

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 December 2013

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

Decision (including any steps ordered)

1. The complainant has requested copies of funding documents and correspondence between the Arts Council England (ACE) and various organisations as well as details of any complaints sent to the ACE by a number of individuals and organisations.
2. ACE identified information within the scope of the request and redacted some personal information on the basis of section 40(2), withheld some information on the basis of section 41(1) and considered it could neither confirm nor deny if other information was held without disclosing information provided in confidence (section 41(2)).
3. The Commissioner's decision is that ACE has correctly applied the exemptions to withhold some information and to neither confirm nor deny if information was held.

Request and response

4. On 2 May 2013, the complainant wrote to ACE and requested information in the following terms:
 - 1) *"Any and all funding documents and correspondence with the Arts Council and Custom/Practice or any of its representatives since 1st January 2012, including the date of submission.*

- 2) *Any and all funding documents and correspondence with the Arts Council and Grassroots Shakespeare London or any of its representatives from 1st August 2012.*
- 3) *Any and all funding documents and correspondence with the Arts Council and Spartan Dogs or any of its representatives since January 2011.*
- 4) *Any and all correspondence or complaints sent to the Arts Council by Spartan Dogs or any of its representatives with reference to the Lion and Unicorn Theatre, Giant Olive Theatre Company, George Sallis or Tamzin Paskins. And any responses from the Arts Council or any of its members on this matter.*
- 5) *Any and all correspondence or complaints sent to the Arts Council by Rae McKen, Gill Ahn (also known as Gill Foreman), Lorenzo Martelli, Rebecca Loudon or 'Custom/Practice' with reference to the Lion and Unicorn Theatre, Giant Olive Theatre Company, George Sallis or Tamzin Paskins. And any responses from the Arts Council or any of its members on this matter.*
- 6) *Any and all correspondence or complaints sent to the Arts Council by Siobhan Daly or any representatives of 'Grassroots Shakespeare London' with reference to the Lion and Unicorn Theatre, Giant Olive Theatre Company, George Sallis or Tamzin Paskins. And any responses from the Arts Council or any of its members on this matter.*
- 7) *Any correspondence between Siobhan Daly and the Arts Council Chairman, Sir Peter Bazalgette, which refers to the Lion and Unicorn Theatre, Giant Olive Theatre Company, George Sallis or Tamzin Paskins.*

Correspondence is defined as letters, emails, transcribed telephone calls or any information that can be provided at all."

5. ACE responded on 3 June 2013. In response to parts 1, 2 and 3 of the request it attached a copy of one Grants for the arts application and offer letter from Custom/Practice. Some information – namely artist's fees and salary details – was redacted from these documents on the basis of section 40(2). ACE also explained that although it publishes details of successful applicants for funding it could neither confirm nor deny if it has received applications which are unsuccessful as to do so would reveal information provided in confidence (section 41) and information which may be prejudicial to commercial interests (section 43).

6. With regard to parts 4, 5 and 6 of the request; ACE confirmed that no correspondence or complaints relating to Tamzin Paskins or George Sallis was held. For correspondence or complaints relating to the Lion and Unicorn Theatre or Giant Olive Theatre Company ACE identified two emails – one from Rae Mcken with a response from ACE and one from another individual with an ACE response. This information was provided to the complainant with some information redacted from the second email chain on the basis of section 40(2) and 41 of the FOIA.
7. For the last part of the request (referred to by ACE as part 5 but referred to in this Notice as part 7) ACE confirmed no correspondence was held within the scope of the request.
8. Following an internal review ACE wrote to the complainant on 19 June 2013. It stated that after reconsidering the request it upheld its original decision.

Scope of the case

9. The complainant contacted the Commissioner on 19 June 2013 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of his investigation to be to determine if:
 - ACE has correctly applied the section 40(2) exemption to withhold personal data from the funding application, offer letter and email;
 - ACE has correctly applied the section 41 and 43 exemptions to neither confirm nor deny if unsuccessful applications have been received;
 - ACE has correctly applied the section 41 exemption to withhold information from the email chain identified as within the scope of the last part of the request.

Reasons for decision

Section 40 – personal information

Information withheld from the application form

11. Section 40(2) of the FOIA provides that information which is the personal data of a third party is exempt if a disclosure of the information would breach any of the data protection principles.
12. The first question the Commissioner has considered is whether the information is personal data for the purposes of the Data Protection Act 1998 (DPA). Personal data is defined in 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."
13. The Commissioner notes that the information withheld under section 40(2) from the application and the email chain consists of the identity of one individual and information salaries and/or fees paid to various artists and technicians. With regard to the application, the information withheld is specific amounts paid to individuals who undertook jobs roles in the production. ACE did provide fee information for each area of artistic spending but redacted the information on the specific role and fee per day.
14. The Commissioner notes that this information in itself is not directly linked to a specific individual, a fact with ACE also acknowledges. That being said, ACE has argued that individuals could be identified from other information within the application form or by people with industry knowledge, particularly as production members are discussed within the body of the application form which has been disclosed as part of this request. As such ACE considers that if it was to disclose the specific salary/fee information it could, in conjunction with information in the application form or searchable on the internet, lead to an interested person obtaining personal information about a specific individual by disclosing information about their financial position in the form of salary/fee information.

15. In his guidance on *Information in the public domain*¹, the Commissioner accepts that public authorities can consider disclosure in the context of the effect of disclosure where there is existing information in the public domain. The Commissioner also accepts that disclosure under the FOIA in theory is disclosure into the public domain (although the extent to which the information remains in the public domain is not always clear). In any event, in this case the Commissioner has considered this 'mosaic' effect and whether disclosure of the specific fee information for roles in a production would be a disclosure of personal data when considered in conjunction with other information in the application form such as job titles and names.
16. Due to the nature of the information in the application form which the Commissioner confirms is names and detailed job descriptions, he accepts that disclosure of the salary details for job roles would easily be able to be linked to other information in the application form and therefore relate to a living individual. The Commissioner therefore accepts that the information withheld from the application form is personal data as defined by the DPA.
17. Having decided that the information is personal data, the next question the Commissioner must consider is whether a disclosure of that information would breach any of the data protection principles.
18. The most relevant data protection principle in this case would be the first data protection principle. This requires that information is processed 'fairly and lawfully'. The Commissioner must therefore decide whether a disclosure of the information would be 'fair'.
19. In considering whether disclosure would be fair the Commissioner takes into account the following factors:
 - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - The individual's reasonable expectations of what would happen to their information; and
 - Balancing the rights and freedoms of the data subject with legitimate interests.

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information-in-the-public-domain-foi-eir-guidance.ashx

20. The Commissioner has considered the requested information and the arguments presented by ACE that the individuals concerned would have no reasonable expectation that information about their specific salaries would be disclosed. The information was obtained by Custom/Practice who are not a public authority subject to the FOIA so it is unlikely individuals employed by Custom/Practice would have any expectation their information would be disclosed in this way.
21. The Commissioner accepts that these individuals would therefore be likely to have an expectation that information about their pay and fees would not be disclosed but this does not necessarily mean that this expectation is reasonable.
22. The Commissioner's view is that when considering what information individuals should expect to have disclosed about them a distinction should be drawn as to whether the information relates to the individual's public or private life. In this case the information is financial information of individuals who do not work in the public sector and would have no expectation of this sort of disclosure. ACE has argued that artists and technicians are often in transitory roles, moving on from one project to another, as such they have a reasonable expectation that details of the fees they are paid would not be disclosed so as to prejudice their future negotiations for work. The Commissioner accepts this point and considers that due to the nature of the work and the fact that the information is of a financial nature and relates to an individual's private life, the expectation that this information not be disclosed is a reasonable one.
23. The Commissioner has considered the submissions of the public authority and in particular whether it felt that the release of the information would cause unnecessary or unjustified harm to the individual involved. As with the arguments presented by ACE in relation to the reasonableness of the expectation of non-disclosure, the Commissioner acknowledges that disclosure of an individual's salary or fee details would cause the individual unwarranted distress or unjustified damage as it may impact on their ability to negotiate future positions.
24. In relation to the final factor, the legitimate interest in the public knowing this information, ACE acknowledges accountability and transparency provide arguments for disclosure but that any interest in this has been satisfied by the disclosure of information relating to the total amounts of artistic spending and how the public money provided for the project has been distributed.
25. In making his decision the Commissioner has considered whether disclosure of the information would lead to a greater infringement of the individual's legitimate right to privacy than is outweighed by the

legitimate interest in disclosure. The Commissioner accepts that the disclosure of the specific salary and fee details would provide a further breakdown of how the public money given to the project has been apportioned but disclosing the information at such a granular level, particularly where it can be linked to an individual, would be an unusual step to take and the Commissioner is not convinced this would significantly increase transparency within ACE enough to outweigh the individual's expectation of privacy in this case.

26. The Commissioner therefore considers that disclosure of the information within the application form which has been withheld would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the information is exempt from disclosure.

Information withheld from the email

27. ACE has withheld the name and contact information of the sender of the email identified by ACE as within the scope of parts 4, 5 and 6 of the request. As with the consideration of the information withheld from the application form, the Commissioner has first considered whether the information would be personal data as defined by the DPA. As the information consists of a name and an email address he is satisfied the information relates to a living individual and it is personal data.
28. The Commissioner has next gone on to consider whether the disclosure of this information would breach the first data protection principle. In doing so he has first considered whether the individual concerned would have had any reasonable expectation that their information would be disclosed in this way. As the information is the identity of the sender of an email and the contact information of that individual, the Commissioner is of the view that this individual would not have had any reasonable expectation their contact information and name would be disclosed.
29. The Commissioner has gone on to consider the submissions of ACE with regard to whether it felt the release of the information would cause unnecessary or unjustified harm to the individual involved. When considering this the Commissioner notes that the individual was approached to ask for consent to disclose and expressly refused this. Disclosure of an individual's name and contact information into the public domain where the email has been sent regarding the Lion and Unicorn Theatre or Giant Olive Theatre and may involve a complaint would be likely to cause the individual damage or distress as it could lead to undue scrutiny on that individual.
30. In relation to the legitimate interest in the public knowing this information, the Commissioner recognises the public interest in any

information which may increase transparency within public authorities but he does not necessarily consider the disclosure of the information in this case would assist in achieving this. Balanced against this is the fact that the individual had no reasonable expectation that their name and contact information would be disclosed and releasing the information may have a detrimental impact on that individual.

31. In making his decision the Commissioner has therefore considered whether disclosure of the information would lead to a greater infringement of the individual's legitimate right to privacy than is outweighed by the legitimate interest in disclosure. The Commissioner does not consider there are any compelling arguments in favour of disclosing the name and contact information of this individual but he does acknowledge the legitimate interest in the individual's right to privacy.
32. The Commissioner has concluded that disclosure of this information would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the information is therefore exempt from disclosure.

Section 41 – information provided in confidence

33. ACE has applied section 41(1) to withhold some information from one of the two emails identified as being within the scope of parts 4 – 6 of the request. ACE also applied section 41(2) to neither confirm nor deny if unsuccessful applications were received that were relevant to the request. The Commissioner has firstly considered the application of section 41(1) to withhold information from the email.

Information withheld from the email

34. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

35. The information withheld from the email sent to ACE details concerns that the sender wanted to highlight to ACE. The information was sent by a member of the public and the information is therefore information obtained from a third party and the Commissioner therefore accepts the first limb of section 41 is met.

Would disclosure constitute an actionable breach of confidence?

36. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- Whether the information has the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence and
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.
37. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
38. ACE received the information from the third party in its role as promoter of the arts and distributor of lottery funding. It is clear from the content and the wording that the sender was contacting ACE in confidence and had no expectation that the email would be disclosed or distributed more widely.
39. Based on the above, the Commissioner accepts that the withheld information cannot be said to be publicly available and such it cannot be considered to be otherwise accessible. After viewing the withheld information the Commissioner does not consider it to be trivial as it is a frank communication about concerns and issues the sender has. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.
40. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence. The email offers the view of the sender on an application to ACE and the information was provided on the understanding it would be used solely to inform ACE's decision making.
41. The Commissioner recognises that information will be received by ACE from various sources in order for it to make decisions on funding applications and there is an implied obligation of confidence on the part of ACE when it receives information to assist in this process.
42. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The email contains a frank view on an application for funding.
43. The test under section 41 is whether disclosure would constitute a breach of confidence actionable by the person who provided the information or any other person. The Commissioner considers that

disclosure of the letters could result in an actionable breach of confidence by ACE as disclosure impacts on the sender by opening them up to scrutiny and potential criticism.

Would a public interest defence be available?

44. As section 41(1) is an absolute exemption there is no public interest. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.
45. The complainant has argued that it needs to see the content of the email in order to defend itself against any claims. The complainant has further argued that the ongoing dispute is having a detrimental effect on its reputation and it is in the public interest for the contents of the email to be disclosed so that local theatres can defend themselves. ACE has also recognised that disclosure of the information will promote openness and transparency about how it deals with third party disputes.
46. The Commissioner recognises there is always some public interest in the disclosure of information held by public authorities to bring about more accountability and transparency. However, the Commissioner has to be mindful of the wider public interest in preserving the principle of confidentiality. It is in the public interest that the duty of confidentiality between confiders and confidants is preserved.
47. ACE has argued there is a strong public interest in maintaining the trust and confidence of organisations and individuals who want to contact ACE with concerns about organisations who may be the recipients of funding. The Commissioner has followed this argument through and can recognise that if this information was disclosed it may result in the perception that ACE does not treat information provided to it by third parties in confidence and this may make third parties more reluctant to offer views and concerns in the future. This would not be in the public interest as it may mean that ACE are making decisions on apportioning funding without being made aware of information which may have been relied on when forming opinions and making decisions.
48. There is also a strong public interest argument regarding the maintenance of confidence where a public authority considers that disclosure of the information could result in a detrimental impact on the confider. This is a particular issue where the content of the information constitutes a complaint or concern which may lead to the confider being

subjected to criticism or, in some cases, harassment due to the disclosure of the specific nature of their concerns.

49. Taking into account all the circumstances of this case, the nature of the relationships between the parties and the content of the withheld information the Commissioner considers ACE would not have a public interest defence for breaching its duty of confidence. The Commissioner cannot conclude that there is a strong enough public interest argument to disclose the requested information.
50. Therefore the Commissioner finds that the information withheld from the email identified as within the scope of parts 4-6 of the request has been correctly withheld on the basis of section 41(1) of the FOIA.

Information on unsuccessful applications

51. ACE has cited the exemption from the duty to confirm or deny provided by section 41(2) in response to the request for documents and correspondence with ACE and Custom/Practice, Grassroots Shakespeare London and Spartan Dogs.
52. ACE has provided a copy of the application form and offer letter to Custom/Practice with some redactions under section 40(2) but considers section 41(2) applies in relation to any other funding documents or correspondence.
53. This section provides an exemption from the duty to confirm or deny where to do so would constitute an actionable breach of confidence. The central issue for the Commissioner here is therefore whether the provision of a confirmation or denial response to this request would constitute an actionable breach of confidence. As any breach of confidence would not be actionable if a public interest defence were available, the Commissioner has also considered that to the extent that it is relevant.
54. ACE has refused to confirm or deny if any further funding documents or correspondence are held. Its reasoning for this is that it does publish information on successful applications but not unsuccessful applications for funding. To confirm if any further funding documents within the scope of the request are held may reveal that unsuccessful applications were made by the listed organisations. By neither confirming nor denying whether any further information is held, ACE consider they are not disclosing any information provided in confidence.
55. In considering whether ACE has correctly relied on the section 41(2) exemption to neither confirm nor deny the existence of any further

funding documents or correspondence the Commissioner has considered the same points as he did when considering the application of section 41(1) to the information withheld from the email.

Was the information obtained from another person?

56. ACE considers if further information was held it would be information obtained from another party as it would constitute a funding application sent by an organisation. The Commissioner therefore accepts the first limb of section 41 is met.

Would disclosure constitute an actionable breach of confidence?

57. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- Whether the information has the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence and
- Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

58. If ACE received any further funding documents (most likely to be in the form of applications) then the information would have been received by ACE in its role as a decision-maker for the distribution of lottery funding. When submitting applications for funding to ACE it is made clear that the application and any commentary in relation to the application will remain confidential should the application be unsuccessful.

59. Based on the above, the Commissioner accepts that should information on unsuccessful applications be held it would not be said to be publicly available and such would not be considered to be otherwise accessible.

60. Information submitted in applications will detail how the applicant runs its business and how it intends to use any funding to progress and develop. This will include confidential business details and budget information. The Commissioner does not consider that this information, if it was held, is trivial and he is therefore satisfied that the information has the necessary quality of confidence.

61. The Commissioner is also satisfied that information on funding, particularly on applications, is imparted in circumstances imparting an obligation of confidence as this is explicitly stated as part of the application process.

62. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The test under section 41 is whether disclosure would constitute a breach of confidence actionable by the person who provided the information or any other person. The Commissioner considers that by confirming if any further applications of funding documents are held in relation to the organisations named in the request this could result in an actionable breach of confidence by inferring that these organisations were unsuccessful in their applications for funding.
63. If ACE were to disclose this information by confirming whether funding documents were held and therefore potentially indicating that unsuccessful applications had been received from the organisations named in the request this could have an impact on the ability of those organisations to secure funding in the future from other sources or to achieve private donations for the specific production which had been unsuccessful in receiving funding from ACE.

Would a public interest defence be available?

64. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.
65. ACE has recognised that by confirming or denying if this information is held this would increase openness and transparency and the Commissioner recognises there is always some public interest in raising awareness of accountability and transparency.
66. ACE has argued there is a strong public interest in preserving a relationship of trust and confidence to allow ACE to consider all relevant information when making a decision on funding. There is also a strong public interest in ACE maintaining levels of trust by abiding by its obligation of confidence expressly stated in the application process.
67. ACE is of the view that if this trust was eroded it may restrict the information provided to ACE in the future and have a detrimental impact on ACE's process for making decisions on awarding funding.
68. Taking into account all the circumstances of this case the Commissioner has concluded that ACE would not have a public interest defence for breaching its duty of confidence. The Commissioner does not accept there is a strong enough public interest argument to compel ACE to confirm or deny if further funding documents and correspondence are held.

69. Therefore the Commissioner finds that ACE has correctly applied section 41(2) to neither confirm nor deny if any further information within the scope of parts 1-3 of the request is held. As such he has not gone on to consider the application of section 43 to this same information.

Right of appeal

70. 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

71. 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.

72. 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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