<u>IN THE MATTER OF AN APPEAL TO</u>
<u>THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)</u>

EA/2014/0040

BETWEEN:-

BRENDAN MONTAGUE

<u>Appellant</u>

-and-

THE INFORMATION COMMISSIONER

<u>First Respondent</u>

-and-

THE BOARD OF TRUSTEES OF THE TATE GALLERY

<u>Second Respondent</u>

TATE'S RESPONSE TO THE GROUNDS OF APPEAL

Introduction and case management

1. Mr Montague appeals against the Commissioner's decision notice FS50493467, issued on 10 December 2013. The Commissioner found that Tate had correctly applied section 43(2) of the Freedom of Information Act 2000 ('FOIA') in refusing to disclose to Mr Montague certain information concerning BP's sponsorship of Tate.

2. Mr Montague challenges that decision. Tate has been joined as the Second Respondent. This is its response to Mr Montague's grounds of appeal. It

supplements the Commissioner's decision notice and response to the grounds of appeal, with which Tate agrees.

3. In a separate document, Tate sets out its own grounds of appeal against a further decision notice (numbered FS50493468) issued by the Commissioner on 4 March 2014. That decision also concerned a request from Mr Montague for information concerning BP's sponsorship of Tate. The Commissioner found that Tate had correctly withheld some of the requested information, but he ordered it to disclose other information which had been requested by Mr Montague.

4. Tate appeals against that decision notice, for the reasons set out in its grounds of appeal (served separately). Given the overlap of parties and subject matter, Tate invites the Tribunal to consider the two appeals together.

5. Tate agrees to both appeals being determined on the papers.

6. Tate is mindful of the need to explain its case on an open basis as far as possible. That is the approach taken in this document. Tate will also (a) seek to ensure that its evidence and submissions are as far as possible put on an open basis, and (b) that as much as possible of the Confidential Annex to the decision notice be made open. That said, Tate considers that some elements of its case will need to be explained on a closed basis, since to do otherwise would tend to defeat the purpose of this appeal. It will make the necessary applications under regulation 14(6) of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 in respect of the relevant parts of the Confidential Annex and its evidence and submissions as soon as is practicable in accordance with the management of this case.

The disputed information

7. On 12 April 2012, Mr Montague asked Tate to disclose to him:

"(1) The total amount of sponsorship provided by BP to Tate for each of the past 23 years.

(2) Any confidentiality agreement contained within the contracts between BP and Tate for each of the years where sponsorship was provided".

8. Tate disclosed the information it held under part 2 of the request. It withheld the information requested under part 1. This is the disputed information in this appeal. Tate relies on two exemptions under FOIA.

Section 43(2): prejudice to commercial interests

9. First, Tate relies on section 43(2), which provides that:

43(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

10. This is a qualified exemption. Tate contends that, in all the circumstances, the public interest in maintaining the exemption outweighed that in the disclosure of the requested information.

11. In his decision notice, the Commissioner agreed with Tate. Tate supports the Commissioner's decision and reasoning on section 43(2) as set out in the Confidential Annex to the decision notice. It disagrees with Mr Montague's three grounds of appeal.

12. *First*, Mr Montague complains of a failure to give reasons. The Commissioner has in fact given very detailed reasons for his decision, albeit in a Confidential Annex. The Tribunal will consider that Confidential Annex. It will also consider the case afresh in

any event, and give its own reasons. As indicated above, Tate will seek to put its case on an open basis as far as is possible.

13. *Second*, Mr Montague says that section 43(2) was not engaged. He is wrong. Section 43(2) was engaged because:

(i) Disclosure of the disputed information would in effect amount to a "price list". Taken together with other publicly available information, reliable inferences could be drawn as to the overall sponsorship packages on which Tate and BP had agreed. This would indicate what Tate had historically accepted by way of sponsorship funding in return for particular benefits. Trends or changes in sponsorship figures over time could also be reliably analysed.

(ii) Disclosure of such "price lists" would materially weaken Tate's negotiating position in respect of future sponsorship discussions, whether with BP or with others.

(iii) Disclosure would also provide other cultural institutions with a competitive advantage over Tate in securing sponsorship. Tate would have no corresponding access to such "price lists" for other institutions. There would not be a level playing field.

(iv) Disclosure of the disputed information would have been likely to prejudice Tate's long-standing relationship with BP, particularly given BP's reasonable expectations as to the confidentiality of this information (addressed further below).

(v) It is generally accepted across the charitable sector that sponsorship agreement details remain confidential in the absence of sufficiently weighty countervailing factors. Disclosure of the disputed information in this case would breach that principle and would in that respect prejudice Tate's comparative standing.

(vi) There is a significant and weighty chance that disclosure of the disputed information would deter other potential sponsors from becoming involved with Tate.

(vii) Disclosure of the disputed information would have created a damaging precedent: see *WS v IC and North Lancashire PCT* [2013] UKUT 0181 (AAC), [2013] 2 Info LR 197 at paragraph 85.

14. *Third,* Mr Montague says that the public interest favours the disclosure of the disputed information. He is wrong. The public interest favours the maintenance of the section 43(2) exemption because:

(i) Tate is heavily reliant on corporate sponsorship, particularly in the current climate of cuts in public funding. Any loss of or diminution in corporate sponsorship would be very strongly contrary to the public interest, including by impacting upon the price of ticketed events. There was a significant and weighty chance that the disclosure of the disputed information would have such consequences.

(ii) The public interest in transparency as to BP's sponsorship of Tate is very substantially served already by other publicly available information. To take one example, the overall size of the funding package provided by BP for sponsorship of Tate and three other institutions for the period 2012-16 had been publicly announced by the time of Mr Montague's request. The *incremental* public interest in the disclosure of the disputed information is comparatively weak.

Section 41(1): actionable breach of confidence

15. Further or alternatively, Tate relies on section 41(1) of FOIA, which provides that:

> *41(1) Information is exempt information if—*
>
> *(a) it was obtained by the public authority from any other person (including another public authority), and*
>
> *(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

16. This is an absolute exemption, but does not apply where a public interest defence would be likely to succeed against an action for breach of confidence. This is similar but not identical to the public interest balancing test under section 2(2)(b) of FOIA. A public interest defence to an action for breach of confidence imposes a higher threshold on the party arguing in favour of disclosure.

17. The disputed information was obtained by Tate from BP. It consists of the sum of money which BP ultimately told Tate it was willing to pay by way of sponsorship for each of the years in question.

18. BP provided that information on a confidential basis. Had Tate published the figures (otherwise than under FOIA), BP could have brought an action against Tate for breach of confidence. In the circumstances, such an action would very probably have succeeded. It would not have been defeated by a public interest defence.

19. The disputed information is therefore exempt under section 41(1) as well as section 43(2).

Conclusion

20. Tate will invite the Tribunal to uphold the Commissioner's decision and to dismiss Mr Montague's appeal.

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31st March 2014