



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2018/0194**

**Before**  
Judge Stephen Cragg Q.C.

**Tribunal Members**  
Rosalind Tatam  
Roger Creedon

**Determined, by consent, on written evidence and submissions.  
Considered on the papers on 9 July 2019**

**Between**

**Jonathan Beckman**

Appellant

and

**The Information Commissioner  
The National Gallery**

Respondents

**DECISION AND REASONS**

**INTRODUCTION**

1. On 8 August 2017 the Appellant requested the following information

from the National Gallery (the Gallery):

- 'Any documents, records and/or correspondence relating to the loan of the painting *David Contemplating the Head of Goliath* by Orazio Gentileschi.
- Any documents, records and/or correspondence relating to technical or art-historical analysis, or provenance research conducted on *David Contemplating the Head of Goliath* by Orazio Gentileschi from before or after the loan agreement
- Any documents, records and/or correspondence relating to the return of the *David Contemplating the Head of Goliath* by Orazio Gentileschi to its owner.'

2. *David contemplating the Head of Goliath* is a painting attributed to Orazio Gentileschi. We refer to it in this decision as the Painting. The Painting came on loan from a private owner to the Gallery in June 2013. It was displayed in the Gallery's 'Making Colour' exhibition between June and September 2014. The initial loan period, of June 2013 to June 2015, was extended first to November 2015 and then to March 2016. Between April 2015 and March 2016 the Painting formed part of a small display alongside paintings from the Gallery's own collection and one other loan. When that display came to an end, the Painting was returned to its owner as scheduled.
3. The context of the request is broadly that questions have been raised in the press about the Painting's authenticity and attribution. During the period up to and during the loan of the painting, the Gallery has said that it had no obvious reason to doubt that the work was as attributed.
4. The Gallery has provided some information to the Appellant, but it has withheld a large amount of information. This appears in a bundle where

some pages have been withheld completely and some pages have been redacted. The Gallery has claimed a number of exemptions to disclosure under FOIA. These apply to different parts of the withheld material, although there is some overlap. The Commissioner sums up the scope of the case as it appeared before her as follows:-

14. The complainant contacted the Commissioner on 6 December 2017 to complain about the way his request for information had been handled and to dispute the application of the four exemptions 36, 40, 41 and 43. The complainant did not complain to the Commissioner about the application of sections 21 (information in the Annual Review for 2013/14, the Gallery accounts to March 2014 and press cuttings) or 31 (withheld information regarding the transportation of the artwork, its permanent location and secure storage areas at the Gallery).

15. During the course of the Commissioner's investigation the Gallery applied section 31 to the valuation of the painting. The Gallery also cited an additional exemption. It applied section 42 (legal advice) to the annotations made by the Gallery's in-house legal counsel, written during the loan negotiation. The complainant was informed and he provided his arguments against these exemptions. The Gallery responded with its comments.

16. The Commissioner therefore considers the focus of the investigation to be whether the Gallery was entitled to rely upon the six exemptions (31, 36, 40, 41, 42 and 43) to withhold the redacted parts of the disclosed bundle of information and, if so whether the public interest favours maintaining those exemptions.

17. The Commissioner has been provided with a copy of the withheld information (bundle of 538 pages, including the disclosed 463 pages), clearly marked with which exemption(s) apply to which pages or parts of pages. The Commissioner will only refer to the parts of the withheld information in general terms so that she does not inadvertently disclose some of the detail within the withheld information.

5. The result of the Commissioner's consideration was that she upheld the applicability of the exemptions apart from in relation to section 31 FOIA (law enforcement) and section 43 FOIA (legal privilege) where she said

that other exemptions covered the relevant withheld material and so it was not necessary to consider these exemptions.

6. In addition, the Commissioner found that in each case where the public interest test should be applied, the balance of the public interest favoured the continued withholding of the information.
7. On 31 August 2018, the Appellant submitted a notice of appeal against the decision notice. On 12 October 2018, the Commissioner sent in her response to the tribunal. On 3 November 2018, the Appellant submitted his reply. On 12 November 2018, the Gallery submitted its response to the appeal. On 26 November 2018, the Appellant submitted his reply to the Gallery's response. On 15 January 2019, the Gallery submitted a witness statement from Susan Foister, deputy director of the Gallery which was followed by two supplementary statements. The Appellant submitted a 'final submission' shortly before the Tribunal considered the case on the papers. The Tribunal has considered the contents of all these documents in reaching its decision, although not every point made has been directly referred to in this decision, which is already of considerable length.
8. The Appellant formulated his appeal in seven grounds which he described as follows:-

Ground 1: the Appellant was denied his right to a fair hearing.

Ground 2: the application of the section 36 [FOIA] exemption was unreasonable.

Ground 3: the Commissioner incorrectly weighed the arguments against release of the material.

Ground 4 : the Commissioner incorrectly weighed the arguments in favour of disclosure.

Ground 5: the Commissioner paid insufficient regard to precedent in the interpretation of section 40(2) [FOIA].

Ground 6: there is [a] public interest defence for disclosure of material withheld under section 41[FOIA] and the Commissioner misapplied the test.

Ground 7: the Commissioner incorrectly concluded that revealing information withheld under section 43(2) [FOIA] would prejudice commercial interests.

9. It is appropriate to deal with the first ground at this point. The Appellant complains that he was not given an opportunity to respond to arguments raised with the Commissioner by the Gallery, and so was denied a fair hearing. This Tribunal considers all the arguments afresh and so, whatever the position before the Commissioner, the Appellant has had the opportunity to respond to all the Gallery's points in this appeal, and all his points have now been considered.
10. As there a number of exemptions relied upon by the Gallery and supported by the Commissioner, it is appropriate to consider each one separately, and to consider the Appellant's other grounds of appeal at relevant points in the analysis.

#### SECTION 36 FOIA

11. Section 36 reads materially in this case: -

**36. – Prejudice to effective conduct of public affairs.**

(1) This section applies to –

(a) ...

(b) information which is held by any other public authority

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

(a) ...

(b) would, or would be likely to, inhibit –

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation,

(c)...

(3) ...

(4) ...

(5) In subsections (2) and (3) “qualified person” --

...(o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means –

(i)...

(ii) ...

(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.

12. Section 36 FOIA is not one of the exemptions excluded from the ‘public interest’ test, and therefore, by section 2 FOIA:-

(1)..

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) [the right to have information communicated] does not apply if or to the extent that –

(a) ...

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

13. In this case the appropriate Qualified Person (QP) was the Gallery’s director, Dr Gabriele Finaldi. The Gallery advised the Commissioner that the QP’s opinion was sought on 5 September 2017. During a meeting with the QP he was shown the withheld information and made aware of how the exemption operated, as well the arguments for and against its application. His opinion was that the exemption applies to information

comprising internal advice, discussions and deliberations about the borrowing of the Painting, the undertaking of due diligence, the terms of the loan agreement, the valuation of the Painting for the purposes of the Government Indemnity Scheme and responses to press inquiries.

14. The correct approach to a case where the s36(2) FOIA exemption is invoked following the opinion of a QP, is explained in the recent Upper Tribunal (UT) case of *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) (*Malnick*). At paragraphs 28 and 29 of the UT's judgment is this:-

28. The starting point must be that the proper approach to deciding whether the QP's opinion is reasonable is informed by the nature of the exercise to be performed by the QP and the structure of section 36.

29. In particular, it is clear that Parliament has chosen to confer responsibility on the QP for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect. As Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55):

“It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates.”

15. The UT then continued to describe the two stages involved in deciding whether information is exempt under s36 FOIA at paragraph 31:-

31.....first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition (“prejudice”) would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

16. The UT then emphasises that the ‘QP is not called on to consider the public interest for and against disclosure...the QP is only concerned with the occurrence or likely occurrence of prejudice’ (paragraph 32). Going on, the UT explains:-

32...The threshold question under section 36(2) does not require the Information Commissioner or the FTT [First Tier Tribunal] to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal).

17. The UT also decided that when considering whether the QP’s opinion was reasonable ‘we conclude that “reasonable” in section 36(2) FOIA means substantively reasonable and not procedurally reasonable’ (paragraph 57).
18. The Gallery’s case is that the withheld information comprises frank and candid discussions about a private loan, which is an issue of crucial importance to the Gallery. We have assessed the relevant internal exchanges in the withheld material and we agree that that is the case. As the Gallery says, the information concerns a loan that had very recently run its course and around the time of the FOIA request had attracted a degree of speculative media coverage. Although at the time of the request the loan had recently come to an end, the issue about the



attribution of the Painting was very much a live one, and the information was sensitive at the time of the request.

19. The Gallery claims that disclosure would have a 'chilling effect' on the basis that frankness and candour in similar communications in the future would diminish if employees knew that disclosure would occur in cases such as this one. Dr Foister's witness statements provide further detail to provide context for the view of the QP.
20. Although the Tribunal might have been less convinced by the arguments in relation to a 'chilling effect' as a result of disclosure than was the QP, there is no doubt that the QP gave a reasonable opinion in this case. In our view, it was reasonable of the QP to form the opinion that there would be likely to be a chilling effect on the free and frank exchange of views for the purposes of deliberation, and on the giving of free and frank advice in the future if the information were disclosed. This would be prejudicial to the Gallery's exercise of its core functions, including due diligence and negotiation of loans, and the response to press enquiries.
21. The Appellant advances arguments to the contrary in support of his appeal Ground 2. He has a point that increased public scrutiny of decision making can actually enhance that process rather than harm it. As indicated above, the Tribunal does not automatically accept 'chilling effect' arguments, but in this case it cannot be said that the arguments relied upon by the QP are unreasonable in the context in which the request for information was made.
22. There is also a proper debate in our papers about whether the matter is still 'live'. The Appellant says that the loan has finished and so it is not a 'live' matter. The Gallery and the QT say that the debate is still fresh and continues. Either might be the preferred interpretation, but again it cannot be said that the QT's approach is unreasonable.

23. As we have concluded that the Commissioner has reached the correct decision in relation to the applicability of section 36 FOIA on the basis of the QP's reasonable opinion, we must move on to consider the arguments for and against disclosure in the public interest, (which form the subject matter of the Appellant's Ground 3 and Ground 4). This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case, the harm that disclosing the information would cause is greater than the public interest in its disclosure. In considering this, we must give the QP's opinion on prejudice appropriate consideration.
24. The Appellant has raised a number of matters which are relevant to public interest in making disclosure, some of which are also reflected in his case as to whether the QP's opinion was reasonable. These can be summarised as follows:-
- (a) Now the loan has expired, the matter is no longer 'live' and this lowers any public interest factors against disclosure.
  - (b) Thousands of people saw the Painting and were told it was by Gentileschi, and there is a public interest in understanding how that attribution was decided by the Gallery, now that allegations about the authenticity have been raised.
  - (c) He disputed the weight to be given to the chilling effect, as the Gallery's conservators and curators were used to robust exchanges of views in other environments such as conferences and symposia.
  - (d) The emails discussing responses to press inquiries would shed important light on the gallery's beliefs about authenticity.
25. The Gallery acknowledged that those working for public authorities

should expect their decisions to come under scrutiny and should be able to defend their advice and decisions.

26. In summary, the Commissioner accepted that there are public interest arguments in favour of disclosure and in particular, there is a public interest in understanding how decisions are made for the loan arrangements of paintings and how responses to press enquiries are drafted.

27. The Gallery raised a number of issues relevant to the public interest in maintaining the exemption which can be summarised as follows:-

(a) There is still a live issue, as the interest in the loan of the Painting to the Gallery has continued, with an article in *The Guardian* in June 2018 cited as an example.

(b) The Gallery emphasised that the primary purpose of the due diligence process was in fact ensuring that legal ownership in the paintings it borrowed on loan was not disputed – which was not in issue in the present case. The Gallery explained that *‘during the period up to and during the loan of the painting, the Gallery had no obvious reason to doubt that the work was as attributed...Due diligence, as carried out in relation to the Gentileschi, was not a process of authentication.’*

(c) The Gallery stated that the disclosed information shows the press questions asked and the answers given, and that *‘the press release presents an accurate reflection of the outcome of the discussions.’* On that basis, there was only a limited public interest in disclosing the Gallery’s decision-making process which led to the press releases, and this is outweighed by the chilling effect on Gallery staff if disclosure is made.

28. The Commissioner said that she was sympathetic to the Appellant's arguments that it is in the public interest for the public to have confidence in the attributions made by a major gallery and the decision to borrow the Painting in particular. However, she was of the view that the matter was still 'live' as decisions about borrowing paintings constituted a core issue for the Gallery. There was a significant public interest in Gallery staff being free to provide completely honest assessments when considering a proposal to borrow paintings for the Gallery, and to have candid discussions when drafting responses to press enquiries. Her view was that this public interest outweighed the public interest in disclosure.
29. Much of the Appellant's written submissions in the appeal focus on the public interest in disclosure, and we comment on this at some length here. The points made also have relevance when discussing other exemptions where the public interest balance is considered.
30. The Appellant's general approach, it seems to us, is that as there are doubts raised about the attribution of the Painting, then disclosure of as much information as possible by the Gallery will be in the public interest to throw light on the issue of attribution and the way that that has been dealt with by the Gallery. Thus in his appeal the Appellant describes 'the major public interest argument I made in favour of disclosure' and explains that where there is doubt about authenticity of the Painting 'there is a strong public interest in seeing all of the information, discussion and analysis that fed into the loan of the painting'.
31. Notwithstanding this approach, we agree with the Commissioner on the issue of public interest. Like the Commissioner we accept that there is some public interest in transparency in the Gallery's dealings with sensitive and difficult issues, such as the attribution and ownership of works of art. However, we also accept the Gallery's explanation that

when borrowing the Painting its focus was more on legal ownership (about which there was no real doubt), rather than on attribution, and the withheld information confirms that that is the case.

32. This is important in relation to this request. The Appellant's concern is that paintings are loaned and displayed where there is doubt about attribution. If it were the case that the Gallery was forming a definitive view about attribution which subsequently turned out to be mistaken, then there would be a greater public interest in discovering how the error had been made. But the Gallery does not claim to be making that assessment on attribution. The only assessment reached by the Gallery was that it had no reason to doubt that the Painting was by Gentileschi.
33. If the major concern is about attribution, but this is not a significant factor considered by the Gallery and does not feature largely in the withheld material, then this rather undermines the Appellant's case that 'all off the information, discussion and analysis that fed into the loan of the painting' should be disclosed in the public interest. Rather, the withheld information needs to be considered on the basis that it does not contain substantive information about attribution. There is still a public interest in disclosure for the purposes of general transparency and accountability, but that carries much less weight than would an argument that the withheld material relates to a major error in attribution by the Gallery.
34. Of course, with the information that the Appellant now has, he can make what he will of the Gallery's case that it's due diligence procedures are largely about legal ownership rather than attribution, and he would be free to argue that the Gallery does not therefore go far enough in its due diligence, especially where paintings are to be displayed to paying customers. But once he has been told, correctly, that the information held does not relate significantly to the question of attribution, it is difficult

for him to successfully use public interest arguments to bring about disclosure of the information that is held, where there are strong public interest arguments in favour of withholding the material.

35. As Dr Foister also notes, in relation to the use of public funds, that this was a case where public funds were deployed primarily to pay for travel arrangements, rather than for the purchase of a painting about which there were doubts about authenticity.
36. We accept the Commissioner's views that in this particular case, that public interest is outweighed by the need for the Gallery to have a safe space to discuss and seek advice on sensitive issues.
37. Giving appropriate consideration, as we must, to the QP's reasonable opinion on prejudice for the purposes of s36(2)(b) FOIA, only serves to support that conclusion.

#### SECTION 40(2) FOIA

38. The Commissioner explains as follows in the decision notice:-

On most pages of the disclosed information, the Gallery withheld instances of third party personal data (names, contact details, home telephone numbers, etc) of the owner, Gallery staff, fine art transport staff and journalists who contacted the Gallery. However, the complainant's main interest lies in the identity of the lender of the painting and his agents as it was important to know the relationship between the Gallery and the lender: *'a private individual benefits when he lends a painting to a gallery. It is placed in the shop window, so to speak, its value is raised.'* The Commissioner has agreed with the complainant that she will focus her investigation on this aspect.

39. Section 40 FOIA reads, materially, as follows:-

#### **40.— Personal information.**

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if –
  - (a) it constitutes personal data which do not fall within subsection (1), and
  - (b) either the first or the second condition below is satisfied.
- (3) The first condition is –
  - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –
    - (i) any of the data protection principles, or
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

40. Consideration has to be given under s40(3)(a)(i) and (ii) as to whether that personal data can be disclosed without contravention of data protection principles.
41. Materially, for the purposes of s40(3)(a)(i), the first data protection principle requires that personal data is processed (which includes disclosure) fairly. Section 10 of the DPA 1998 (as referred to in s40(3)(a)(ii)) refers to damage or distress caused by disclosure.
42. In relation to interpreting the first principle, the disclosure must also not breach the material conditions in Sch 2 to the DPA 1998 ‘relevant for purposes of the first principle’. Processing is permitted if the data subject

has consented to it (Sch 2, first condition), but if not then for the purposes of the sixth condition in Sch 2 it must be established that the disclosure is necessary in order to meet the legitimate interests of the appellant.

43. Further for the purposes of the sixth condition, there is an exception to disclosure even where disclosure has been established as for the purposes of the appellant's legitimate interests. Thus, the exception covers a situation where the processing (disclosure) is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
44. In the decision notice the Commissioner made the following findings about personal data, summarised here:-
  - (a) Even though ownership of the Painting is vested in a company, disclosure of the name of the company, when combined with other information, would amount to disclosure of information from which living data subjects would be identifiable, and so was personal data.
  - (b) The a name of a gallery associated with the Painting was correctly withheld as personal data 'as it is the name of the owner of the gallery'.
  - (c) The valuation of the Painting was something that fell within the exemption under s36 FOIA and therefore consideration as to whether this was personal data was unnecessary.
45. Distilling the requirements of s40 FOIA, in deciding whether disclosure is fair, the Commissioner has noted the following in her Response:
  68. When considering whether disclosure would be unfair, and so breach the first principle, the Commissioner takes three factors into account:



- What reasonable expectation do the individuals have about what will happen to their personal data?
- Have the individuals given their consent to disclosure?
- What might be the likely consequences resulting from disclosure?

69. Assessing fairness however, also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public. It may still be fair to disclose the information if there is an overriding legitimate interest in doing so. The Commissioner therefore also considered these interests.

46. The Gallery's case was that individuals not working for the Gallery would not expect their personal data to be disclosed. It was usual practice for the Gallery, and other galleries worldwide to be able to borrow paintings while maintaining an owner's anonymity. The Gallery said that the individual in this case had said that they do not consent to disclosure of their personal data. The Commissioner accepted these arguments.
47. The Appellant's case on this point was that lenders of works of art to the Gallery are often 'refined and sophisticated' people who should expect a high degree of scrutiny and would not, in those circumstances, have a reasonable expectation of privacy.
48. It seems to us that the Gallery's arguments are to be preferred. A person who loans a painting to the Gallery on the basis that they will remain anonymous, is entitled to expect that the Gallery will not disclose his or her name as the owner of the painting, except in the limited circumstances then provided for by the DPA and FOIA, and that such disclosure might well cause distress to an individual, prepared to lend to the Gallery so that art works can be seen by the public, but wanting his or her ownership of art work to remain private.
49. The Appellant's Ground 5 is that 'the Commissioner paid insufficient regard to precedent in the interpretation of section 40(2) [FOIA]'. We take

this to be a reference to the Appellant's argument that as the owner of the Painting is formally a company rather than an individual, then the details of ownership do not constitute personal data. However, we accept the Commissioner's argument on this point in paragraph 28 of her response that the relevant test is 'whether the owner can be identified with reasonable likelihood, from [the withheld] information, taking into account all methods reasonably likely to be used by any person wishing to identify the owner'. The Gallery informed the Commissioner that 'the owner is listed as the only living person in the entry for the relevant company' on the public register, and on that basis it seems clear that the relevant test is met.

50. In circumstances where there is a reasonable expectation of privacy, the legitimate interest of the Appellant in disclosure would need to be strong. The Appellant's case is that where there is doubt over attribution over a picture exhibited in public, then to resolve this issue requires information to be disclosed, such as where the painting comes from and the relationship between the owner and the Gallery. We agree with the Commissioner that there is a legitimate interest in achieving transparency in the Gallery's dealings. But like the Commissioner, in our view, in this particular case at least, this legitimate interest does not outweigh the important interest in maintaining a reasonable expectation of privacy.
51. In some cases the legitimate interests might be strong enough to outweigh a reasonable expectation of privacy (and we accept the Appellant's point that 'refined and sophisticated' art owners will understand this is a possibility), but simply because there is a debate about the attribution of the picture, especially where the Gallery does not claim to have investigated the issue to any extent, is not sufficient to mean that personal data should be disclosed in this case.

52. Thus, in accordance with the Commissioner's reasoning in the decision notice we find that the information which relates to the ownership of the Painting and which is personal data has been correctly withheld by the Gallery.
53. The Appellant also argues that the valuation of the painting does not constitute personal data, but in relation to this we note (as did the Commissioner) that the valuation has been found to be covered by the s36 FOIA exemption and therefore it is not necessary to consider the further possible exemption under section 40(2).

#### SECTION 41 FOIA

54. Section 41(1) FOIA provides as follows:-
  - (1) Information is exempt information if -
    - (a) it was obtained by the public authority from any other person (including another public authority), and
    - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
55. This is an absolute exemption, but there is a public interest balancing exercise to be applied as part of the common law in relation to a breach of confidence.
56. The Gallery cited section 41(1) FOIA to withhold documentation containing information that had been passed to it in confidence including the terms of the Government Indemnity scheme (GIS) which relates to insuring the Painting and confidential information provided to the Gallery by the owner of the painting or those acting on their behalf. As the Commissioner says the Appellant 'is looking for information surrounding the technical or art-historical analysis, or provenance

research of the painting, conducted on the painting from before or after the loan agreement (part 2 of the request)'.

57. The Commissioner's view can be summarised as follows:-

(a) For the purposes of s41(1)(b) FOIA, and whether disclosure to the public would constitute an actionable breach of confidence by the Cabinet Office, the Commissioner applied the test in *Coco v A. N. Clark (Engineers) Limited* [1968] FSR 415. This requires the application of a three-stage test as to whether (a) the information in question had the necessary quality of confidence, (b) the information was imparted in circumstances importing an obligation of confidence, and (c) the unauthorised use of the information would be of detriment to the confider. The Commissioner found that all these tests were met.

(b) The provenance information and condition report were provided in confidence by a third party.

(c) However, as the provenance checklist was redacted in its entirety under s36 FOIA as forming part of the due diligence constituting staff advice and decision making, it was not considered for the purposes of section 41 FOIA.

(d) The other provenance information and the condition report potentially impacts on the valuation of the painting, is not trivial information and is not otherwise accessible – and therefore has the necessary quality of confidence. This is accepted by the Appellant in his written submissions.

(e) The information relates to a painting in a private collection and not one which the Gallery owns or has sought to purchase. The

circumstances in which the withheld information was supplied to the Gallery by third parties impliedly and expressly confirmed that it would retain a confidential quality and that the Gallery would not share the information provided as part of this process.

(f) The Gallery's case that release of the information may have a detrimental impact on the owner (possible impact on the valuation of the Painting), and the Gallery (releasing this confidential information would have a detrimental impact in future cases), was accepted by the Commissioner.

58. The Commissioner also considered whether the Gallery would have a public interest defence to disclosure of the information. She noted that the Appellant's argument was that disclosure would not damage the owner's interests, and that it was in the public interest for the Gallery to disclose the information to show its rigour in handling information regarding the Painting. We note that the Appellant's Ground 6 is that 'there is [a] public interest defence for disclosure of material withheld under section 41[FOIA] and the Commissioner misapplied the test'.

59. The Gallery re-iterated its point that the information was provided primarily to carry out due diligence in relation to ownership rather than authentication, and also was concerned that disclosure would damage the ability of the Gallery to receive information in confidence from owners in the future. Balancing these arguments relating to, respectively, openness and trust, the Commissioner said she was 'mindful of the wider public interest in preserving the principle of confidentiality and the ability of the Gallery to seek due diligence on future loans of artwork' and concluded that there was a stronger public interest in maintaining the obligation of confidence than in disclosing the

information. Therefore, the Commissioner found that the information was correctly withheld under section 41 FOIA.

60. In our view the application of the exemption in s41 FOIA has been correctly applied to the information identified by the Commissioner. We note the first tier tribunal decision in *Armstrong v ICO* (Case no: EA/2014/0165, 3 February 2015) where the FTT set out the principles to be applied, citing from the leading textbook, and we repeat what was said in that case as follows:-

10. Toulson and Phipps on Confidentiality (3<sup>rd</sup> Edition) includes a summary of conclusions reached by the authors at the end of a comprehensive review of the law on the public interest defence, as it has developed under the impact on English law of the European Convention on Human Rights. The summary is in the following terms (paragraph 6-075):

“Although each case has to be examined on its own facts, the following general principles are suggested:

(1) Respect for confidentiality is itself a matter of public interest.

(2) To justify disclosure of otherwise confidential information on the grounds of public interest, it is not enough that the information is a matter of public interest. Its importance must be such that the duty otherwise owed to respect its confidentiality should be overridden.

(3) In broad summary either the disclosure must relate to serious misconduct (actual or contemplated) or it must otherwise be important for safeguarding the public welfare in matters of health and safety, or of comparable public importance, that the information should be known by those to whom it is disclosed or proposed to be disclosed.

(4)

(i) Even if the information meets that test it does not necessarily follow that it would be proper for the defendant to disclose it.

(ii) The court must consider the relationship between the parties and the risks of harm which may be caused (or avoided) by permitting or prohibiting disclosure, both in the particular case and more generally. For example, if the law inhibits a doctor from disclosing information about a patient which may affect another person, it may lead to risk of avoidable injury or death; but if it permits a doctor to do so, it may impair a patient's willingness to confide in the doctor and receive treatment.

(5) Ultimately the court has to decide what is conscionable or unconscionable, which will depend on its view of what would be acceptable to the community as a fair and proper standard of behaviour. This requires the court to make an evaluative judgment, but it does not have an unfettered discretion.

(6) In cases where the party claiming confidentiality is a branch of Government, or a body performing a governmental function, a separate principle applies. In such cases detriment to the public interest is an essential ingredient of the cause of action.

61. Applying these principles, it is our view that there is nothing of sufficient importance to override the public interest in the respect for confidentiality. We accept that there is a public interest in knowing about the provenance information and condition report provided to the Gallery about a painting it has borrowed and exhibited. However, this is not sufficient, in our view, to override the public interest in maintaining confidentiality when it is clear that that was the basis upon which the information was provided to the Gallery. In particular, we cannot see that any of the issues referred to in paragraph 10(3) of the *Armstrong* judgment are engaged.
62. In our view therefore the exemption in s41(1) FOIA applies in this case.

SECTION 43(2) FOIA

63. The Gallery cited section 43(2) FOIA to withhold information about the loan agreement and the valuation of the painting. The Commissioner explains as follows that:

101. The Gallery has stated that both the commercial interests of the National Gallery and those of the person who owns the painting would be harmed by the release of information. In particular, the Gallery believes, and has had confirmed, that the lender's commercial interests would be harmed by the release of information regarding the valuation of the painting. The lender's ability to sell the painting or engage in future negotiations about this or other works would be greatly hindered. As the Commissioner has already considered the Gallery's valuation of the painting as correctly withheld under section 36, she will not therefore consider it again here.

102. The loan agreement (both the draft copies and the final version) covers all aspects of the contract for the loan of the painting and includes the annotations from the lawyers on 4 pages of the draft versions. The Gallery has also applied section 42(1) (confidential legal advice) to these annotations.

64. Section 43(2) FOIA, materially, reads as follows:-

**43. – Commercial interests.**

(1) ...

(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).

65. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.
66. In relation to the test for prejudice in s43(2) FOIA, in *Hogan v Information Commissioner* (EA/2005/0026, 17 October 2006) it was stated as follows:-



28. The application of the 'prejudice' test should be considered as involving a number of steps.

29 First, there is a need to identify the applicable interest(s) within the relevant exemption...

30 Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a *de minimis* threshold which must be met. ..

31 When considering the existence of 'prejudice', the public authority needs to consider the issue from the perspective that the disclosure is being effectively made to the general public as a whole, rather than simply the individual applicant, since any disclosure may not be made subject to any conditions governing subsequent use.

32...

33 ...

34 A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner* (EA/2005/0005) interpreted the phrase "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. That Tribunal drew support from the decision of Mr. Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin), where a comparable approach was taken to the construction of similar words in Data Protection Act 1998. Mr Justice Munby stated that 'likely': "*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.*"

67. Applying this approach the Commissioner concluded that this exemption is applicable. The Commissioner made the following findings:-
- (a) Loan negotiations are undertaken to ensure that privately owned pictures can be shown in public, and disclosure of information about the process involved is commercially sensitive to the lender, and would affect the perceived trustworthiness of the Gallery: therefore the harm alleged by the Gallery relates to its commercial interests.
  - (b) The Gallery had presented a reasonable argument that there is a causal link between the requested information (the loan agreement) and its commercial interests (ability to charge for exhibitions which include private loans.)
  - (c) Prejudice to commercial interests would be caused if the loan agreement were disclosed, as disclosure would be detrimental to current and further negotiations for private loans which are important to enhance the charged-for exhibitions organised by the Gallery, and hence affect the economic interests of the Gallery.
68. For all of these reasons the Commissioner found that the section 43(2) exemption is engaged and that disclosure of the loan agreements would result in a real and significant risk to the Gallery's economic interests.
69. Similar public interests were considered by the Commissioner in relation to this exemption to those listed above in relation to other exemptions.
70. The Appellant argues that the credible allegations regarding the Painting, mean that there is a clear public interest in learning what valuation has been put on the Painting by the gallery, and it is acknowledged by the Gallery that there is a public interest in transparency and accountability.

71. The Gallery points out that there was little public expenditure linked to the loan and that the curiosity generated by journalists in the information is not the same as establishing the public interest in disclosure.
72. The Commissioner's view, whilst accepting that the disclosure would promote transparency and accountability, was that the public interest in maintaining the section 43(2) exemption outweighed the public interest in disclosure:-

124....disclosure would add little to the public understanding of the allegations made about the painting. The terms of the loan (including the valuation which the Commissioner considered was correctly withheld under section 36) were negotiated in 2013 and concerned detailed contractual information (on photographic rights etc) between the lender and the Gallery.

126. As regards the public interest in maintaining the exemption the Commissioner's view is that there is a strong public interest in protecting one of the core tasks of the Gallery: to continue to compete fairly when negotiating for the loan of privately-owned works to exhibit alongside those in public collections. The Commissioner accepts that the display of privately-owned works are an important part of the Gallery's ability to stage charged-for exhibitions which is of commercial interest to the Gallery.

73. In relation to the Appellant's Ground 7, we do not find 'that the Commissioner incorrectly concluded that revealing information withheld under section 43(2) [FOIA] would prejudice commercial interests'. The Appellant disputes whether commercial harm would be caused as the information is in a standard format that would be available to anyone who approached the Gallery with a proposed loan, and that the information sought was old when it was requested. The Commissioner counters in her response that in fact the specifics of the loan of the Painting do contain unique information and terms the Gallery was prepared to offer the owner (albeit that the benefits do not appear to have amounted to very much, as the Appellant notes), and disclosure

would be useful to future lenders to the commercial disadvantage of the Gallery. The Commissioner's view was that the information was still relevant, as the parameters of negotiation had not changed significantly, and the information was not especially old or stale.

74. In our view, these are important points which answer the Appellant's appeal ground. Even the fact that little benefit has been offered to the owner of the Painting has the potential to be of importance within the context of the full loan agreement. In our view, the Commissioner has reached the right conclusions in relation to the applicability of the exemption in section 43(2) FOIA. We agree with the reasons put forward by the Commissioner for accepting that the exemption was engaged.
75. We are also in agreement that the balance of the public interest favours non-disclosure. In reality, the loan agreement and the valuation of the Painting are at the heart of the commercial activities of the Gallery in its core function of bringing art works in private collections to the attention of the public, often in exhibitions for which it is able to charge admission. A lack of trust in the Gallery in its ability to keep private commercially sensitive information would adversely impact on these activities to the detriment of the Gallery and the public.
76. Other than an increase in transparency and accountability, there is little in the way of argument as to why disclosure would be in the public interest. Certainly there would seem to us to be little light to be shone on the authenticity issue in circumstances where, as explained above, the Gallery's 'due diligence' is directed more at ascertaining ownership than establishing provenance. On that basis it can be assumed that the loan agreement and the valuation of the Painting have been carried out on the basis that the Painting is indeed by Gentileschi.

## SECTION 31 AND SECTION 42 FOIA

77. The decision notice contains some consideration about the applicability of section 31 FOIA (prevention or detection of crime) to withhold information regarding the transportation of the artwork, its permanent location outside of the Gallery and the secure storage areas at the Gallery. There was also discussion about the applicability of section 42 FOIA (legal professional privilege) to annotations made by the Gallery's in-house legal counsel to the loan agreement. However, as information had already been withheld under other exemptions, the Commissioner did not consider these exemptions further. We take the same approach.
78. Although s31 FOIA does not appear in the Appellant's appeal grounds, it is referred to in his subsequent written submissions. However, as the submissions refer to publication of the valuation of the Painting in our view this has also been withheld under other exemptions and we do not address the issue further in this appeal.

## CONCLUSION

79. Therefore, we dismiss the appeal in this case.

Signed Stephen Cragg QC

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 30 August 2019

(Case considered by Panel on 9 July 2019).

