

Information Tribunal

Appeal Number: EA/2005/0005

FS50063478

FREEDOM OF INFORMATION ACT 2000

Heard at Procession House, London
On 16 December 2005
Prepared

Decision Promulgated

25th January 2006

Before

**Mr Chris Ryan, Deputy Chairman
Mr Peter Dixon, Lay Member
Mr Ivan Wilson, Lay Member**

Between

JOHN CONNOR PRESS ASSOCIATES LIMITED

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Mr Matthew Davis (a Director of John Connor Press Associates Ltd)
For the Respondent: Mr Timothy Pitt-Payne (Counsel)

DECISION

We have decided to allow the appeal. As the information in issue has now been disclosed to the Appellant we make no further direction or order.

Reasons for Decision

- 1 Between 18 December 2004 and 6 February 2005 the National Maritime Museum (“NMM”) staged an exhibition in the The Queen’s House, Greenwich of artwork by an artist called Conrad Shawcross. The exhibition was part of the “New Visions” contemporary art programme arranged by NMM and was called “Continuum”. It consisted of three new works, commissioned by NMM, and two of the artist’s earlier pieces. The New Visions programme had previously included a variety of different types of artwork including video, film, photographs, artwork, performance art displays and audio installations.
- 2 On 12 January 2005 John Connor Press Associates Limited (“JCPA”) requested NMM to provide it with all documentation and correspondence relating to any payments made to Conrad Shawcross for the Continuum exhibition. The request was made under the Freedom of Information Act 2000 (“the Act”) and was responded to by a letter from NMM on 25 January 2005. The letter was accompanied by a copy of the contract between NMM and Conrad Shawcross, three invoices submitted by Conrad Shawcross, various budget statements and some email exchanges recording discussions between the parties about the contract. However, all financial details had been redacted from the documents and the covering letter explained that this was because NMM felt that it should not disclose financial information since this would be likely to prejudice the commercial interests of both NMM and Conrad Shawcross and that it would not be in the public interest to release the information at that time. It relied upon Section 43(2) of the Act as justification for the stance it had adopted.
- 3 The significance of the reference to Section 43(2) of the Act is as follows:
 - (a) Section 1 of the Act, as it applies to the facts of this case, has the effect that a person making a request for information to a public authority, such as NMM, is entitled to have that information communicated to him or her unless the information falls within the definition of one or more categories of exempt information.

- (b) Section 43(2) defines one of those categories as information the disclosure of which “would, or would be likely to, prejudice the commercial interest of any person (including the public authority holding it)”.
- (c) The effect of Section 2(3) is that Section 43(2) provides a qualified, not an absolute, exemption. This means that, even if it is established that the information in question falls within the definition, the obligation to disclose will still arise unless, as stated in section 2(1)(b), “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

4 The information redacted by the museum included:

- (a) The contribution that the Museum contracted to make, and subsequently did make, towards the cost of the production of the work;
- (b) The valuation placed on each of the works;
- (c) Estimates of the costs expected to be involved in producing and exhibiting the work;
- (d) Sums that were sought from, or contributed by, other sponsoring bodies.

5 Even with the financial information redacted the released documents disclosed a substantial body of information about the transaction between NMM and Conrad Shawcross that we consider might be of interest to any other artist considering entering into a similar arrangement with the NMM (or, indeed, any person or body considering a similar contract with Conrad Shawcross). In particular it disclosed that:

- (a) NMM’s financial support took the form of a contribution to the costs of the materials required to produce and exhibit the artwork;
- (b) the total contribution had been provided in part by The Elephant Trust and the Arts Council England;
- (c) copyright in the artwork would be retained by Conrad Shawcross;
- (d) the contribution was to be refunded if the artwork was sold within three years of the end of the exhibition;

- (e) NMM accepted the risk of loss or damage of the artwork during the exhibition and in transit.
- 6 JCPA complained that NMM did not have the right to withhold financial information by redacting the documents in this way. However, following the submission of that challenge to its internal complaints procedure, NMM maintained its refusal to provide the financial information. It wrote to JCPA on 7 February 2005 notifying it of its decision and giving reasons for it. In essence, these were that disclosure at that time would be likely to prejudice the NMM's bargaining position during contractual negotiations with other artists and would compromise Conrad Shawcross's bargaining position in relation to negotiations for the subsequent sale of similar works.
- 7 By a letter dated 10 February 2005 JCPA lodged an application with the Information Commissioner under Section 50 of the Act for a decision as to whether its original request for information had been dealt with by NMM in accordance with the Act. By the time that the Information Commissioner had completed his investigation, pursuant to that application, and had issued a Decision Notice (which he did on 20 June 2005), NMM had concluded that the commercial sensitivity of the previously withhold financial information had declined to such a level that un-redacted copies of the relevant documents could be released. They were sent to JCPA under cover of a letter dated 8 June 2005. However, this did not affect the decision that the Information Commissioner was required to make, namely, whether NMM had satisfied the requirements of the Act in reaching its decision to withhold the financial information, on 25 January 2005, and in reaffirming that decision on 7 February 2005.
- 8 The Decision Notice recorded that the Information Commissioner had concluded that the financial information fell within the exemption provided by Section 43(2) and that the public interest in maintaining that exemption overrode the public interest in disclosing the information at the relevant time. In the Statement of Reasons that accompanied the Decision Notice, the Information Commissioner dealt very shortly with the question of whether the exemption applied. He stated that it did "because the information comprises details of the financial arrangements made between NMM and Conrad Shawcross for the latter's contribution to NMM's New Visions programme". He then considered the public interest arguments for and against

maintaining that exemption in relation to the commercial interest of NMM. He concluded that the balance had favoured withholding the information at the time when the decision had been made. His reasoning was as follows:

“The Commissioner recognises the public interest in financial transparency and accountability where public authorities commission new works of art, particularly where that is not their core activity. The commissioning of works of art is not the core activity of NMM. The disclosure of the requested information may also inform the debate about museum funding in that it relates to the choices a free-to-access, publicly subsidised museum has made to attract greater visitor numbers and generate revenue in competition with other attractions (including non-subsidised attractions).

“However, the Commissioner understands that at the time the request was made (January 2005), the NMM was involved in active negotiations with another artist for their New Visions programme. The Commissioner recognises that premature release of the financial arrangement between NMM and Conrad Shawcross would be likely to prejudice the NMM’s bargaining position in respect of these active negotiations for a similar project to the extent that the public interest in maintaining the exemption outweighs the public interest in releasing the information. The Commissioner gave particular weight to the fact that NMM were dealing with public funds and needed to ensure value for public money.

“The Commissioner also considers that the likelihood of prejudice will diminish with time and with the conclusion of the active negotiations to the point where any prejudice to the NMM’s commercial interest would no longer outweigh the public interest in releasing the information that [JCPA] requested.”

Later he concluded:

“The Commissioner has decided that the public interest in protecting NMM’s bargaining position during active and contemporaneous negotiations for a project of a similar nature overrides, for the time being, the public interest in making public the financial details of the negotiations which immediately preceded those active negotiations.”

- 9 The Information Commissioner also considered the public interest test in relation to prejudice to the commercial interest of Conrad Shawcross. However he concluded that, on its own, this would not have justified maintaining the exemption. That part of his decision has not been challenged and it accordingly forms no part of this decision.
- 10 By a letter dated 1 July 2005 JCPA indicated its intention to appeal the Information Commissioner's decision to this Tribunal and that letter was subsequently incorporated into a formal Notice of Appeal lodged on 8 July 2005. After various directions had been given and complied with the appeal came before us for hearing on 16 December 2005 on the basis of Amended Grounds of Appeal lodged by JCPA and an amended Reply lodged by the Information Commissioner. JCPA was represented by one of its directors, Mr Matthew Davis, and the Information Commissioner was represented by Mr Timothy Pitt-Payne of counsel.
- 11 In its amended Grounds of Appeal JCPA set out two grounds of appeal. The first ground was most accurately summarised in paragraph 3 of the Commissioner's amended Reply, in which he said that it was that "the Commissioner...wrongly decided that the exemption under section 43 (2) of the Act is relevant to this case". The second ground of appeal was that, if the financial data in question was exempt information, it should still have been disclosed on the basis that the public interest in disclosure outweighed the public interest in protecting the NMM from the prejudice it was likely to suffer as the result of disclosure. For the reasons given below we have concluded that the first ground of appeal succeeds and we do not therefore need to give further consideration to the second ground.
- 12 Our role, in determining an appeal, is set out in section 58 of the Act. It reads:
- (1) If on an appeal...the Tribunal considers -
 - (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could

have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

No question arises in this appeal on the exercise of discretion by the Commissioner and we have therefore to decide, quite simply, whether the Decision Notice is “in accordance with the law”. The relevant law for this purpose is to be found in the statutory provisions summarised in paragraph 3 above. In particular, for the purposes of the first ground of appeal, we have to decide whether the Commissioner’s conclusion that the financial information in question should have been treated as exempt at the time is or is not “in accordance with” section 43(2) of the Act. In reaching our decision on that point we have the power to review any finding of fact on which the Decision Notice was based.

- 13 It was suggested to us by Mr Pitt-Payne that we should adopt a more restrictive approach to the appeal; that we should contrast section 58 with the language of section 50 (which sets out the role of the Commissioner on an application to him) and conclude that we should not conduct a full review of the merits but treat an appeal to the Tribunal as more akin to a judicial review. We believe that (certainly in regard to the first ground of appeal on the facts of this case) our role is clearly set out in section 58 and that we do not need to refer to any other provisions of the Act to help us interpret it. We accordingly proceed to answer the question that we set ourselves towards the end of paragraph 12 above.

- 14 The Commissioner asserted, in paragraphs 29 and 30 of his amended Reply, that he had been right to conclude that the section 43(2) exemption applied in the light of the reasoned arguments set out in a letter dated 13 April 2005 from Christopher Gray, the Museum Secretary at NMM, to Elizabeth Dunn of the Commissioner’s staff. Mr Pitt-Payne drew our attention, in particular, to a passage in this letter in which the NMM made it clear that it considered that the prejudice to its commercial interest would decline over a period of time and that the financial information could be released once it had completed its negotiations with the next artist in its New Visions series. That artist was subsequently identified as Beth Derbyshire. Elizabeth Dunn, who is now known under her married name of Elizabeth Hogan, gave evidence

before us and provided an explanation, under cross examination by Mr Davis, as to why she had concluded that NMM's bargaining position in its negotiations with Beth Derbyshire would have been undermined had the financial information been publicly available. Ms Hogan conceded that Beth Derbyshire's work was different from that of Conrad Shawcross (it was common ground between the parties that it included some paintings and performance art in the form of a chain of semaphore signallers). However, she stated that the important common elements that she took into account were that both were part of the New Visions series, that they were both designed to be sympathetic to NMM's general theme and that the investment of public money was involved in both cases. Some evidence came to light in the course of the hearing, and was admitted by agreement between the parties, which suggested that Beth Derbyshire had exhibited at NMM in 2002, earlier in the New Visions series. Although it was suggested to Ms Hogan in cross examination that this fact might have affected her assessment of the likelihood of prejudice, had she been aware of it at the time, we do not have sufficient information as to the nature of the work exhibited, or the terms agreed between Beth Derbyshire and the NMM on that earlier occasion, to derive much assistance from this evidence.

- 15 We accept that the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transactions. Whether they were or not would depend on the nature of the information and the degree of similarity between the two transactions. The question we have to answer in relation to the first ground of appeal is whether disclosure of the particular information withheld from JCPA would have been "likely" to cause such prejudice to the NMM, at the time when disclosure was refused, by undermining its negotiating position with Beth Derbyshire. We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk. We draw support for that view from the words of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), a case in which the same expression fell to be construed under the Data Protection Act 1998. He said: "I accept that "likely" ... does not mean more probable than not. But on the other hand, it must connote a significantly greater degree of probability than merely 'more than fanciable' ". A little later he said that in his view the word "connotes a degree of

probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not".

- 16 We have concluded that in this particular case the threshold we have sought to define was not achieved for the following reasons:
- (a) The information that NMM had already disclosed would have provided any artist entering into negotiations with NMM with a lot of information (as summarised in paragraph 5 above) that would be valuable to him or her;
 - (b) The fact that it had already been disclosed that the contract with Conrad Shawcross provided for a contribution to the cost of materials, as opposed, for example, to a flat fee, reduces very materially the value of the financial information that was withheld;
 - (c) The nature of the works created by Conrad Shawcross and Beth Derbyshire were so different that they could not be treated as true comparables, for the purpose of negotiation, particularly in view of the level of disclosure referred to in (a) above - we were not convinced that the similarities relied upon by Ms Hogan (see paragraph 14 above) were especially relevant in this respect; and
- 17 We also concluded that, despite Ms Hogan's efforts to investigate the position fully and the NMM's cooperation and evident commitment to public disclosure, insufficient information about the structure of the arrangements being negotiated with Beth Derbyshire at the time was brought to light to enable the Commissioner to conclude that NMM's negotiating position would have been undermined had the unredacted documents been disclosed.
- 18 We have accordingly concluded that no sufficient risk of prejudice to the commercial interests of the NMM was demonstrated to justify the exemption under section 43(2) being applied to the redacted financial information at the relevant time. In those circumstances, as mentioned above, it is not necessary or appropriate for us to

consider the second issue as to the balance of public interest between disclosure and temporary withholding.

Signed

Chris Ryan
Deputy Chairman

Date: 24 January 2006