

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 2 June 2009

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

### Summary

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The complainant made a request to the National Portrait Gallery for information it held in respect of proposed commissioned portraits of Tony Blair and General Sir Mike Jackson. The National Portrait Gallery responded to the request by disclosing a quantity of information relating to the Sir Mike Jackson commission. Additional information was withheld under the exemptions in section 36 (Prejudice to effective conduct of public affairs) and section 40(2) (Personal information) of the Act. The Commissioner has considered the complaint and has found that section 36(2)(c) applies to all of the information withheld from the complainant and the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore the Commissioner did not consider the National Portrait Gallery's application of section 40(2). The Commissioner requires no steps to be taken.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 3 October 2007 the complainant made a freedom of information request to the public authority for the following information:  
  
"1...All internal documentation (including emails, minutes, faxes, reports, contracts etc) and all external correspondence (including emails) held by the gallery which relate in anyway whatsoever to the Tony Blair commission listed in your last letter of 10 September 2007."

- 2...All internal documentation (including emails, minutes, communications, faxes, reports, contracts etc) and all external correspondence (including emails) held by the gallery which relate in any way whatsoever to the Sir Michael Jackson commission listed in your last letter of 10 September 2007.”
3. The public authority responded to the request on 25 October 2007. First of all, by way of providing a background to how it had responded to the request, it explained how the commissioning process works. It said that the approval of a sitter by the public authority's trustees was only the first stage in what could be an extremely lengthy process. It said that securing the agreement of a sitter may take months or years to achieve given that those selected for portraits lead very demanding and busy lives. It said that selecting and matching an artist with the sitter, the next stage in the process, was just as complex and time consuming and that even when a contract has been signed it traditionally took 18 months for a portrait to be completely realised and formally accepted into the collection.
  4. In respect of the Tony Blair Commission the public authority said that it was still its intention to secure a portrait and it referred the complainant to the minutes of the meetings of its trustees, available on its website, which confirmed that Tony Blair had been approached by the Gallery and consideration was being given to a suitable choice of artist. However, it said that to provide any further information would prejudice, or would be likely to prejudice, the effective conduct of public affairs. It explained that making correspondence, emails and documentation publicly available could dissuade the artist or sitter from taking part and therefore information was being withheld under the exemption in section 36(2)(c) of the Act. It added that section 36(2)(b)(i) and (ii) also applied because disclosure of the information could inhibit the free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation.
  5. In explaining its application of the exemption the public authority said that there was a significant risk that release of communications between the Gallery, sitter and the artist will damage its ability to progress the commission without any commensurate benefit to the public. It said that the commissioning process depends on establishing confidence between itself, the sitter and the artist. If information was disclosed whilst the portrait is being completed it said that this confidence would be damaged, in this particular case and in any future portraits involving the artist or sitter.
  6. The public authority now set out its reasons for concluding that the public interest in disclosure was outweighed by the public interest in maintaining the exemption. In doing so it noted that the once a commission has been completed the sensitivities involved decreased and subject to the provisions of the Act information would be released.
  7. In addition to its reliance on section 36 the public authority also said that it considered that details of prospective artists and sitters constituted personal data and that disclosure of such information at this stage in the commissioning process could cause damage or distress to those individuals. Therefore it said that the exemption in section 40(2) was also being applied.

8. As regards the Sir Mike Jackson commission the public authority provided the complainant with four documents falling within the scope of the request. However, it said that additional information was being withheld under section 36(2)(c) and also section 36(2)(b)(i) and (ii). It concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure. Its reasons for reaching this decision were the same as in the Tony Blair case. Again it said that section 40(2) applied and any personal data was redacted from the information disclosed to the complainant.
9. On 21 November 2007 the complainant wrote to the public authority to ask that it carry out an internal review of its handling of his request. In particular the complainant said that he found it difficult to accept that disclosure of information regarding these two commissions would damage the public authority's ability to perform its duties. Given that the commissions relate to high profile individuals the complainant said that he thought that disclosure would be unlikely to cause offence as both men had been subject to a great deal of public scrutiny.
10. The public authority presented the findings of its internal review on 4 January 2008. It confirmed that the request had been refused under sections 36(2)(b)(i); 36(2)(b)(ii); 36(2)(c) and 40(2) of the Act. It said that it had carefully considered whether this decision was appropriate and in doing so the qualified person had been consulted to ensure that his decision, that disclosure could prejudice the free and frank provision of advice, the free and frank exchange of views for the purpose of deliberation or the effective conduct of public affairs, was understood. At this stage the public authority upheld its decision to refuse the request.

## The Investigation

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### Scope of the case

11. On 23 January 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant highlighted his request for an internal review which he said explained why he believed the information he requested should be disclosed.

### Chronology

12. The Commissioner commenced his investigation on 25 November 2008 and wrote to the public authority to ask for copies of the withheld information clearly marked to show where each exemption applies. The Commissioner also asked the following questions regarding the public authority's application of section 36:
  - The Commissioner asked the public authority to confirm if it had sought the opinion of the qualified person when applying the exemption.
  - The Commissioner asked the public authority to confirm when the qualified person's opinion was given.

- The Commissioner asked the public authority to confirm whether the qualified person's opinion was given verbally or in writing. The Commissioner asked to be provided with a copy of the opinion if it was indeed given in writing.
  - The Commissioner asked the public authority to explain what other information was placed before the qualified person to allow him to reach his decision.
13. As regards its application of section 40(2), the Commissioner asked the public authority to explain which data protection principle would, in its opinion, be breached as a result of disclosure and why. The Commissioner also invited the public authority to make any additional representations in support of its handling of the complainant's request.
14. The public authority responded to the Commissioner on 19 December 2008. At this point it provided the Commissioner with copies of the withheld information and also provided a copy of the 'section 36 certificate' signed by the public authority's qualified person, its Director. It explained that in offering his opinion the qualified person was presented with copies of all the relevant correspondence under review. It also stressed that the qualified person was familiar with the proposed commissions and was a party to the emails and correspondences by which they were being discussed and negotiated.
15. The public authority provided the Commissioner with further explanation on the context in which the information was created and the stage at which the two commissions had reached at the time the complainant made his request.
16. The public authority went on to explain how the commissioning process works and outlined its experience of commissioning portraits and releasing information. In particular it provided the Commissioner with examples illustrating the fragile nature of the commissioning process during the initial sensitive stages as was the case in the Tony Blair and Sir Michael Jackson commissions. The public authority then elaborated on its reasons for concluding that the public interest in maintaining the exemptions in section 36 outweighed the public interest in disclosure.
17. In response to the Commissioner's question regarding the application of section 40(2) the public authority said that in its opinion the first data protection principle, which requires that personal data be processed fairly and lawfully, was the relevant principle. It then went on to explain why it believed disclosure would be unfair. The public authority also suggested that section 40(3)(ii), read in conjunction with section 40(2), may also apply as disclosure of the information would be likely to cause damage or distress to the individuals and artists concerned pursuant to section 10 of the Data Protection Act 1998.

### **Findings of fact**

18. As described on its website, the public authority's aim is "to promote through the medium of portraits the appreciation and understanding of the men and women

who have made and are making British history and culture, and...to promote the appreciation and understanding of portraiture in all media”.

19. After a prospective portrait subject has been selected the next step in the commissioning process is to obtain their agreement to sit for a portrait. The public authority will then consider suitable artists which will usually involve a meeting between the sitter and the artist. A more detailed description of the commissioning process is available on the public authority’s website at the following link:

<http://www.npg.org.uk/collections/new/commissioning-portraits/the-commissioning-process/process.php>

20. The names of agreed subjects for commissions are listed on the public authority’s website at:

<http://www.npg.org.uk/collections/new/commissioning-portraits/the-commissioning-process/process.php>

21. When a portrait has been completed it is publicised extensively. Prices paid to the artists are included in the Trustees’ minutes which are also available on the public authority’s website at:

<http://www.npg.org.uk/about/corporate/trustees-and-trustees-meetings.php>

22. In this case the public authority’s qualified person, its Director, Sandy Nairne, gave his opinion on the application of section 36 on 25 October 2007.

## Analysis

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23. A full text of the relevant provisions of the Act which are referred to in this section are contained within the legal annex.

## Exemption

### Section 36(2) (Prejudice to effective conduct of public affairs.)

24. The public authority has claimed that more than one “limb” of the exemption applies, namely section 36(2)(b)(i); section 36(2)(b)(ii) and section 36(2)(c).
25. Section 36(2) provides that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the Act –

(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,
- or

- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
26. In investigating whether the section 36 exemption is engaged the Commissioner will undertake the following:
- Ascertain who is the qualified person for the public authority
  - Establish that an opinion was given
  - Ascertain when the opinion was given
  - Consider whether the opinion was reasonable in substance and reasonably arrived at.
27. The Commissioner has received a copy of the section 36 certificate, a written record of the qualified person's opinion. Having reviewed this certificate the Commissioner has established that the proper qualified person, the public authority's Director, gave an opinion on the application of the exemption on 25 October 2007 and therefore prior to the public authority's refusal of the complainant's request.
28. In the case of *Guardian & Brooke v The Information Commissioner & the BBC*, the Information Tribunal considered the sense in which the reasonable person's opinion under s.36 is required to be reasonable. It concluded that:
- "...in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at".<sup>1</sup>*
29. The qualified person's opinion in this case was that section 36(2)(b)(i); 36(2)(b)(ii) and section 36(2)(c) are engaged for the following reasons.
- Disclosure may undermine confidence in the commissioning process and dissuade the sitter or artist, or future sitters and artists from taking part.
  - Disclosure might dissuade experts from offering advice because those who might supply it are reluctant to engage in a high profile media debate in which their contribution might be disclosable.
  - Individuals involved may be less likely to engage in free and frank discussion in which their contribution might be disclosable, particularly where the commission concerns a high profile individual.
30. The public authority has not explicitly stated which arguments apply to which particular sub-section of the exemption. However, the Commissioner is of the view that first argument would be used to support the application of section 36(2)(c) where as the second and third arguments would be used to support the application of section 36(2)(b)(i) and 36(2)(b)(ii) respectively.

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<sup>1</sup> *Guardian & Brooke v Information Commissioner & the BBC* [EA/2006/0013], para. 64.

31. Similarly the qualified person, and the public authority generally, has not explicitly stated whether disclosure would or would be likely to result in the prejudice outlined above. In light of this the Commissioner thinks it is appropriate to apply the lesser test, that is to say the exemption will apply if disclosure would be likely to cause the prejudice in section 36(2) of the Act. This approach has found support in the Information Tribunal when it stated:

*“We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.”<sup>2</sup>*

32. The Information Tribunal has also considered the meaning of ‘would be likely to prejudice’ and found that for this to apply:

*“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.”<sup>3</sup>*

33. This in turn follows the judgement of Mr Justice Munby in the High Court in which the view was expressed that:

*“Likely connotes a degree of probability that 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.”<sup>4</sup>*

34. The Commissioner has considered the opinion of the qualified person and finds the arguments for engaging section 36(2)(c) most convincing. Therefore the Commissioner intends to focus his analysis on considering whether the qualified persons opinion with regard to section 36(2)(c) was reasonable in substance and reasonably arrived at. The Commissioner will not consider the alternative limbs of the exemption in section 36(2)(b)(i) and (ii).

35. Having reviewed the withheld information the Commissioner is satisfied that the qualified person’s opinion is reasonable in substance. In reaching this view the Commissioner is mindful of the fact that when the complainant made his request both the Tony Blair and Sir Mike Jackson commissions were at an early and therefore sensitive stage as the commissioning process was still ongoing and had not yet been finalised. In respect of the public authority’s application of section 36(2)(c) the Commissioner has also taken into account a number of examples referred to by the public authority which served to illustrate the fragile nature of the commissioning process and the real danger that artists and/or sitters would withdraw from the process if their communications with the public authority were disclosed at such a sensitive stage in the process. The examples were given in confidence and Commissioner does not think it necessary to go into further detail suffice to say that he found them persuasive.

<sup>2</sup> McIntyre v Information Commissioner & the Ministry of Defence [EA/2007/0068], para. 45.

<sup>3</sup> John Connor Press Associates Ltd v Information Commissioner [EA/2005/0005], para. 15.

<sup>4</sup> R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 Admin

36. In considering whether the qualified person's opinion was reasonably arrived at the Commissioner will look at what information was placed before the qualified person when he gave his opinion and whether relevant or irrelevant factors were taken into account.
37. The Commissioner notes that the qualified person was involved in the two commissions and was also a party to some of the correspondence and other communications withheld from the complainant under this exemption. Therefore the Commissioner is satisfied that the qualified person was well placed to make a judgement on whether disclosure of the requested information would or would be likely to cause the prejudice which this exemption is designed to prevent. Given that the qualified person also had access to the withheld information itself as well as submissions prepared by his staff the Commissioner has concluded that the opinion was reasonably arrived at.
38. The Commissioner is satisfied that disclosure at the time the request was made would have been likely to have dissuaded the artists and sitters or future artists and sitters from taking part in the process. Therefore the Commissioner finds that that the qualified person's opinion was both reasonable in substance and reasonably arrived at and consequently finds that the exemption in sections 36(2)(c) is engaged.

#### **Public interest test**

39. Section 36 of the Act is a qualified exemption and therefore subject to the public interest test. Section 2(2)(b) of the Act provides that such an exemption will only apply if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
40. The public authority has acknowledged that disclosure of the withheld information would serve the public interest in accountability and transparency in its work. The Commissioner agrees with the public authority on this point and would also add that disclosure would aid the public's understanding of how the commissioning process works. Whilst the public authority already publishes information about completed Commissions including prices paid to artists, the Commissioner considers that disclosure of the information at an early stage in the commissioning process would serve the public interest to the extent that it would allow for greater scrutiny of how the public money is being spent before the commission is completed.
41. Whilst the Commissioner accepts that there is a public interest in disclosure he finds that there are also strong reasons for withholding the information and preventing the prejudice which the exemption is designed to prevent.
42. The Commissioner believes that disclosure would be likely to damage the commissioning process both in respect of the Tony Blair and Sir Mike Jackson commissions and future commissioning work undertaken by the public authority. It would not be in the public interest to prejudice the public authority's ability to secure portraits for the nation of two notable public figures. Similarly it would not



be in the public interest to prejudice the public authority's ability to commission portraits in the future by raising the prospect that disclosure of information relating to the most sensitive early stage of the commissioning process could be disclosed.

43. The Commissioner is also mindful of the fact that any damage caused to the commissioning process, given that this is at the very heart of what the public authority does – i.e. securing portraits of prominent individuals for the nation, the extent and severity of any prejudice caused would be significant.
44. In considering the public interest in disclosure the Commissioner is also mindful of the fact that the public authority already publicises information on how the commissioning process works, including details of subjects for portraits and the price paid to the artists, on its website. Indeed, in this case the names of both Tony Blair and Sir Mike Jackson had already been published on the public authority's website as prospective subjects for portraits. Therefore the public interest in accountability and transparency could be argued to have already been met to an extent as this information would allow the public to judge whether the public authority is commissioning appropriate portraits and whether the public authority is getting value for money from the artists concerned. However, the Commissioner's decision concerns the public interest in disclosing the particular information in question in this case.
45. The Commissioner acknowledges that disclosure of the particular information in this case would shed further light on how the commissioning process was developing with regard to these two particular commissions. However, having weighed this against the harm that would be likely to be caused to these commissions and the harm that would be likely to be caused to future commissions the Commissioner finds that the public interest favours maintaining the exemption.
46. In conclusion, the Commissioner accepts that there is some public interest in disclosure but finds that in all the circumstances of the case this is clearly outweighed by the public interest in maintaining the exemption. In reaching this view the Commissioner has given due weight to the opinion of the qualified person and is mindful of the arrangements the public authority already has in place to ensure the accountability and transparency of how it commissions portraits to be accepted into its collection.

#### **Section 40(2) (Personal information)**

47. The public authority also cited the exemption in section 40(2) of the Act to some of the withheld information on the grounds that it constituted personal data and disclosure would cause damage and distress to individuals featured in the information, pursuant to section 10 of the Data Protection Act 1998, or else would breach the first data protection principle. However, the Commissioner is satisfied that all the information withheld from the complainant is exempt from disclosure by virtue of section 36 and therefore he has not gone on to consider the public authority's application of section 40(2).

## The Decision

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48. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The public authority dealt with the request in accordance with the Act by correctly withholding information from the complainant under section 36(2)(c) of the Act.

## Steps Required

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49. The Commissioner requires no steps to be taken.

## Right of Appeal

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50. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 2nd day of June 2009**

**Signed .....**

**Lisa Adshead  
Senior FOI Policy Manager**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

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**Section 2(2)** provides that –

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

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

**Section 36(1)** provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

**Section 36(2)** provides that –

“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) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (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, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

**Section 40(1)** provides that –

“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.”

**Section 40(2)** provides that –

“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.”

**Section 40(3)** provides that –

“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.”