IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No. EA/2015/0289

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50575524

Dated 18th November 2015

BETWEEN	**Mr Brendan Montague**	**Appellant**
	And	
	The Information Commissioner	**1st Respondent**
	And	
	The Board of Trustees of the Tate Gallery	**2nd Respondent**

Determined at an oral hearing at Alfred Place on 11th May 2016

Date of Decision 26th July 2016

BEFORE	Miss Fiona Henderson (Judge)
	Mr Paul Taylor
	And
	Mr Dave Sivers

Representation

The Appellant was represented by Ms Julianne Kerr Morrison instructed by Leigh, Day & Co

The Commissioner was represented by Mr Peter Lockley

The Board of Trustees of the Tate represented by Ms Aileen McColgan

Subject: s43(2) FOIA commercial interests

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

Decision: The Appeal is allowed. The Tate shall disclose within 35 calendar days from the date of this decision the BP sponsorship figures from 2007-2011 inclusive.

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50575524 dated 18th November 2015 which held that the Board of Trustees of the Tate Gallery (the Tate) had correctly relied upon s43[1] FOIA when refusing to disclose the requested information.

Background

2. BP has sponsored the Tate continuously since 1989 and at the date of the information request was the longest and most consistent sponsor of any permanent art collection in the UK. At the date of the request BP sponsored the collection displays at Tate Britain, the BP Art Exchange Programme and two learning events each year.

3. Mr Montague is an investigative journalist and director of Request Initiative, a non-profit company that makes requests for information under the Freedom of Information Act 2000 on behalf of charities and other NGOs. The information that is the subject of this appeal was originally included in a request dated 12th April 2012 which asked for BP sponsorship amounts from 1990 to 2011. The case was considered by the First Tier Tribunal in case EA/2014/0040[2] which held that s43 FOIA was not engaged for 1990-2006 and that information was therefore ordered to be disclosed. For 2007-2011 that Tribunal held that s43 was engaged as the information was not historic, relating to a recently expired contract, and that the

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[1] Prejudice to commercial interests of public authority or a third party

[2] This case was joined with EA/2014/0070 &71 against separate but related decision notices concerning other information about the sponsorship relationship between BP and Tate

public interest in disclosure was outweighed by the public interest in maintaining the exemption.

4. In relation to the current level of sponsorship, BP has announced that for the period 2012-2016, it will provide a total of £10 million divided between 4 institutions (of which the Tate is one). Following the Tribunal's ruling in EA/2014/0040, the BP Sponsorship figures relating to years 1990-2006 were disclosed, ranging from £150,000 per annum in 1991-1999 to £330,000 per annum in 2002-2006. The disclosures garnered a lot of media coverage and comment about the relationship between BP and Tate and fossil fuel sponsorship of the arts in general. There have also been a number of protest interventions focussed around fossil fuel sponsorship of the arts including BP's relationship with the Tate. In spring 2016 it was announced that BP's sponsorship for Tate would end in 2017. There is no evidence that this was linked to the disclosure of the sponsorship fees but was said by Peter Mather head of BP UK to:

> *[reflect] the extremely challenging business environment in which we are operating*.[3]"

Information Request

5. The Appellant wrote to the Tate on 8th February 2015[4] asking for:

> *"the amounts of sponsorship provided by BP to Tate year on year from 2007-2012"*

On 20th March 2015[5] the Tate refused the request relying upon s43(2) FOIA and stating that having considered the public interest, their view was that the public interest rested in maintaining the exemption.

Complaint to the Commissioner

[3] The Independent March 11th 2016
[4] p73 OB
[5] There had been correspondence between the parties prior to this as the Tate applied to extend the time for responding pursuant to 10(3) FOIA to which the Appellant objected

6. The Commissioner accepted the Appellant's complaint on 13th May 2015 (although he had first complained on 17th March 2015) which was before the Tate's internal review procedure had been exhausted. The Appellant clarified that he only required the sponsorship amounts to 2011. The Commissioner (and therefore the Tribunal) has confined the investigation and decision to the modified date.

Appeal

7. The Appellant appealed the decision notice disputing that s43 was engaged and disputing that the public interest balance favoured withholding the information on the grounds that:

   i) Given the passage of time since the agreement expired, the figures are now historic,

   ii) The arguments relied upon by the Commissioner were rejected by FTT in EA/2014/0040 in relation to older figures.

   iii) The impact of the Commissioner's Decision Notice is that the sponsorship figures could be withheld indefinitely because Tate re-negotiates its sponsorship deal with BP periodically.

   iv) The inclusion of a confidentiality clause does not alter the position as:

      a) It is not clear that the clause extends to those figures.

      b) The Appellant does not accept that a further disclosure of old sponsorship figures would harm the relationship between BP and Tate.

8. The Commissioner resisted the appeal relying upon the contents of his decision notice.[6] The Tate were joined to the Appeal on 15th January 2015 as 2nd Respondent at their own request. They adopted the submissions made on behalf of the

[6] However, the Commissioner's position changed having heard the evidence at the oral hearing which in his submissions did not meet the threshold for s43(2) to be engaged.

Commissioner in his reply and indicated that they intended to adduce evidence on the application of the confidentiality clause to the amount of BP's sponsorship.

Evidence

9. The hearing was listed for an oral hearing on 11th May 2016. Mr Montague was cross-examined on behalf of the Tate and the Commissioner. His evidence predominantly went to the public interest which is not repeated here in light of the Tribunal's finding that the exemption is not engaged. Additionally, his evidence provided examples of sponsorship information in the public domain released by other publicly funded organisations including some figures relating to BP. He had provided a witness statement[7] and exhibits which included a copy of the witness statement and some of the exhibits from the earlier appeal[8]. He provided an additional supplementary bundle of exhibits referred to in his earlier witness statement shortly before the oral hearing[9]. Although the Tate objected to this late submission because it was outside of the timetable set out in the case management directions and Counsel and witnesses were different from those in EA/2014/0040, the Tribunal accepted this late submission under its case management powers provided for in rule 5 *The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* having regard to the overriding objective as set out in rule 2. The Tribunal was satisfied that:

- This was information that the Tate was aware of from the earlier proceedings,
- This was the supporting evidence for information already referred to in an exhibit (ie the earlier witness statement) which was already before this Tribunal, and it was easier for all parties to have it in documentary format.
- This was evidence in the same vein as other evidence already before the Tribunal.

[7] P161 OB
[8] P173 OB
[9] Tate had received email copies at 4.32pm on 9.5.16

- Any disadvantage to the Tate's witnesses and Counsel could be remedied by allowing time during the hearing for them to consider the documents and provide any additional instructions necessary.

10. Written and oral evidence on behalf of the Tate was given by Ms Bidgood (Head of Corporate Development and Events)[10] and Mr Jones (Head of the Director's Office)[11] Both witnesses were cross examined by the other parties and the Tribunal asked some questions by way of clarification. Although the disputed information has been provided in a closed bundle it was not necessary to hear argument in closed session, neither has it been necessary to provide a closed annex to this decision.

Whether s43(2) is engaged

11. S43 FOIA provides: …

(2) 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) ….

12. The Tate argued that the prejudice "would be likely". It was not disputed that the risk of prejudice must be a very significant and weighty chance of prejudice, it can be less than 50% i.e. it need not meet the civil standard of "more probable than not". Additionally, the prejudice itself must be real, actual or of substance[12].

13. Whilst it was suggested by the Tate that it is likely that BP would be prejudiced in their future negotiations with other organisations that they wished to sponsor, there was no evidence to support this. Although they have not consented to the disclosure of these figures it is striking that in relation to this appeal and in the context of the disclosures that had been made as a result of the ruling in EA/2014/0040 that they had not been asked. Mr Jones told the Tribunal that since the information was caught by a confidentiality clause in the original contract which lasted beyond the contract term, in his view, that set out BP's expectation and the Tate *"did not feel it was necessary to ask"*.

[10] P 393 OB
[11] P 401 OB
[12] Department for Work and Pensions v IC [2014] UKUT 0334 (AAC) at [26 -7]

14. In our judgment this is a flaw in the Tate's consideration of the request and the appeal and is not in keeping with the s45 code of practice[13] which makes it clear the circumstances in which consultation is expected or would be good practice.[14] The confidentiality clause predates the subsequent disclosures in EA/2014/0040 (themselves made notwithstanding a confidentiality clause which was identical in effect). That BP continue to consider the figures commercially sensitive and that disclosure would therefore be damaging to the Tate's continuing relationship with BP (as it was anticipated at the relevant date) is explicit in the Tate's arguments, however, that is dependent upon how BP actually viewed the figures at that time, about which the Tate have provided no evidence.

15. The Tate argued that their own commercial interests would be likely to be prejudiced and urged the Tribunal to take the same approach as the previous Tribunal in EA/2014/0040. The Tribunal observes that it is not bound by the findings of fact in EA/2014/0040 and that the circumstances in which this request was made and the evidence in this case were not the same.

16. The Tate relied upon the:

    i) Reputational damage (in particular the importance of the confidentiality clause to the assurance of current and potential sponsors),
    ii) Damage to Tate's negotiating position with BP and others.

17. Ms Bidgood has 13 years' experience as a fundraiser within the arts and cultural sector specialising in corporate relations. She explained and we accept that sponsorship is a commercial relationship between a corporate company and a charitable body such as the Tate, governed by a legally binding commercial contract whereby a corporate company pays a fee to the Tate in consideration of a variety of benefits including public acknowledgement of its support. It is in the commercial interest of the Tate to secure the highest possible fee and in the commercial interest of the sponsor to negotiate as low a figure as possible. In the context of cuts to Arts

[13] Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part 1 of the Freedom of Information Act 2000, Issued under section 45 of the Act S45 Code of Practice

[14] Paragraph 31

funding, securing sponsorship is critical to the financial sustainability of the Tate. There are a finite number of sponsors in an increasingly competitive environment.

Reputational damage

18. Ms Bidgood's evidence was that it was standard practice for the Tate to include a confidentiality clause in their sponsorship agreements and standard practice for the Tate to treat the sponsorship figures as confidential indefinitely as Tate must be seen to maintain confidentiality and the confidentiality outlasted the contract term. The Tribunal has had regard to the confidentiality clause[15] concerned which requires BP and the Tate to treat as "*secret and confidential and not at any time for any reason to disclose…*" information received during the period of or in connection with the Agreement. However, it is subject to the caveat:

> *"7.1.1[except] As required by law, judicial process or regulatory proceeding;"*

19. Counsel for the Tate accepted that disclosure under FOIA was disclosure as required by law and that disclosure pursuant to FOIA would therefore not leave the Tate open to an action for breach of confidence.

20. Ms Bidgood's evidence was that breach of the confidentiality clause *"would undermine Tate's ability to assure any current or potential future sponsors that the amount of their sponsorship fee … can be protected by Tate even by the inclusion in their sponsorship contracts of a clear confidentiality clause"*.[16]

21. However, it is clear that her assessment of the likely reputational damage was dependent upon her belief that disclosure of the disputed information by the Tate under FOIA would be a breach of that confidentiality clause:

> *"if the Tate were to be required to reveal the level of BP's sponsorship it would be placed (regardless of any legal defence) in direct breach of the duty of confidentiality it owes to BP under its current and previous funding agreement."* [17]

[15] P99 OB
[16] Paragraph 20 statement of Ms Bidgood p396
[17] Paragraph 25 p 397 OB

She equated disclosure with breach which would be viewed as a fundamental breach of trust which would have serious and long-term implications for Tate's ability to secure funds from sponsors.

22. Her evidence before the Tribunal was that if the information requested under FOIA was deemed by Tate to be commercially sensitive (which in her view it would be if it was subject to a confidentiality clause) the Tate would do *"what we can to ensure that it is not disclosed*" because it would be a breach of confidentiality to disclose it.

23. Mr Jones is the chair of the FOI group who respond to FOIA requests made to the Tate. In his witness statement he said that the Tate would not "*in any circumstance release the information sought by the Appellant because it is subject to a confidentiality clause. Breaching this clause would or would be likely to:*

Represent an actionable breach of confidence, would breach the trust of a sponsor and expose Tate to legal action... It is absolutely clear that it was not expected by either BP or Tate that the sponsorship fees would be released."[18]

24. The Tribunal does not accept this conclusion. It is not open to the Tate to argue that they would or would be likely to be exposed to legal action when they have not asked BP their position. This evidence does not take into consideration the ramifications of the earlier disclosures. There was no positive evidence that any of the consequences feared by the Tate had either come to pass or been threatened, the evidence at its highest was that there had been some "reference" by existing sponsors but there was no evidence that this had impacted upon any existing or potential sponsorship agreements.

25. Whilst Mr Jones acknowledged in his oral evidence that if engaged, the exemption relied upon was subject to the public interest test; his evidence to the Tribunal was nevertheless that disclosure of the figures would create a real and substantial risk of damaging BP's relationship with the Tate, or of putting-off other potential sponsors who might be concerned that the Tate could not be "trusted" with their commercial information. He distinguished between freely giving the information following a request and giving it following ICO or Tribunal proceedings. His evidence suggested

[18] Paragraph 17 statement of Mr Jones, p403-404

that it would be unreasonable for the Tate to disclose the information in the face of the confidentiality clause which set the terms of the relationship.

26. The Appellant argues that this position abdicates responsibility, the implication being that the Tate will maintain confidentiality until ICO or FTT compel them to disclose. It does not appear to give sufficient weight to assessing the actual commercial sensitivity of the information, or the public interest. The Previous contract had a clause with identical effect and there is no evidence that disclosure in EA/2014/0040 affected the ability to continue the sponsorship relationships with BP or any other sponsor.

27. The Commissioner changed his position at the hearing having heard the evidence; concluding that the case for prejudice was not made out and that s43(2) FOIA was therefore not engaged. He expressed concern at the way that the Tate was applying the confidentiality clause which in his view was within a "hairs breadth" of contracting out of FOIA.

28. The Tribunal shares these concerns. The Tate is a public authority under FOIA with the responsibilities of accountability and transparency that that entails. All commercial sponsors should be expected to be aware of this and to understand that any confidentiality clause is subject to FOIA. If there had ever been any doubt, the disclosure pursuant to EA/2014/0040 made it abundantly clear that these types of figures were disclosable under FOIA. We do not accept therefore that disclosure in this case would deter other commercial organisations from becoming sponsors neither are we satisfied that it would impact upon the Tate's relationship with BP. Disclosure pursuant to FOIA would represent the Tate following the law rather than any mis-handling of information about sponsorship. Indeed prior to entering into confidential agreements the s45 Code of Practice puts the onus on the public authority to ensure that the parties with whom it contracts understand the role of FOIA notwithstanding the presence of confidentiality clauses e.g. at para 32 of the Code:

"It is important that both the public authority and the contractor are aware of the limits placed by the Act on the enforceability of such confidentiality clauses..."

29. The Tate argued that they risked losing sponsorship to other organisations. The Tate's evidence was that it was standard practise not to disclose fees, the implication being that the Tate would be conspicuous if they disclosed under FOIA and this would prejudice their relationship with BP and other sponsors. The Tate argues that the figures in the public domain relied upon by Mr Montague to show the expectation of the industry are not comparable to the BP sponsorship fee because they relate to sponsorship of a different type of product (as BP's sponsorship was of the collection rather than a display or specific exhibition).

30. We do not accept this argument. We take into consideration the information relating to both BP and other Sponsors of the arts in Britain already in the public domain presented by Mr Montague[19]. Although BP's sponsorship was bespoke we are satisfied that the commercial sensitivity of the figures (how much was paid, what did they get for their money) in any major corporate sponsorship of the arts are likely to be the same regardless of the product.

31. Whilst it is not the Tate's general practise to disclose their figures, and whilst we accept that the Tribunal cannot know what was behind those disclosures that we were shown had been made (i.e. – was there a confidentiality clause? Was it by consent? Did the Sponsor seek the publicity?) From the breadth, variety and amount of information in the public domain, the Tribunal is satisfied that it is by no means rare for sponsorship figures of past contracts in particular, to be publicly known. Disclosure by the Tate would not be so unusual that they would be conspicuous or out of step with their competitors and hence prejudiced by this.

<u>Damage to negotiating position</u>

32. The BP sponsorship contracts span 5 years, at the date of the request in 2015 the contract in place ran from 2012 to 2017, the request is therefore for the sponsorship fees immediately preceding the current one.

[19] Some examples post dated the relevant date, however, the evidence as a whole sheds light on the industry expectations, and practises and contradicts the Tate's evidence that the industry "norm" was to withhold this type of information.

33. Ms Bidgood told the Tribunal that the BP contract was normally agreed about 12 months before the contract started (which was 7th August 2007). We are satisfied therefore that it is likely that the contact was negotiated in the autumn of 2006 (some 9 years before the relevant date relating to this information request). She accepted that there was a different economic climate then, the state of public finances and funding to arts has changed and the situation of commercial sponsors may have changed since then. However, she disagreed with the Appellant who suggested that the passage of time meant that the information was no longer commercially sensitive. Ms Bidgood's evidence was that economic cycles repeat and potential partners use that bench mark for how they negotiate. Her experience was that people read across and draw comparisons between disclosed fees for known sponsorship and what they would expect to receive.

34. Her evidence was that revealing these sums (which may have been agreed some years before, when the economic climate was quite different) would encourage negotiating organisations to seek to reach deals of the same perceived value despite the opportunity being very different from that which they wish to support. However, there was no positive evidence that this is what has happened since the substantial and detailed disclosure of the Tate BP sponsorship figures up to 2006. Additionally, the Tate are a commercial organisation and would be in a position to distinguish historic figures. We take into consideration that the figures of which disclosure is sought were negotiated in 2006 (9 years before the information request) and that the circumstances in which they would be used today are very different from those in place when the contract was negotiated. To this extent we accept the arguments advanced on behalf of Mr Montague that they are now historic.

35. It was the Tate's case that a potential sponsor with knowledge of the level of funding provided by others sponsors past or present in return for particular benefits, will be in a position to drive a harder bargain to the detriment of the Tate. However, Ms Bidgood's evidence was that a material factor in the setting of the fee is the identity of the sponsor and the relationship. In February/March 2015 the person negotiating with the Tate for the "BP package" was BP and they knew that they had paid in

previous years. When responding to the request the Tate could not have taken account of the as yet unknown decision by BP to discontinue their sponsorship.

36. At the relevant date, there were no expressions of interest which the Tate were actively engaging with for the "BP package". As far as Ms Bidgood was aware there was no other Sponsor waiting who could have used the specific information to obtain the same package. This is because the Tate would never have taken the same package to another sponsor, the Tate doesn't have a "shopping list" there are no published fees or prices for such opportunities. Corporate partners generally determine how much they are prepared to pay for sponsorship and the Tate determines what opportunities are available for that sum. There is always the opportunity to express interest but the benefits and fee associated with it is bespoke to the partner. In relation to an exhibition programme a number of potential sponsors might be considering the same element of a programme but the detail is entirely bespoke.

37. We are therefore satisfied that knowledge of BP's sponsorship figure from 2006-2011 could not be used as a template by any potential sponsor in their negotiations with the Tate. The Tribunal notes that the figures from 1999 to 2006 and BP's global current sponsorship over 5 years shared between 4 organisations is already known, consequently we are not satisfied that disclosure of the disputed information would weaken the Tate's bargaining position. Those commercial sponsors that want to mount those arguments have sufficient information already in terms of known sponsorship of other organisations and current "ball park" figures. The Tate are able to counter these arguments relying upon: the bespoke nature of its opportunities, its world class status and changes in the economic climate, public funding for the arts and the circumstances of the sponsors.

Conclusion

38. For the reasons set out above we are not satisfied that the exemption is engaged and we allow the appeal. In light of our findings relating to the non-engagement of s43(2) we do not go on to consider the public interest.

Steps

39. The Tate shall disclose within 35 calendar days from the date of this decision the BP sponsorship figures from 2007-2011 inclusive.

40. This decision is unanimous.

Dated this 26th day of July 2016

Fiona Henderson

Tribunal Judge