

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 March 2014

Public Authority: Tate
Address: Millbank
London
SW1P 4RG

Decision (including any steps ordered)

1. The complainant has requested Tate to review the handling of a previous request made in December 2011 by a different applicant to see if additional information could now be released. He also asked Tate to disclose copies of the minutes of all the Ethics Committee meeting held to date in which BP's sponsorship of Tate is discussed.
2. Tate released some information but refused to disclose sections of the relevant documents under sections 36(2)(b), 38, 42 and 43 of the FOIA.
3. The Commissioner has considered the exemptions in turn. His decision is that section 43 of the FOIA applies to the following information and therefore it should not be disclosed:
 - The redactions made to section 3.1 of the report headed "BP's Sponsorship of Tate".
 - The financial figure contained in paragraph 4 of section 4.2 of the report headed "Report 2: Tate Corporate Relationships".
 - The redactions to section 3.1 of the report headed "Report 4.1: Sponsorship Renewal – BP".
 - The redaction to section 3.2 of the report headed "BP's Sponsorship of Tate" under the section headed 'Summary of renewal offer'.
 - The two financial figures quoted in bullet point 2 of section 4 of the report headed "Report 4.1: Sponsorship Renewal – BP".

4. For all other information withheld under this exemption, he does not agree that section 43 of the FOIA applies.
5. For section 42 of the FOIA, this has been applied to a small amount of information in three documents. The Commissioner considers section 42 of the FOIA applies to the redactions made in the following documents:
 - One sentence of section 3.2 of the report headed "Report 4.1: Sponsorship Renewal – BP".
 - First paragraph of 3.2 of the minutes of the Ethics Committee held on 6 February 2012.
6. For all other information withheld under section 42, the Commissioner does not agree that this exemption is engaged.
7. Regarding sections 36, and 38 of the FOIA, the Commissioner has decided that these exemptions are not engaged for any of the information currently withheld under these sections.
8. As the Commissioner has decided that the majority of the information is not exempt from disclosure under the exemptions cited, he now requires Tate to release all outstanding information to the complainant with the exception of the information listed in 3 and 5 above.
9. Tate must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

10. On 13 April 2012 the complainant wrote to Tate and requested information in the following terms:

Request 1

"[name redacted] made a Freedom of Information request to Tate on 28 December 2011 for:

1. The date the decision was made by Tate Trustees to accept BP's offer of renewal of sponsorship as announced on 19 December 2011.
2. The minutes of the meeting of the Trustees at which this decision was taken and the minutes of any other meeting at which renewal of BP

sponsorship now announced was discussed along with any record of the deliberation(s) taken by Trustees on this matter.

3. The minutes of the Tate Ethics Committee at which BP sponsorship renewal was discussed and the recommendation(s) and any associated report by the Ethics Committee, or any other body, made to the Tate Board on or related to the matter of BP sponsorship renewal after 19 May 2010 and up to the date of subsequent announcement (19 December 2011).
4. Any other assessment of BP and Tate's Ethical Fundraising Policy in 2011 and any information or reports regarding environmental, reputational or similar audits and/investigations conducted by Tate (or parties contracted by Tate) relating to BP sponsorship in the period of the present sponsorship (that decided by Tate management in 2006 to be until 2012) including any assessments with regard to the impacts on fulfilment of Tate's mission.
5. The emails Nicholas Serota, Director of Tate sent to Tate staff with regard to the acceptance of BP's offer of renewal of sponsorship when it was announced.

Tate responded to the request by releasing documents and providing information on 16 February 2012. The information was redacted citing several exemptions including under section 36, section 40(2), section 42 and section 43(2) of the Freedom of Information Act. The response and documents disclosed were found at the website, What Do They Know?

I write to today to request that Tate re-examine the use of the exemptions with a view to releasing the information in response to this request."

Request 2

1. "A list of the dates when the Tate Ethics Committee has met.
 2. "Copies of each of the minutes for the Tate Ethics Committee meetings."
11. In relation to request 1, Tate responded on 13 June 2012. It released what information it was willing to disclose to the other applicant and reviewed the application of exemptions cited, as the complainant requested. Tate decided to release further information to the complainant in light of this further review and the passage of time. Tate still withheld information under sections 36(2)(b), 40, 41, 42 and 43 of the FOIA.

12. In relation to request 2, Tate responded on 13 June 2012. It provided a list of dates the Ethics Committee had met and provided redacted versions of the minutes taken. Tate confirmed that it considered some of the information was exempt from disclosure under sections 36(2)(b), 42 and 43 of the FOIA.
13. The complainant requested an internal review on 10 July 2012.
14. In relation to request 1, Tate informed the complainant of the outcome of its internal review on 2 August 2012. Tate released a small amount of further information to the complainant but in the main remained of the view that the withheld information was exempt from disclosure under the exemptions previously cited.
15. In relation to request 2, Tate informed the complainant of the outcome of its internal review on 3 August 2012. Again Tate released a small amount of further information to the complainant but considered the exemptions previously cited still applied to all remaining withheld information.

Scope of the case

16. The complainant contacted the Commissioner on 25 March 2013 to complain about the way his request for information had been handled. Specifically he asked the Commissioner to consider both requests and whether Tate had acted appropriately by refusing to release the remaining withheld information to him.
17. During the Commissioner's investigation it was agreed that the Commissioner would only review any withheld information which relates to or discusses BP and its sponsorship of Tate.
18. It was therefore agreed that the Commissioner would review the following documents and the exemptions applied each:
 1. The extract from the report to the Ethics Committee headed "BP's Sponsorship of Tate" (for discussion at the meeting of the Ethics Committee on 6 May 2010).
 2. The extract from the minutes of the Ethics Committee meeting held on 6 May 2010.
 3. The extract from the report to the Ethics Committee headed "Report 2: Tate Corporate Relationships" (for discussion at the meeting of the Ethics Committee on 1 November 2010).

4. Reports to the Ethics Committee headed "Report 4.1: Sponsorship Renewal BP" (for discussion at the meeting of the Ethics Committee meeting held on 27 June 2011).
5. The extract from the minutes of the Ethics Committee meeting held on 27 June 2011.
6. The extract from the minutes of the Ethics Committee meeting held on 6 February 2012.
19. During the Commissioner's investigation Tate released a small amount of further information to the complainant. The only remaining withheld information in a document referred to by Tate as the 'Comments Log' (which was a document for discussion at the meeting of the Ethics Committee on 1 November 2010) is personal data, to which Tate applied section 40 of the FOIA. The complainant has confirmed that he has no complaint about Tate's application of section 40 of the FOIA. As personal data is all that remains, this document has not been considered any further in this notice.
20. Tate has applied a range of exemptions – section 36(2)(b), 38, 41, 42 and 43 of the FOIA and often more than one exemption to the same information. The Commissioner will now address each exemption in turn.

Reasons for decision

21. Tate submitted very detailed arguments to the Commissioner to support the application of each exemption. With the exception of section 42 of the FOIA, Tate marked the majority of its arguments as being confidential and commercially sensitive themselves. Section 42 of the FOIA will be dealt with in the main body of this notice. All other exemptions cited will be discussed in a confidential annex attached to this notice. For these remaining exemptions, this notice can only contain a description of each exemption, what it has been applied to and the Commissioner's overall decision.

Section 36

22. Section 36(2)(b) of the FOIA states that information is exempt from disclosure if its disclosure 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.
23. Tate has applied section 36(2)(b) of the FOIA to the following sections of the following documents:
- Section 3.5 of the report headed "BP's Sponsorship of Tate".
 - Paragraph 4 of section 4.2 of the report headed "Report 2: Tate Corporate Relationships".
 - Parts of sections 3.2, 3.5, 3.6, 4 of the report headed "Report 4.1: Sponsorship Renewal – BP".
 - Paragraph 4 of section 3.2 of the minutes of the Ethics Committee meeting held on 6 February 2012.
24. Tate must demonstrate that in the qualified person's opinion disclosure of the above information would or would be likely to inhibit the free or frank provision of advice or the free and frank exchange of views for the purposes of deliberation. The Commissioner must be satisfied that the opinion is that of the qualified person for the Tate and that it is reasonable. He does not necessarily have to agree with the opinion. He only has to satisfy himself that the opinion is accordance with reason i.e. it is an opinion that a reasonable person could hold.
25. In its submissions to the Commissioner, Tate confirmed that the qualified person for the purposes of section 36 of the FOIA is the Chair of the Board of Trustees. In relation to these requests, their opinion was sorted on 6 June 2012 and provided the same day. It confirmed that the qualified person was briefed fully on the requests and the information that falls within those request and they decided that section 36(2)(b)(i) and (ii) applied to the information listed in paragraph 23 above.
26. The Commissioner has given the matter careful consideration. He considers the qualified person's opinion that disclosure of the above information would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation is a reasonable one and therefore that section 36(2)(b) is engaged.
27. However, he has considered the public interest test and he has decided that the public interest in maintaining this exemption is outweighed by the public interest in favour of disclosure. He therefore requires the information listed in paragraph 23 to be disclosed.

Section 38

28. Section 38 of the FOI states that information is exempt from disclosure if its disclosure would or would be likely to –
- (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual.
29. Tate's main arguments centre on disclosure of the following information being likely to endanger public safety:
- Section 3.4, 3.5 and 4 of the report headed "BP's Sponsorship of Tate".
 - Paragraph 6 and 7 of section 2 of the minutes of the Ethics Committee held on 6 May 2010.
 - Parts of paragraphs 3 and 4 of section 4.2 of the report headed "Report 2: Tate Corporate Relationships".
 - Sections 3.5, 3.6, 3.7, 3.8 and one paragraph of section 4 of report headed "Report 4.1: Sponsorship Renewal – BP".
 - Paragraph 4 of section 3.2 of the minutes of the Ethics Committee held on 6 February 2012.
30. Tate considers the contents of this information would be likely to increase protests and activism and therefore prejudice public safety. The Commissioner has reviewed this information and considered the arguments presented by Tate. He remains unconvinced that this information would be likely to endanger public safety if it was disclosed and therefore he has decided that section 38 of the FOIA does not apply.
31. As he does not consider that section 38 of the FOIA applies to this information, there is no need to go on to consider the public interest test here.

Section 42

32. Section 42 of the FOIA states that information is exempt from disclosure if it is protected by legal professional privilege.
33. Section 42 has been applied to the following information:
- Second half of paragraph 8 of section 2 of the minutes of the Ethics Committee meeting held on 6 May 2010.
 - One sentence of section 3.2 of the report headed "Report 4.1: Sponsorship Renewal – BP".

- First paragraph of 3.2 of the minutes of the Ethics Committee held on 6 February 2012.
34. The Commissioner must first decide whether the above information falls within either category of advice privilege or litigation privilege. He does not consider litigation privilege is relevant in this case, as there is no evidence or suggestion of litigation in relation to BP and its sponsorship or that the legal advice Tate obtained about this matter being more widely used for other litigation.
 35. Concerning advice privilege, the above information must constitute either Tate's instructions to a legal adviser or legal advice Tate has received on a particular matter.
 36. Regarding the first bullet point (redaction to the minutes of the Ethics Committee meeting held on 6 May 2010), the Commissioner does not agree that this constitutes advice privilege. The sentence redacted is the comments of a QC about a particular legal requirement and details a recommendation they made. The fact that the comments are that of a QC does not in itself mean that the information is subject to advice privilege. The sentence contains no evidence of legal advice provided by the QC or any other legal adviser and does not refer to or provide the details of any request for legal advice.
 37. Therefore, the Commissioner does not agree that this information is subject to legal professional privilege. As it is not, section 42 of the FOIA cannot apply and the Commissioner requires this information to be disclosed.
 38. In respect of the two remaining bullet points (redactions to the Report 4.1: Sponsorship Renewal – BP and the minutes of the Ethics Committee held on 6 February 2012), the Commissioner notes that these redactions contain information of direct reference to legal advice Tate received in May 2008 regarding the issue of sponsorship.
 39. These sections refer to this legal advice and what Tate was advised. It is therefore clear that this information falls within the definition of advice privilege and section 42 of the FOIA applies.
 40. The Commissioner will now consider the public interest test.
 41. He accepts there is a public interest in overall transparency and accountability. He also accepts there is a public interest in understanding more clearly decisions made by public authorities and why a particular course of action has been taken and is indeed considered appropriate.

42. He also accepts that there is significant public interest in this long standing sponsorship relationship and considerable opposition to it from activists and environmentalists.
43. However, in this case, the Commissioner considers the public interest in disclosure is outweighed by the public interest in maintaining this exemption. Although the legal advice in question was obtained in 2008 it is still live today and relevant to all sponsorship renewal discussions that take place with BP. They were relevant to the deal agreed in 2011 and will be relevant to discussions that will take place in 2015/2016 for renewal of sponsorship.
44. It is well established that the public interest inherent in maintaining legal professional privilege will always be strong due to the importance of the principle behind legal professional privilege which is to safeguard openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. Clear, compelling and specific justification that at least equals the public interest in protecting legally privileged information must be shown in order to override the strong public interest inherent in the exemption.
45. While the Commissioner accepts there is a public interest in understanding more clearly Tate's decision to continue its relationship with BP and that there is a lot of public opposition against it, he does not consider these factors are compelling enough to warrant the disclose of legally privileged information in this case. He notes that the legal advice is still live today and will continue to be used at all sponsorship renewal discussions with BP.
46. Therefore, in all the circumstances of the case, the Commissioner finds that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure.
47. For the above reasons, the Commissioner is therefore satisfied that bullet points two and three and paragraph 33 should not be disclosed.

Section 43

48. Section 43 of the FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of Tate or another party.
49. Section 43 has been applied to the following information:
 - Parts of section 3.1, all of 3.4 and 4 of the report headed "BP's Sponsorship of Tate".

- All redactions made to the minutes of the Ethics Committee meeting held on 6 May 2010.
 - All redactions to 4.2 of the report headed "Report 2: Tate Corporate Relationships".
 - Sections 3.1, 3.2, 3.5, the remaining sentences of the first paragraph of section 3.6, 3.7, 3.8 and elements of section 4 of the report headed "Report 4.1: Sponsorship Renewal – BP".
 - The redaction to section 4.1 of the minutes of the Ethics Committee meeting held on 27 June 2011.
 - The redaction to paragraph 3 of section 3.2 of the Ethics Committee meeting held on 6 February 2012.
50. The Commissioner has reviewed this information and considered Tate's arguments in detail. He does not agree that disclosure of any of this information would be likely to prejudice the commercial interests of Tate. He is therefore not satisfied that section 43 of the FOIA applies in this case to the above information.
51. As the Commissioner does not agree that section 43 of the FOIA applies, there is no need for him to go on to consider the public interest test for this exemption.

Right of appeal

52. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Rachael Cragg
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