

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 11 May 2011**

**Public Authority:** Victoria & Albert Museum  
**Address:** Cromwell Road  
South Kensington  
London  
SW7 2RL

### Summary

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The complainant requested information from the Victoria and Albert Museum (the 'V&A') relating to its dealings with the artist Madonna and her representatives regarding a film which Madonna is directing. He also requested any information it held regarding Madonna's management company, Live Nation, and the V&A regarding a potential Madonna exhibition at the V&A. The V&A said that the information relating to the first request was exempt under section 40 (personal information). As regards the second request it applied section 43 (commercial interests) and section 41 (information provided in confidence). The Commissioner's decision is that all three exemptions are applicable.

The Commissioner's decision is that the V&A breached section 17(1)(b) in that it did not claim the exemption in section 40(5)(b)(i) when responding to part 4 of the complainant's request.

### 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 18 May 2010 the complainant asked the V&A for:

"I would like the following information under the Freedom of Information Act...

1. All correspondence (including emails) with the singer, musician and the film maker Madonna which in any way relates to one or more of the following ideas/projects.

a) A film about the life, work and times of the Duke and Duchess of Windsor currently planned by Madonna. The film currently has the working title W.E.

b) A possible exhibition at the V&A to celebrate the life, work and cultural contribution of Madonna.

2. All correspondence (including emails) between the V&A and any representative and or employee of the singer which in any way relates to either and or both of the aforementioned projects.

3. Can the V&A list any items in its own collection which were once owned by the Duke and Duchess of Windsor or which have some direct link to the couple. These items will include but will not be limited to items of clothing furnishings, paintings, jewellery and documents.

4. Has Madonna and or any employee and or representative acting on her behalf and or on behalf of the aforementioned film sought access to these items for the purposes of research and or requested the items for use in the aforementioned film. If so can you please provide all related correspondence between the V&A and Madonna and or all related correspondence between the V&A and or any employee and or representative acting on her behalf and or on behalf of the film? Can you please provide a list of objects at the centre of these requests? Can you please provide all internal V&A documents (including emails) which relate to these requests?

5. Can the V&A please provide all minutes of the meetings of trustees which in any way relate to the idea of an exhibition to celebrate the life, work and cultural contribution of Madonna.

3. On 15 June 2010 the V&A responded. In response to the requests:

1. It confirmed that no correspondence was held between the V&A and Madonna.
- 2a). It referred the complainant to its response to question 4.
- 2b). It said that it does hold correspondence between the V&A and Live Nation, an organisation representing Madonna, but the information is exempt from disclosure under section 41 (information held in confidence) and section 43 (commercial interests).
3. It provided the information it holds to the complainant.
4. It confirmed that it does hold information on individual scholars, journalists and others who have visited the research collections at the V&A during the specified period, but said that the identity of individuals, the dates of their visits and the details of the material consulted are regarded by most visitors as a private matter. It therefore exempted the information under section 40(2) (personal information).
5. It confirmed that the subject of a Madonna exhibition was discussed twice at meetings of the Trustee's Finance Committee in October 2009 and March 2010. However it exempted the minutes of the meetings under sections 41 and 43 of the Act.
4. On 17 June 2010 the complainant requested that the V&A review its decision not to disclose the information to him.
5. On 15 July 2010 the V&A responded. It provided information in response to point 2b), and point 5, but redacted other information from the documents it provided.

## **The Investigation**

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### **Scope of the case**

6. On 3 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information he requested should have been provided to him.
7. The Commissioner notes that the V&A held no information in relation to point 1, and provided information in response to point 3. The complainant did not raise this as an issue with the Commissioner and

so he has not therefore considered these parts of the request further within this Decision Notice.

## Chronology

8. On 30 September 2010 the Commissioner wrote to the V&A and informed it that he had received a complaint from the complainant.
9. The V&A responded on 29 October 2010. It provided the withheld information to the Commissioner together with further arguments in support of its position.

## Analysis

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### Exemptions

10. The V&A applied section 40(2) to the information. Section 40(2) provides an exemption to disclosure where the information is the personal data of a third party and a disclosure of that information would breach one of the data protection principles of the DPA. The Commissioner must firstly decide whether any information held would be personal data,

#### Is the information personal data?

11. Section 1 of the DPA defines personal data as data which relate to a living individual who can be identified:
  - from those data, or
  - from those data and other information which is in the possession of, or is likely to come into the possession of the data controller.
12. The V&A applies section 40(2) on the basis that information on visitors' dealings and interests with the V&A would be personal data relating to them and that it would not be fair to disclose that information in response to a request under the Act. The complainant however questioned whether section 40 should be applicable in this scenario. He said in his request for the V&A to review its decision:

“Clearly the public has a right to know if commercial organisations (including film companies and or their representatives) gaining access to a publicly funded collection. At the same time the public has a right to know in what ways the V&A is utilising and exploiting its collection. There is clearly a distinction to be made between someone seeking access to the

collection for commercial reasons and a student studying certain items of purely academic reasons. It is my contention that the rules regarding confidentiality are not the same in all circumstances."

13. The Commissioner understands that Semtex Films are currently producing a film with the working title W.E., and that Madonna is noted on its website as the director of that film. Articles have also appeared in the press about interviews carried out with the members of the Royal Family by Madonna relating to the film.
14. The Act defines personal data as data belonging to an identifiable 'living' individual. Clearly Semtex Films is not an identifiable living individual but has its own legal personality. The Commissioner is however satisfied that even if Madonna or her representatives were in contact with the V&A as part of her role in making a film for Semtex films, information on Madonna's dealings with the V&A would be personal data relating to her.
15. The Commissioner is therefore satisfied that a disclosure of information such as that requested by the complainant would be a disclosure of personal data belonging to the artist.

#### Section 40(5)(b)(i)

16. The Commissioner notes that the V&A claimed section 40(2) for the information in response to the 2<sup>nd</sup> and 4<sup>th</sup> part of the request. It said that it holds information in relation to artists and academics who visit the research collections at the V&A during the specified period, but disclosing that information would breach section 40(2) the Act. However the complainant asked for information specifically relating to Madonna or her representatives dealings with the museum.
17. The V&A did not therefore specify whether it holds information which specifically falls within the scope of the complainant's request. i.e. information relating to either Madonna or her representatives dealings with the V&A. Its response was a general response relating to information held on any academics and artists that use its facilities. The Commissioner notes that this is potentially a breach of section 1(1)(a) of the Act. This section requires an authority to confirm or deny whether it holds information falling within the scope of the request or not.
18. The Commissioner notes that the V&A would have had some difficulty responding to the request in this way however. Clearly if a complainant requests whether there is any record of a particular individual contacting the V&A regarding a project, confirming whether

information is held or not, even where that information is clearly exempt from disclosure, would divulge that there had been contact between the parties. In essence therefore the only solution is to refuse to provide clarification as to whether any information is held at all; on all requests of this sort. This includes situations where information is not held.

19. Section 40(5)(b)(i) provides that an authority is exempted from the requirement to confirm or deny whether information is held if doing so would disclose personal data and that disclosure would breach one of the data protection principles. It does not require that information is actually held, merely that if information was held but confirming or denying that would breach the data protection principles, then the requirement to comply with section 1(1)(b) is removed. The V&A must therefore consider more generally whether disclosing information on private individuals using the V&A facilities for research would breach the data protection principles and whether it is therefore able to apply section 40(5)(b)(i) more generally.
20. Due to its obligations under the section 1(1)(a) the V&A's response should therefore have either clarified whether it holds information or not or alternatively applied section 40(5)(b)(i) and explained that it was not under a duty to confirm or deny whether it holds relevant information. Therefore the Commissioner finds that the V&A breached section 17(1)(b) by failing to state an exemption which it was relying upon.
21. The Commissioner must therefore consider whether the V&A was able to apply section 40(5)(b)(i) in order to decide whether it is required to confirm or deny whether it holds relevant information or not. In order to decide whether 40(5)(b)(i) applies the Commissioner must decide whether a disclosure of information of this sort would breach one of the data protection principles of the DPA.

### The Data Protection Principles

22. The First Data Protection Principle requires that personal information should be processed "fairly". In order for a disclosure of this information to be fair, artists/academics etc would generally have had to have an expectation that information about their dealings with the V&A would be disclosed to any member of the public by the V&A in response to a request, at the time that they first dealt with the V&A or at the time of the request. This might be because the V&A informed them that that would occur, or because it would have been obvious at the time that the information was provided. Alternatively another reason might apply which would make that disclosure fair.

### The level of expectation of disclosure

23. The Commissioner considers that there is a very strong general argument that releasing details of a person's private research at any public library or museum would be a breach of their personal privacy. Aside from any commercial detriment that might occur, the Commissioner considers that the nature of this intrusion would itself be of sufficient detriment to the privacy of individuals so as to cause a breach of the fairness requirement of the first data protection principle. There would therefore need to be compelling factors which overruled those expectations in order to make that disclosure fair.
24. The Commissioner has considered the argument put forward by the complainant that the artist and her representatives were working on behalf of the film studio rather than in a private capacity, and that any disclosure of personal data should not be accorded the same degree of weight as if the information were purely personal to the individual. His argument is that this may impact on the fairness aspect of whether the disclosure of personal data breaches the first data protection principle.
25. The Commissioner considers that private individuals would not expect that their correspondence or information on their movements, visits or items they have referred to at the V&A would be disclosed if requested under the Act. In the same way, he considers that there would be no expectation on an artist's behalf that information relating to them would be disclosed in response to an FOI request as this too would amount to a breach of the individual's private affairs. The Commissioner considers that artists and directors have a personal and private investment in projects such as films and theatre productions. It is often their performance which will be publicly reviewed and criticised due to the nature of the industry they are in. It is their future which will in part be determined by the success or the failure of the project in a way which is separate to far more personal than any criticism which might be levelled against the company concerned. He therefore does not believe that the fact that a film company is the ultimate 'employer' affects the nature of the private effect a disclosure of information might have on the artists undertaking the project.
26. The Commissioner also places strong reliance on the fact that neither the artists nor their overarching companies will be public officials, nor, for the most part in a scenario such as this would they be receiving funds from the public purse. They would be acting purely in a private capacity, using V&A facilities as any member of the public or any company might.



27. The Commissioner recognises that as public figures artists live their lives in the public eye to an extent artists' might therefore have some expectations that some details of their dealings or use of the V&A might become known as a matter of course.
28. However the Commissioner accepts that there would be an expectation that the V&A would seek to keep such matters as visits, contacts and interests with its items confidential as this would otherwise breach the individual's privacy. For instance the Commissioner considers that artists or academics may contact the V&A to research particular interests' early on in projects and at that time the artists may not want the public or rivals to know what those interests are as this may disclose details of projects they are working on prior to the artist being ready to announce them.
29. The Commissioner notes that the disclosure prior to the artist being ready to announce their project may be detrimental to that project in certain instances. Aside from potentially allowing rivals to 'steal a march' it may dampen the marketing impact of a planned formal announcement if details have already been leaked into the public domain via a disclosure in this way. This will not always be the case. Some artists will reveal the basis of their new projects, and release snippets of information as time goes by to raise interest and keep the project in the public's mind. This will be the decision of the artist however, not the V&A.
30. The Commissioner therefore considers that artists, as any other individuals, would have a general expectation that details of their dealings with the V&A would not be disclosed unless they chose to reveal that information themselves.

Is there a compelling interest in disclosure?

31. The Commissioner has therefore considered whether there is any compelling interest in the V&A disclosing any personal data it holds in relation to this request.
32. The Commissioner notes that neither the Artist nor the film company are public authorities or public officers. However the V&A is a public authority, and the Commissioner has considered whether there might be situations where there may be a compelling public interest in this sort of information being disclosed. This might be because of the level of access to the resources (such as V&A items) or the aid that has been provided from public funds to an artist. If this is significantly beyond what a member of the public or an academic would expect then this may override the artist's reasonable expectations or any detriment to



their privacy that might be caused through a disclosure of their personal information.

33. The Commissioner considers however that in this instance there would be no compelling public interest in any information held by the V&A being disclosed which would override the expectations of any parties.
34. The Commissioner's decision is therefore that a disclosure of this sort of information would breach the fairness requirement of the first data protection principle.

#### Section 43

35. The V&A exempted the information requested in parts 2(b) and part 5 of the request under section 43 of the Act. Section 43 applies to information which, if disclosed, would, or would be likely to prejudice the commercial interests of any party.

#### The applicable interests within the relevant exemption

36. The V&A part funds and stages exhibitions and tours of artist's works on a commercial basis. It also provides merchandising in relation to such projects. Effectively in such cases the V&A is using public funds to fund a commercial, an educational and/or an entertainment event which fits within its remit.
37. Within the information caught within the scope of this request is information relating to point 5 of the complainant's request - a potential Madonna exhibition.
38. The V&A states that it often enters into correspondence and agreements of a commercial nature with artists or their representatives such as Live Nation regarding joint ventures. In the past it has run such exhibitions with artists such as Kylie and Vivienne Westwood. Negotiating the agreements for these to occur requires open and frank discussions and exchanges of information between relevant parties. The V&A said that if this information were to be disclosed it would be likely to affect these organisations' confidence in the V&A's ability to hold commercially sensitive information in confidence, and that this would be likely to affect its ability to enter into contracts and agree deals of this nature in the future.
39. The V&A did not provide any details of any third parties commercial interests which might be affected by a disclosure of this information nor how they might be affected by its disclosure. The Commissioner is not prepared to speculate what those interests might be nor how they might be affected by disclosure. Accordingly he has not considered this

aspect further. He has concentrated instead on the arguments submitted by the V&A regarding its own commercial interests.

### The nature of the prejudice

40. The nature of the prejudice which the V&A argues would be likely to occur is that commercial organisations and individuals would lose confidence in the V&A's ability to hold commercially sensitive information in confidence. Individuals and organisations would have concerns that they could not negotiate commercial agreements or provide information on commercial projects they are undertaking without fear of the information subsequently being disclosed. It is noted that within this information the potential partners have shared information, including financial information in an open and frank way, and the argument is that this could not continue if the organisation's feared that such information would subsequently be disclosed.
41. This would be likely to affect both the reputation of the V&A as well as potentially dissuading artists or organisations from agreeing to work with the V&A. This would be likely to prejudice the ability of the V&A to attract visitors to it, and subsequently affect the revenue it obtains through such exhibitions. This would be likely to occur both in terms of the loss of entrance fee but also through the loss of the related memorabilia it sells in its shop and website. The Commissioner notes that these would provide significant sources of funding to the V&A.
42. The V&A said in its review:

"The V&A is entitled to pursue negotiations of a commercially sensitive nature with its partners in a way that encourages mutual trust and openness, and the free and timely exchange of information. The premature disclosure of commercial sensitive information would weaken our ability to operate effectively within a highly competitive environment and damage the confidence actual or potential partners have in the V&A. This applies particularly when dealing with major public figures in the worlds of film, entertainment and contemporary art."

### The likelihood of the prejudice

43. The Commissioner has considered the prejudice to the V&A's commercial interests which would be likely from a disclosure of this information. Again he has not received arguments or evidence in respect of third parties and so has not taken this into consideration.

44. He firstly notes that the negotiations were not complete at the time of the request and so there is no final agreement falling within the scope of the request.
45. The information includes such figures as estimated royalty figures, profit splits, likely costs and estimated budgetary figures for goods and services required in respect of some of those costs. A disclosure of this information, whilst still in the negotiation stage would be likely to be commercially damaging to the V&A. It would for instance highlight to respective providers the costs which the V&A has budgeted for individual services, and the royalty levels it has set aside for contributors. This would be likely to allow interested parties to identify areas where service providers might exert pressure to obtain further profits. For instance knowledge of the budgetary estimates set aside by the parties for individual's services would affect the level playing field that service providers operate under during negotiations. The Commissioner notes however that in general it will be the competitiveness of the market that sets the final price of goods and services.
46. Detailed information is included on what the exhibition might entail. A disclosure of this may weaken the marketing impact that a formal announcement of the exhibition might have if it is disclosed as a 'headline' months before the V&A and Live Nation are prepared to market it, or have even made final agreements over it. It may also alert competing organisations who may then seek to steal a march over the V&A's plans.
47. The information refers to previous agreements of a similar nature made by the V&A and highlights areas made in those agreements which could have been improved upon; areas that were potentially detrimental to the V&A's returns from previous exhibitions. On the other hand it refers to successful parts of agreements and profitable areas of agreements in the past. Such a detailed examination of the most successful and profitable areas of past V&A exhibitions may provide valuable details to competitors within a competitive market.
48. The information also contains estimated costs and market information which are likely to change as negotiations continue. Clearly the disclosure of such figures would provide insight into the negotiations, however they would not provide transparency or accountability over the final agreement that was reached and it is this final agreement which has an effect on the public purse.
49. The information may however be useful such as to those planning similar agreements with the V&A in the future. It would provide

knowledge of areas where the V&A might be able to be pushed further. This would result in less return for the public purse.

50. The V&A is a world renowned and respected cultural institution, artists may seek to tie their work through such a joint venture in order to 'establish' themselves further within their field. Therefore in negotiations over such a venture artists may decide to agree terms which are less favourable to them than normal. The disclosure of such information may therefore cause the artist problems where other institutions are aware of this and seek similar advantageous terms and conditions. It is also possible that the V&A would provide concessions to persuade major artists to sign up which they may not wish to pass on to other, less financially attractive artists.

#### The Level of likelihood of prejudice accepted by the Commissioner

51. Given the detail of the information which has been withheld the Commissioner is satisfied that a disclosure of the information would be likely to cause prejudice to the V&A and potentially Live Nation's commercial interests. The information covers negotiations which will be similar to other negotiations which both the V&A and Live Nation will have with other artists in the future (i.e. about joint ventures). A disclosure of the details of the negotiations between these parties, of the draft terms specified and the information shared between the parties within the information would be likely to prove detrimental to their future negotiations. He is also satisfied that a disclosure of the information might dissuade Live Nation and other such organisations from entering into open and frank discussions and negotiations with the V&A in the future, and that this would be likely to prove disadvantageous to the public purse.
52. The Commissioner is therefore satisfied that section 43 is engaged by the information. He must therefore carry out a public interest test to ascertain whether the public interest in maintaining the exemption outweighs the public interest in disclosing it.

#### **The public interest test**

##### The public interest in maintaining the exemption

53. The Commissioner has considered the public interest in the exemption being maintained. The central public interest factors revolve around the reasons for the existence of the exemption in the first instance and are highlighted above.
54. If an authority is required to disclose information which effectively prejudices its commercial interests then any funds it loses out on are

funds which the public will eventually need to pay for. The Commissioner considers this a strong public interest in withholding the information. The question he must ask however is whether protecting against this sort of prejudice is of greater public interest than the public interest in the information being disclosed.

55. The V&A should not be put into a disadvantageous commercial position when competing against private companies providing a similar service. The Commissioner notes that there are significant private suppliers of similar events within London. It is in the public interest to allow the V&A to compete with those suppliers on a 'level playing field'.
56. The Commissioner also notes that a disclosure of the information would not greatly increase the V&A's transparency as regards the final costs and the deal it is agreeing with Live Nation. This is because the negotiations were still ongoing at the time of the request.
57. The Commissioner notes that this is not a case where the V&A is effectively paying an artist to provide his or her services to the museum. It is a joint agreement where both parties potentially stand to make significant losses if the exhibition were to fail or profits if it is successful. It is not therefore a case of disclosing the V&A's costs for services it is being provided with, but information on an ongoing joint commercial enterprise with a mind to obtaining an overall profit. The V&A's profits would likely be used to fund future projects at the museum or returned to the public purse however this does not deter from the commercial nature and intentions of the activity.

#### The public interest in disclosing the information

58. The central public interest in disclosing the information rests in creating transparency and accountability in the use of public funds. As a public authority the Museum receives public funding from government, and where it intends to use these funds for the purposes of creating profit, both for the public, but also for the artists or their organisations by agreeing to work in partnership with them there is a public interest in disclosing details about that deal. There is the possibility that agreements could result in substantial losses for the public purse if the agreements which are entered into are not carefully put together. A disclosure would allow the public to understand what the agreements were and if they should have been entered into in this first place.
59. There is also a public interest in allowing the public to have further information about such joint projects in order to that it can consider whether the money invested was well spent. This will create greater public confidence in financial decisions taken by the V&A.

60. In this case this holds less weight than it might given that the figures are still in negotiation and are not settled. A disclosure of the information would not therefore clarify the final nature of the agreement in question.

#### Balance of the public interest arguments

61. The Commissioner has considered the above. His decision is that the public interest in maintaining the exemption outweighs the public interest in the information being disclosed in this instance.
62. The Commissioner decision is therefore that section 43 was applied correctly in this instance.

#### Section 41

63. The Commissioner has considered whether the V&A has applied section 41 correctly. The V&A applied section 41 to information it holds which falls within the scope of points 2 and 5 of the complainant's request; essentially information on any proposed Madonna exhibition. Section 41 is provided in the legal annex of this Decision Notice.
64. Section 41(1) provides that information is exempt from disclosure if:
- (a) it was obtained by the public authority from any other person; and
  - (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
65. In order for section 41(1) to be engaged it must be shown that:
- The information was provided to the authority by another person, and
  - that a disclosure of the information would give rise to an actionable breach of confidence - which in turn the Commissioner considers in this case requires that:
    - the information has the necessary 'quality of confidence' – it need not be highly sensitive, but it must not be trivial;
    - the circumstances in which the information was provided gave rise to an obligation of confidence, in that a 'confider' provided information to a 'confidant' in the expectation, whether explicit or implied, that the information would only be disclosed in accordance with the wishes of the confider;



- disclosure of the information would be unauthorised and to the detriment of the person(s) to whom the duty of confidence is owed, or cause a relevant loss of privacy;
  - the action would not fail on grounds which provide a legal defence to a breach of a duty of confidence, for instance that disclosure would be protected by a public interest defence.
66. The Commissioner recognises that the above does not constitute the only test of confidence; however he considers it appropriate to use this test in this case.

Was the information obtained from another person?

67. The Commissioner has firstly considered whether the information was obtained from another person. The information which the V&A has applied section 41 was created and provided to it by Live Nation.
68. The Commissioner recognises that the V&A and Live Nation were in the process of negotiating an agreement. As this is the case the Commissioner considers that there are clear elements within the information which were not "confided" in the V&A by Live Nation, but created by both parties during the negotiations, however the V&A has applied section 41 to information and financial suggestions put forward by Live Nation only. Where it has put forward its own figures it has exempted these under section 43 of the Act and the application of that exemption has been considered above.
69. The Commissioner recognises that there is some information which was provided by Live Nation as examples of previous deals and previous pricing from other projects it had been involved in. He notes the V&A has applied section 41 to this information also.

Quality of confidence

70. The Commissioner has considered whether the information has the necessary quality of confidence. He is satisfied that the information is not trivial as it relates to the commercial activities of Live Nation, both on previous projects but also their projections and their wishes for the intended agreement. He is also satisfied that this information is not generally available to the public.

Obligation of confidence

71. The Commissioner notes that there was no specific discussion about the status of the information which was provided by Live Nation to the V&A. However given the nature of the information and the



circumstances in which it was provided to the V&A he has no doubt that the intention was for the negotiations to be carried out in confidence, at least until such time as the negotiations were completed and an agreement signed. Even at that point the Commissioner considers that there will still be elements of the information, such as areas of particular profitability and various cost factors where the Commissioner considers that Live Nation would have a continuing implicit expectation that that information would retain its confidentiality.

72. However at the time that the request was received the Commissioner notes that the final agreement had not been reached, and he considers that during the negotiation stage the parties would believe the information they were exchanging was being provided in confidence. The Commissioner is therefore satisfied that information provided by Live Nation to the V&A has the necessary obligation of confidence.

#### Detriment to the confider

73. The Commissioner recognises that there would be detriment to the confider if there was a disclosure of detailed information. The V&A did not provide any information or evidence in this respect, however the Commissioner has identified and discussed some areas where a disclosure would be detrimental to Live Nation in his analysis of the section 43 exemption above. He therefore considers that there would be a commercial detriment to the confider in this instance.

#### Would an unauthorised disclosure be actionable?

74. In order for section 41 to be applicable, the disclosure of the information would have to be actionable; that is to say that a disclosure would have to be such that the confider would have the right to take the V&A to court if it disclosed the information in question.
75. An actionable breach is not just one that is arguable but one that would, on the balance of probabilities, succeed. Thus, to establish an 'actionable' breach of confidence, the public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed i.e. considering whether or not all three limbs of the test of confidence can be established and whether or not the public authority has a defence to such a claim.
76. The courts have recognised three broad circumstances in which information may be disclosed in spite of a duty of confidence. These include where the disclosure is consented to by the confider, where disclosure is required by law, and where there is a public interest in

disclosing the information that overrides the duty of confidence that is owed.

77. There are no issues surrounding consent, law, or crime as regards the V&A in this instance. This leaves a consideration of the public interest. The Commissioner must consider whether the public interest in disclosing the information overrides the duty of confidence that is owed.

#### The public interest defence

78. In *Derry v ICO* (EA/2006/0014) the Information Tribunal clarified that the test to be applied in deciding whether the public interest provides a defence to a breach of a duty of confidence is that the duty should be maintained unless the public interest in disclosing the information outweighs the public interest in protecting confidences.

#### The public interest in maintaining confidences

79. The central public interest in maintaining confidences in this case resides in the overall public interest in agreements which are made in confidence being maintained until such time as the confider agrees to waive the confidence or until the confidence has waned through other factors.
80. The Commissioner notes that the courts have generally taken the view that the grounds for breaching confidentiality must be strong ones, since confidentiality is recognised as an important value in itself. There is a public interest in maintaining trust and preserving the free flow of relevant information to public authorities to enable them to perform their functions.

#### The public interest in the information being disclosed

81. The Commissioner has considered whether there are any public interest factors over and above those discussed in his analysis of the public interest factors noted in his examination of section 43 above. His decision is that there are not.

#### Conclusions

82. The Commissioner's conclusion is there would be no grounds for defending an action for a breach of a duty of confidence by Live Nation in this instance. Accordingly his decision is that the V&A were correct to apply section 41 to the information in this instance.

## **Procedural Requirements**

83. As outlined in paragraph 20 above, the Commissioner notes that in responding to part 4 of the complainant's request the V&A did not state its reliance on section 40(5)(b)(i) when refusing to confirm or deny whether it held any information. Therefore the Commissioner finds that the V&A breached section 17(1)(b) by failing to state an exemption which it was relying upon in the refusal notice.

## **The Decision**

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84. 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 council was correct to apply section 40(2) and section 40(5)(b)(i) to the information.
- The council was correct to apply section 41 to the information.
- The council was correct to apply section 43 to the information.

85. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The Council breached section 17(1)(b) as it did not state its reliance upon section 40(5)(b)(i) in its refusal notice.

## **Steps Required**

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86. The Commissioner requires no steps to be taken.

## Right of Appeal

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87. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877  
Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

88. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
89. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 11<sup>th</sup> day of May 2011**

**Signed .....**

**Gerrard Tracey  
Principal Policy Adviser  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Personal information

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#### Section 1(1) provides that -

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds

information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

#### 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-

1. any of the data protection principles, or

2. 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."

**Section 40(4) provides that –**

"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)."

**Section 40(5) provides that –**

"The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

- (b) does not arise in relation to other information if or to the extent that either-

1. the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded, or

2. by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

**Section 40(6) provides that –**

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

**Section 40(7) provides that –**

"In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act."

## **Information provided in confidence**

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### **Section 41(1) provides that –**

"Information is exempt information if-

(c) it was obtained by the public authority from any other person (including another public authority), and

(d) 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."

### **Section 41(2) provides that –**

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

## **Commercial interests**

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### **Section 43(1) provides that –**

"Information is exempt information if it constitutes a trade secret."

### **Section 43(2) provides that –**

"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)."

### **Section 43(3) provides that –**

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2)."