

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2013

Public Authority: Arts Council England
Address: 14 Great Peter Street
London
SW1P 3NQ

Decision (including any steps ordered)

1. The complainant has requested information from Arts Council England (ACE) about the funding it awarded to a particular theatre company, You Me Bum Bum Train Limited. ACE disclosed the relevant information it held but redacted the fees and specific amounts paid to 22 individuals on the basis of section 40 (the personal data exemption) of FOIA. The Commissioner has concluded that ACE was entitled to withhold this information on the basis of section 40.

Request and response

2. On 20 June 2012 the complainant wrote to ACE and requested information in the following terms:

'Under the terms of the Freedom of Information Act I should like you to provide me with access to documents concerning the transactions between Youmebumbumtrain and ACE..'

'...I should like access relating to any funding applications, correspondence and funding awards and the reasons/policies that support those awards or declinations for the duration of Jan 2011- present date.'

3. ACE contacted the complainant on 2 July 2012 and asked it to clarify the exact nature of information it was seeking. ACE explained that the information it held consisted mainly of the application form submitted by You Me Bum Bum Train Limited (YMBBT), ACE's assessment which outlined the reasons why the application was successful and the offer

letter which outlined the conditions of the funding agreement. (YMBBT Limited is a company limited by guarantee, i.e. on a not for profit basis, that was established for the purposes of artistic creation. It produces the production You Me Bum Bum Train, an interactive performance performed to one audience member at a time with a large cast, predominately comprised of volunteers.)

4. The complainant responded on the same day and confirmed that it wished to be provided with access to all three of these documents along with supporting documentation and correspondence.
5. ACE responded on 18 July 2012 and provided the information that had been requested. However, the response explained that a small amount of information had been redacted on the basis of section 40(2) of FOIA. ACE explained that the redacted information consisted of either a personal telephone number, address or an amount of funding paid to named individuals involved in the project.
6. The complainant contacted ACE on 22 July 2012 and noted that one of the documents disclosed, 'Supporting Document - Updated budget part 1' listed 22 job titles but the fees and rates associated with each job title had been redacted. The complainant requested an internal review of the decision to withhold details of the fees and rates on the basis of section 40(2) of FOIA.
7. ACE informed the complainant of the outcome of the review on 15 August 2012. The review concluded that the names, rates and specific amounts paid to the 22 individuals were exempt from disclosure on the basis of section 40(2).

Scope of the case

8. The complainant contacted the Commissioner on 19 August 2012 in order to complain about ACE's handling of its information request. Although the complainant accepted ACE's decision to redact the names of the individuals in question, it disputed ACE's decision to withhold the rates and specific amounts paid to the individuals concerned on the basis of section 40(2) of FOIA. The complainant disputed whether the rates and specific amounts paid were in fact personal data, and even if they were, the complainant argued that disclosure was not unfair to the individuals concerned and furthermore there was a legitimate interest in disclosure of this information. The complainant provided detailed arguments to support its points of view and although the Commissioner has not set them out here, they are referred to in his analysis below.

Reasons for decision

9. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act (DPA). ACE argued that disclosure of the withheld information would be unfair and thus breach the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

10. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA as:

'...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

11. The disputed information which is the focus of this complaint consists simply of the rates and specific amounts paid to the 22 individuals who undertook the various job roles involved in the production. This information is included in the budget YMBBT submitted as part of its application for funding to ACE. ACE disclosed the 22 job titles of the various positions which received a fee but as with the actual amounts paid, it redacted the names of the individuals who undertook the various roles from the budget documentation that was disclosed.
12. Therefore, the relevant part of the budget which was disclosed to the complainant took the following format:

Job Title	Name	Fee	[Total paid]
Producer/Director	Redacted	Redacted	Redacted

13. The complainant argued that the job titles alone do not allow the 22 individuals in question to be identified. Therefore the complainant suggested that the fees and specific amounts paid to each of the individuals who undertook the various job titles would not involve the disclosure of personal data.
14. The Commissioner asked ACE to clarify why it believed that the information falling within the scope of this complaint, i.e. the fees and specific amounts, constituted personal data. The Commissioner explained that in his opinion truly anonymised data are not personal data and thus can be disclosed without reference to the DPA. The Commissioner's test of whether the information is truly anonymised is whether a (or any) member of the public could, on the balance of probabilities, identify individuals by cross-referencing the 'anonymised' data with information or knowledge already available to the public.
15. Whether this 'cross-referencing' is possible is a question of fact based on the circumstances of the specific case. If identification is possible the information is still personal data and the data protection principles do need to be considered when deciding whether disclosure is appropriate. However, where the anonymised data cannot be linked to an individual using the additional available information then the information will, in the Commissioner's opinion, have been truly anonymised and can be considered for disclosure without any reference to the DPA principles.
16. ACE argued that even with their names removed, individuals who actually worked on the production can still be readily identified merely through the job title and their association with YMBBT either via the internet or from industry conversations and knowledge.
17. With regard to identification through the internet, ACE argued that members of the production team for YMBBT, past and present, can be easily identified through social media networks such as Linked In and Facebook and professional sites such as Stage Jobs Pro. ACE explained that it does not take a significant amount of time to identify relevant individuals using popular search engines. ACE provided the Commissioner with print outs of a Google search and from the Stage Jobs Pro website. ACE argued that these documents confirmed that considerable amounts of information can be located on the internet about individuals who have been members of the YMBBT production team, albeit that no reference can be found to salary or fee information.
18. With regard to industry conversations and knowledge, ACE explained that individuals in the industry will often know which artists/technicians worked on what job or project even without access to that information via the internet. The nature of the jobs in the arts industry is transitory, with freelance artists and technicians moving from project to project.

Therefore, many people will view the CVs of individuals involved in YMBBT with information about previous roles. ACE also argued that anyone of the thousand volunteers involved with the productions is likely to know who did what job as well anyone who came into contact with any of the artists and technicians during that project.

19. ACE therefore argued that using the job titles and fee information alone would be enough for a member of the public, on the balance of probabilities, to infer personal information about living individuals – either those listed on the provisional budget, or those who actually worked on the production or both. (ACE noted that names of some of the people on the production team for YMBBT on the redacted document disclosed to the complainant are likely to be different to some of those who actually worked on YMBBT because at the time of application the company did not have a definitive list of production members.)
20. Furthermore, ACE explained it did in fact release some information to the complainant which gave the identity of some of the individuals concerned and their job titles. This information was released with consent and was included on pages 11 and 12 of the version of YMBBT's application form which was provided to the complainant.
21. In the Commissioner's opinion disclosure of the rates and specific amounts paid to the 22 individuals listed on the redacted budget would constitute the disclosure of personal data. This is because, in the Commissioner's opinion on the balance of probabilities the public, or at least some members of the public, would be able to identify the individuals who had undertaken the various job roles using the methods described by ACE. In light of this identification being possible then disclosure of the rates and specific amounts paid to the various job roles would effectively result in the rates and specific amounts paid to specific individuals being placed in the public domain. In the Commissioner's opinion the amount that an individual had been paid for a particular piece of work clearly relates to that individual and therefore is their personal data for the purposes of the DPA.
22. The Commissioner notes that in relation to the names of the 8 individuals which ACE actually released as part of the application form itself, it would not be necessary for the public to use either the internet or industry discussions to identify which of these individuals had undertaken certain roles. This is because the information contained in the application form and disclosed to the complainant easily allows for the named individuals that undertook 8 particular job roles to be identified. For example, the information disclosed in the application form confirms that the two Producer/Directors were Kate Bond and Morgan Lloyd. Therefore although in the version of the budget disclosed to the complainant the names of the two individuals who undertook the roles

Producer/Director have been redacted, it is clear from the other disclosures made by ACE, i.e. the application form itself, that those individuals were in fact Kate Bond and Morgan Lloyd. (Indeed, in light of the fact that ACE disclosed the names and roles of 8 individuals in the application form it seems inconsistent to the Commissioner for it to have then redacted the names of the same 8 individuals from the budget.)

23. Having found the withheld information constitutes personal data, the Commissioner must therefore consider whether disclosure of this information would breach the first data protection principle and thus be exempt from disclosure on the basis of section 40(2).
24. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
 - The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

25. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
26. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

The complainant's position

27. With regard to the reasonable expectations of the withheld information being made public the complainant referred to ACE's publication 'How to Apply' booklet that is supplied to applicants. The complainant argued that this booklet warned grant recipients that budgets may be revealed as part of an FOI request, noting that the booklet stated:

*'Under the Freedom of Information Act 2000, if we are asked for information after your activity has ended, we will generally release your proposal and budget together with all other information in your application documents.'*¹

28. The complainant noted that in the past the Commissioner has drawn a distinction between information which relates to one's public life and information which relates to one's private life. In this instance the complainant argued that the payment received by some of the members of the theatre company is part of their public life. This is because the two Producers/Directors have made the issue a public matter. The complainant highlighted a number of national press articles where the two individuals had reportedly stated that the 'management team were unpaid'² and 'neither of them has ever taken a wage from the show'³ along with an addition a of Radio 4 programme on which one of the Directors appeared. The complainant argued that the applicants will no doubt have given consideration to their rights and interests to privacy when speaking nationally in the press and on the radio about this subject.

¹ http://www.artscouncil.org.uk/media/uploads/Gfta_how_to_apply.pdf

² <http://www.thestage.co.uk/news/2010/07/equity-warns-sell-out-show-of-possible-minimum-wage-breach/>

³ <http://www.guardian.co.uk/stage/2012/jul/13/you-me-bum-bum-train-equity>

29. Furthermore, the complainant disagrees with ACE's suggestion that the withheld information should be seen as a salary, and whether disclosure would be fair considered in that context. Rather, in the complainant's opinion the withheld information was simply a one off fee in respect of a publicly given grant.
30. With regard to the legitimate interests in disclosure of the withheld information, the complainant argued that there was a public interest in budgetary spend figures being made available for the following reasons. Firstly, the public are assured that the grant recipient has spent their publicly funded grant lawfully and prudently. Secondly, the public are assured that ACE have spent their grants lawfully and prudently with their own grant funding criteria. Thirdly, the public are assured that arts professionals are paid competitive industry rates in line with ACE grant funding criteria and those rates are not undermined by a public body.
31. Furthermore, the complainant highlighted what appeared to be the apparent contradiction, namely that the production company reportedly stated in the press that the two Producers/Directors were 'unpaid' and had never 'taken a wage from the show' where as this request appeared to suggest that the two individuals had in fact received a fee. The complainant argued that FOIA had been enacted to ensure that information was placed into the public domain in order to allow such contradictions to be explained.
32. The complainant also argued that there was a compelling public interest in disclosure of this particular company's payments to its staff. The complainant argued that the ethics of mounting a show and not paying performers has attracted considerable criticism from the trade union Equity. The complainant suggested that the fairness and equitability of paying 22 staff but not paying 200 performers was of considerable interest to the public. The complainant argued that the ethics of paying some staff and not others is of considerable public interest given the wider context and scandals about payments to senior heads of business and the growth in unpaid work.

ACE's position

33. With regard to the reasonable expectations of the various data subjects, ACE explained that its guidance to applicants, as referred to by the complainant and quoted above, does not in fact state that ACE will release proposals and budget information along with all other application documents. Rather ACE explained that the guidance states that information may be disclosed (emphasis added by ACE in its correspondence with the Commissioner):

*'By law, we **may** have to provide your application documents and assessment information to a member of the public if they ask for them under the Freedom of Information Act 2000. However, we will not release those parts of the documents covered by one or more of the exemptions...After we assess applications, we **may** release your application documents and assessment information if a member of the public asks for them'.*

34. ACE acknowledged that its guidance does go on to say that it will generally release budget information after a project has ended but there is no expectation that it would automatically release private and confidential information and/or personal data. ACE noted that in this case the redacted parts of the budget which are the focus of this case are personal data.
35. ACE also noted that YMBBT expressly stated in its application form that it considered its financial information, such as the budget and business plan, to be confidential and that the two Producers/Directors had reiterated their refusal to disclose the withheld information.
36. ACE therefore argued that YMBBT supplied it with the personal data which is the focus of this complaint with the strong expectation of privacy and the understanding that it was going to be processed for the purpose of assessing and monitoring the grant. ACE explained that YMBBT had informed its production team that their information would be kept private.
37. More broadly, ACE explained that within the arts sector, there is not a culture of openness about pay and it is generally accepted that salaries and fees are confidential. It noted that YMBBT had asked the individual staff on this project to keep their payments confidential as a matter of standard business practice.
38. Furthermore, ACE noted that it had considered the Commissioner's guidance on disclosing salary information of public sector employees when considering this request.⁴ Whilst none of the individuals in question are employees of ACE, it considered this guidance informative none the less. ACE noted that the Commissioner's guidance took the position that senior officials in public authorities should expect details of

⁴ 'Requests for personal data about public authority employees'
http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

their salary bands to be disclosed because senior officials are paid out of public funds commensurate with their level of responsibility. However, ACE argued that the directors and staff/contractors to YMBBT are not in an equivalent position to paid public sector staff even though they received public money. The YMBBT staff have no influence over public policy and they are not anywhere near the levels of seniority at which it would be expected that public sector officials have to disclose personal financial details.

39. With regards to the consequences of disclosing the withheld information, ACE argued that disclosure of fees and exact amount paid to an individual is intrusive. Furthermore, staff such as those listed here are generally operating in a freelance or contracting style environment. Releasing details of their pay on one job would damage the negotiating position of the individuals involved when being considered for other work.
40. ACE recognised that there is a legitimate public interest in its activities and the projects it funds because it is a public body that distributes public funds. It also agreed that there was a legitimate interest in the public knowing that, as the national development agency for the arts, it was not encouraging bad employment practices within the sector. It explained that it understood that the complainant was very concerned about the practice of artists and others working for free across the arts and cultural sector. It explained that it shared this concern and it had taken steps to encourage and promote proper remuneration for artists and others. However, it emphasised that its role was not one of being a regulatory body; rather its standard terms and conditions of funding require grants holders to abide by all applicable laws and to follow best practice.
41. The Commissioner specifically asked ACE to explain the processes and steps that it takes to ensure that organisations who receive funding do actually make the payments that are as good as, or better, than those agreed by the relevant trade unions and employers' associations.
42. ACE explained that its staff who assess applications such as YMBBT's are experienced officers who understand the importance of proper remuneration for those working in this industry. When assessing an application for funding, ACE staff will interrogate a budget and other financial information provided by an applicant and this includes information about how artists and others taking part in a project will be paid. In the specific circumstances of this case ACE explained that the proper payment of the core creative and production teams was in line with its guidelines, as were the fees themselves. ACE also noted that the volunteers, who took part of their own volition, were to be properly reimbursed for any expenses incurred.

43. In any event, ACE argued that there was no legitimate interest in members of the public knowing the fees paid for one production company as this does not further any case for or against the payment of volunteers either by YMBBT or any other arts organisations. Furthermore, ACE argued that there was no legitimate interest in the disclosure of salary information or fee payments for individuals in the private sector at this level of employment.

The Commissioner's position

44. The Commissioner recognises that the complainant has particular concerns around the fees that would appear to have been paid to the two Producers/Directors. Furthermore, the Commissioner believes that the reason why section 40(2) applies to the withheld personal data relating to these two individuals differs slightly from the reasons why section 40(2) applies to the withheld personal data relating to the other 20 individuals. Therefore the Commissioner has broken down his analysis of section 40(2) into two separate parts, firstly whether it would be fair to disclose the personal data of the 20 individuals, i.e. not including the two Producers/Directors and secondly whether it would be fair to disclose the personal data of the two Producers/Directors themselves.
45. In respect of the 20 individuals, and their reasonable expectations about what would happen to their personal data the Commissioner is of the opinion that such information clearly relates to the private life of these individuals rather than any public role. This is because they received the fees whilst working as a member of a production team of a production put on by a private theatre company. The Commissioner does not accept the complainant's suggestion that because the money for the individuals' fees was paid for with a public grant this means that the role undertaken by the individuals in question somehow becomes a public facing one.
46. The Commissioner notes that YMBBT had stated in its application form that it expected sensitive budget information, which included the information which is in the focus of this request, to be kept confidential. Whilst all members of the production team would obviously not have been involved in submitting this form, this expectation of confidentiality was nevertheless communicated to them. That is to say, the members of the production team were informed by YMBBT that their personal data would be kept private. Furthermore, YMBBT asked that the members of the production team did not themselves disclose details of the payments that they received from the company. Set against these specific circumstances and the broader culture within the arts industry of a lack of openness about the payments and fees earned by individuals, the Commissioner is satisfied that the 20 individuals in question would have

had a reasonable – and weighty – expectation that the amount they received for working on YMBBT would not be disclosed.

47. With regards to the consequences of such a disclosure for the individuals in question, although the Commissioner agrees with the complainant that the information is not a salary, disclosure of it would nevertheless reveal how much each individual was paid for a particular piece of work which each individual believes would represent an intrusion into their private lives. Furthermore, the Commissioner accepts the rationale of ACE's argument that disclosure of the fees paid could undermine the negotiating position of the individuals when they are being considered for other work.
48. In terms of the legitimate reasons for disclosing this information the Commissioner agrees with both parties that there is a clear public interest in ACE being open and transparent about the way in which it distributes public funds, which in the circumstances of this case includes the basis upon which funding was granted to YMBBT and the manner in which that funding was spent. Furthermore, the Commissioner agrees that the specific reasons identified by the complainant at paragraph 30 are legitimate ones and that disclosure of the information about the 20 individuals could go some way in allowing these specific public interests to be met, in particular the complainant's third argument, i.e. that the public are assured that arts professionals are paid competitive industry rates in line with ACE grant funding criteria
49. However, the Commissioner is conscious that ACE has disclosed a significant amount of information about YMBBT's application and the funding it awarded with only minimal amounts of information withheld. Indeed the Commissioner notes that ACE has disclosed the overall budget of the YMBBT production with the only figures being withheld relating to the amounts paid to the 22 individuals in question. Therefore, the public are already able to assess how much of this budget was allocated to staff costs. Furthermore, the Commissioner notes that as part of its assessment of YMBBT's application ACE verified that the fees it proposed to pay to staff was within its own guidelines. Furthermore, although the Commissioner recognises that there is clearly an ongoing public debate surrounding the use of volunteers in the arts sector, he is not clear how disclosure of the fees and rates paid to the 20 individuals would particularly inform or further this debate.
50. In all the circumstances of this case, the Commissioner does not believe that the weight that should be attributed to the arguments in favour of disclosing the fees and rates paid to the 20 individuals outweighs the legitimate interests of the individuals to have such information withheld given the strong (and reasonable) expectations that they had that such

information would not be disclosed when allied with the consequences of any such disclosure.

51. The Commissioner is therefore satisfied that the fees and rates paid to the 20 individuals are exempt from disclosure on the basis of section 40(2) of FOIA.
52. Turning to the fees and rates paid to the two Producers/Directors, the Commissioner believes that the application of section 40(2) to this information is more complicated. As with the 20 individuals discussed above, on one level the Commissioner accepts that the two Producers/Directors would have had a strong expectation that such information would not be disclosed given that they had stated on their application form that they did not want such information to be disclosed and the two Producers/Directors have since reiterated their refusal to have such information disclosed.
53. However, the Commissioner has some sympathy with the complainant's view concerning the comments about funding made by the two Producers/Directors in the media. In the Commissioner's view it is slightly difficult to align the two individuals' strong expectation that the disputed information will be treated confidentiality by ACE when they choose to make some comments about the payment, or lack of, that they take from the production in the national media. Nevertheless, in relation to the consequences of disclosure the Commissioner accepts that disclosure would result in some infringement into the privacy of the two individuals in question.
54. In relation to the legitimate interests in disclosing this part of the withheld information the Commissioner agrees with the complainant's suggestion that it would be in the public interest to disclose information which would address the contradiction the complainant highlighted regarding payments apparently made to the two Producers/Directors and the comments in the media. However, the Commissioner is unsure how disclosure of this information would genuinely resolve such a contradiction. This is because based upon the information that ACE has already disclosed it is clear that the two Producers/Directors, namely Kate Bond and Morgan Lloyd, received what the budget described as a 'fee' as part of the production. Disclosing the level of that fee would not, in the Commissioner's view, solve the contradiction identified by the complainant.
55. In conclusion, despite the comments in the press articles identified by the complainant, the Commissioner accepts that based upon how they understood ACE would treat their personal data contained in the application form, the two Producers/Directors still had a reasonably strong expectation that such information would not be disclosed under

FOIA. Furthermore, the Commissioner accepts that disclosure of the information would still result in a not insignificant intrusion into their privacy. Whilst the Commissioner acknowledges the apparent contradiction highlighted by the complainant, given that the disclosure of the withheld information would be very unlikely to resolve this, he believes that the legitimate interests in disclosing the information do not outweigh the legitimate interests of the two individuals in question.

Right of appeal

56. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

57. 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.
58. 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

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