submission noted generic public interest arguments ie the submission advises what public interest arguments for maintaining the exemption are generally identified: the "chilling effect", likelihood of harm, sensitivity of the information and the need for a "safe space".
88. Specifically to this case, the Commissioner noted to ACE that the current valuation placed on the painting is around £50million – some four times the previous purchase price in 2001. He advised that there's arguably a public interest in understanding why such an increase in the valuation is justified. The complainant had presented such an argument in their complaint to the Commissioner.

Balance of the public interest

89. The Commissioner has found that the QP's opinion about both exemptions was reasonable. He'll go on to consider the weight of those opinions in the public interest test. This means he accepts that a reasonable opinion has been expressed that prejudice or inhibition would be likely to occur but will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test favours disclosure.
90. It's not entirely clear to the Commissioner why the RCEWA Chair's comments, to which the complainant referred, support an argument for disclosing the information.
91. In a submission to the Commissioner, and discussing its reliance on sections 41 and 43, ACE noted that the painting has previously attracted a 'premium'. And the 2001 sale at £10.3million was £2million over the highest estimate for the painting.
92. However, ACE advised that other expert comment and consideration of the painting is publicly available. It says that these publicly available sources do set out and address without the need to disclose valuation report, why the painting may attract such a 'premium'. These include being a portrait of a person who is other than white, at a time of British imperial expansion; a 'Western' style painting of a 'non-Western' sitter; and the intersection of science, technology, and progress.
93. ACE explained that there are also macroeconomic issues that, either individually or combined, may drive or fuel growth in the demand for art, not only for its own sake but as a vehicle for investment. Since 2001, these have included: the rise of terror related attacks in the UK and the world generally; the Iraq War 2003-2011; the Great Recession 2007-2009; the UK's departure from the European Union 2016-ongoing; and the COVID-19 pandemic.

94. The Commissioner considers that the publicly available information provides sufficient indication of why the painting was given its most recent valuation. He's found that disclosing the Mould valuation report and other information would be likely to prejudice the free and frank provision of advice and would be likely to otherwise prejudice the effective conduct of public affairs. The Commissioner hasn't been presented with public interest arguments for disclosure that are sufficiently compelling to justify potentially causing those harms.
95. The Commissioner is satisfied that there is greater public interest first, in the export licencing process progressing as efficiently as possible in the future. With regard to both section 36(2)(b)(i) and 36(2)(c), this is facilitated by the Secretary of State being able to make robust decisions having received – either directly or through the RCEWA - detailed and sometimes sensitive advice in a timely fashion from a range of available experts who're willing to share their propriety knowledge, insight and views on the art market.
96. With regard to this case specifically, as has been noted, the complainant submitted their request on 2 April 2023 and the decision on the painting wasn't announced until 25 April 2023. The complainant notes in their request that the painting was, "currently the subject of export deferral ..." As such, the matter of the painting was still live when the request was submitted. This increases the weight of the public interest in withholding the information so that there was a 'safe space' for the matter to be progressed, debated and concluded.
97. With regard to section 36(2)(c), at the time of the request ACE, DCMS and RCEWA were discussing reconsidering the approach to transparency. The Commissioner considers that, at the time of the request, there was greater public interest in allowing those parties to conclude those discussions and agree an approach, having discussed the matter with interested parties, without that process being complicated. Complication could arise from having to disclose the requested information in this case which might make it harder to justify any transparency decision(s) made at a later date.
98. When measured against the public interest in disclosure, the Commissioner is satisfied that the severity of the envisioned prejudice together with the QP's opinion is sufficient to weigh the balance of public interest in favour of maintaining the section 36(2)(b)(i) and section 36(2)(c) exemptions in this case.
99. The Commissioner has found that ACE is entitled to rely on section 36 of FOIA to withhold the Mould valuation report, information in the Annex A1 and Annex B documents, together with the Applicant's application, the Annex A2 document and the Applicant's valuation report. It's

therefore not necessary to consider ACE's application of other exemptions to this information.

Section 21 – information accessible to the applicant by other means

100. Under section 21 of FOIA information is exempt if it's already reasonably accessible to the applicant.
101. The expert adviser's statement forms part of the Annex A2 document. ACE is withholding the majority of the statement under section 21
102. ACE has acknowledged that the complainant specifically drew its attention to 'case notes' as part of their initial request for information ie they referred to the "the RCEWA report" which is the 'case notes'. ACE says that an object's export licence case notes – including the expert advisor's statement - are a publicly available document but ACE hadn't expressly stated to the complainant that this is publicly available and therefore section 21 applied.
103. Aside from information withheld under section 22 and 40, ACE has told the Commissioner that the version of the statement that it holds differs slightly from the version that's published and has highlighted these few differences. The Commissioner agrees that the majority of these differences – missing numbering and a heading - are very slight and make no material difference. However, there are two short sentences that that appear not to be in the published version that the Commissioner considers to be somewhat more substantial as they add a little context. The Commissioner doesn't consider these two sentences can engage section 21 as they're not in the public domain and therefore aren't already accessible to the complainant.
104. However, the Commissioner is satisfied that the majority of the expert adviser's statement **is** exempt from disclosure under section 21 of FOIA as it's already accessible to the complainant; in their request the complainant included a link to the published information that includes the statement and had clearly reviewed that information.

Section 22 – information intended for future publication

105. Under section 22 of FOIA information is exempt if it's intended for future publication. Section 22 is subject to the public interest test.
106. ACE is withholding under section 22 identifying information about the expert adviser (which isn't Anthony Mould) that's included in the statement discussed above.
107. ACE says that at the end of each year ACE, DCMS, and the RCEWA produce an annual report on the export of works of art and objects of cultural interest. Within the annual report more information is provided

about expert advisers. The expert adviser is generally identified by the institution of which they are a part. ACE is therefore relying on section 22 to withhold the identifying details about the expert advisor in this case.

108. ACE provided the Commissioner with a copy of the 2021-2022 annual report on the export of works of art and objects of cultural interest⁴. In this report reference is made to the institutions the expert advisers are connected to, and the advisers' roles. ACE told the Commissioner that it was providing this report as an example. However, the Portrait of Omai is one of the cases discussed in this report. The discussion refers to an individual who's described as acting as the "expert adviser" in this case (page 34), with their job title. However, while an internet search of that job title does retrieve a name, it's a different name from the expert adviser who provided the statement in this case. And the 2022-2023 annual report – which the complainant refers to at paragraph 86 – discusses the Portrait of Omai in its introduction, but only as being a successful outcome for the previous year and the £50million valuation is also addressed.
109. First, ACE publishes the expert advisers' roles and institutions but doesn't publish the names of the expert advisers in its annual reports and section 22 concerns information intended for future publication. Second, the expert adviser referenced in the 2021-2022 report doesn't appear to be expert adviser who provided the statement in this case; their name and job title is different. So it couldn't be argued that publishing their role and institution in effect identifies the name of the expert adviser who provided the statement.
110. The Commissioner's decision is therefore that ACE isn't entitled to rely on section 22 to withhold the name, role and institution of the expert adviser who provided the statement in this case. Since section 22 isn't engaged, it's not necessary to consider the public interest test. For the sake of completeness however, the Commissioner will consider whether the information engages section 40.

⁴ <https://www.artscouncil.org.uk/supporting-arts-museums-and-libraries/supporting-collections-and-cultural-property/reviewing-committee-0/export-objects-cultural-interest-2021-22>

Section 40 – personal data

111. Under section 40(2), information is exempt from disclosure if it's someone else's personal data and disclosing it would contravene Article 5(1)(a) of the UK General Data Protection Regulation (GDPR). This states that, "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
112. First, the Commissioner is satisfied that the name, role and institution of the expert adviser is their personal data – it relates to them, and they can be identified from it.
113. The Commissioner considers that the complainant's interest in matters associated with the valuation of the Portrait of Omai is a legitimate interest for them to have. There's also a general interest in public authorities being open and transparent particularly in this case, given the painting's very high valuation. The information being considered here is the name, role and institution of the expert adviser who advised the Secretary of State about the painting. The complainant has an interest in how the valuation figure for the Portrait of Omai was reached. The expert adviser in question had a role in that process and disclosing their name, role and institution is necessary as it would contribute to a greater understanding about the process.
114. ACE advised the Commissioner that it intends to publish the expert adviser's role and institution in its annual report as this is where it publishes information about those experts who've advised on each case. As discussed however, the expert adviser linked to the Portrait of Omai case and referenced in the 2021-2022 report isn't the expert adviser named in the statement being discussed here. And no expert adviser for the painting is referenced in the 2022-2023 report because the case isn't discussed in detail in that report. However, despite this, and on the basis of what ACE has told him, the Commissioner considers that the expert adviser would nonetheless have a reasonable expectation that their personal data would be disclosed. If they understood that their role and institution was going to be published in an annual report, which appears to be ACE's usual practice, they would also understand that it would be possible to identify them from this information ie that their personal data would be made available.
115. Based on the above factors, the Commissioner considers that the complainant's legitimate interest, and the general interest in transparency, outweigh the fundamental rights and freedoms of the expert adviser in this case. The Commissioner therefore considers that disclosing their name, job title and institution wouldn't contravene the GDPR and would be lawful. Section 40(2) of FOIA isn't therefore engaged.

Procedural matters

116. Section 1 of FOIA requires a public authority to confirm whether it holds requested information and communicate it to the applicant (if it's held and isn't exempt information).
117. Under section 10(1), a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request. Under section 17(1) a public authority must issue a valid refusal notice within the same timescale.
118. However, section 10(3) enables an authority to extend the 20-working-day limit up to a 'reasonable' time if it needs more time to determine whether or not the balance of the public interest lies in maintaining an exemption. A similar provision exists under section 17(3) with regard to refusal notices.
119. FOIA doesn't define what a 'reasonable' extension of time might be. However, the Commissioner's view is that the a should normally take no more than an additional 20 working days to consider the public interest. This means the total time spent dealing with the request should not exceed 40 working days.
120. In this case, the complainant submitted their request on 2 April 2023. Taking account of bank holidays, a response was due by 5 May 2023.
121. ACE advised the complainant on 25 April 2023 that it needed further time to consider the public interest associated with section 43(2).
122. ACE provided its substantive response on 19 May 2023 – it disclosed some information and relied on sections 40, 41 and 43 to withhold other information.
123. The complainant considers that ACE should have disclosed any non-exempt information within 20 working days. However, it appears that ACE initially considered that all the requested information might be exempt from disclosure under section 43.
124. In the event, ACE provided a response within the 40 working day maximum the Commissioner advises. He considers that ACE's requirement for additional time was reasonable in the circumstances and that its interim communication to the complainant was satisfactory.
125. The Commissioner's decision is that there was no breach of section 10(3) or 17(3) of FOIA.

Right of appeal

126. 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

127. 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.

128. 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

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF