

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 September 2020

Public authority: Northern Ireland Screen

Address: 3rd Floor, Alfred House
21 Alfred Street
Belfast
BT2 8ED

Decision (including any steps ordered)

1. The complainant has requested information from Northern Ireland Screen ("NI Screen") regarding funding for certain film productions. NI Screen disclosed some information in response to the complainant's request, however it refused to disclose the remainder, citing section 43(2) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that NI Screen has correctly applied section 43(2) of the FOIA to the withheld information. The Commissioner has also decided that NI Screen has breached section 17(1) of the FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 11 February 2020 the complainant made a request for information in the following terms: -

"I was looking at your website and the decision logs for the last two years are missing please provide links to these decisions.

In addition please provide details as to what funding if any you provided for the BBC programmes 'Lost Lives' and 'Bloodlands'.

I have not requested this information under the FOIA as your existing policy is to publish them and I know of no authorised change.”

5. NI Screen disclosed information to the complainant on 13 February 2020 in respect of the funding amounts for the two specified films and also provided links to the decision logs, stating that the latest ones were due to be published soon.
6. The complainant again wrote to NI Screen on 14 February 2020 asking for the percentage of the overall costs of the shows that was made up by funding. NI Screen replied on 17 February 2020 and refused to disclose the requested information to the complainant, stating that it was “commercially sensitive.” The complainant asked NI Screen to confirm this stance, and it replied stating that it confirmed that the information was commercially sensitive and was not NI Screen’s information to share.
7. The complainant again corresponded with NI Screen on 17 February 2020 stating that he was now requesting the information formally under the FOIA. NI Screen replied stating that it had reviewed the request and that it confirmed that the information belonged to a third party and was commercially sensitive. The complainant then on 26 February 2020 requested a formal statement from NI Screen stating that it held the requested information but was applying an exemption as a basis for non-disclosure. NI Screen responded confirming this position.
8. The Commissioner wrote to NI Screen on 23 April 2020 and asked if it was applying section 43(2) of the FOIA. She also requested a copy of the withheld information and NI Screen’s submissions regarding its application of the section 43(2) exemption.
9. NI Screen responded to the Commissioner on 22 June 2020, confirming that it considered the withheld information to be commercially sensitive and providing its submissions with regard to this.

Scope of the case

10. The complainant contacted the Commissioner on 6 March 2020 to complain about the way in which NI Screen had handled his request for information.
11. The Commissioner has considered NI Screen's handling of the complainant's request, in particular its application of the exemption as set out at section 43(2) of the FOIA.

Reasons for decision

Section 43(2) – prejudice to commercial interests

12. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
13. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the commercial interests;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely, to occur.
14. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case, the withheld information relates to overall funding for film production services. The Commissioner, having perused the requested information, is satisfied that it relates to the purchase and sale of services and is therefore commercial.
15. NI Screen has argued that disclosing the withheld information is likely to cause prejudice to both its own commercial interests and those of the specified production companies.

16. It is therefore necessary to consider whether NI Screen has demonstrated that there is a sufficient causal link between disclosure of the withheld information and the likely prejudice caused to both its own commercial interests and those of the various production companies.
17. In relation to the commercial interests of third parties it is not appropriate to take account of speculative arguments which are advanced by public authorities about how any prejudice may occur. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects arguments advanced by the public authority to be based on its prior knowledge of the third party's concerns.
18. In its letter to NI Screen of 23 April 2020 the Commissioner asked for evidence which demonstrates a clear link between disclosure of the withheld information and any prejudice to commercial interests which may occur.
19. In its response to the Commissioner of 22 June 2020, NI Screen stated that it had not explicitly consulted the production companies as to their views regarding disclosure of the withheld information. It stated that it had not corresponded specifically with those companies regarding the issue of the complainant's request, as it considered that such correspondence would impact negatively upon NI Screen's commercial relationship with the companies in question as it would bring into question the ability of NI Screen to uphold its commercial obligation to keep production information private.
20. NI Screen stated to the Commissioner that it did not need to consult the production companies directly on this issue, as it had been provided with sufficient explanation on previous occasions as to why those companies would want the withheld information to be kept private. With regard to NI Screen's own commercial interests, it stated that disclosure of the withheld information would undermine those commercial interests as other companies would see the potential for disclosure of their commercial information and would be reluctant to do business with NI Screen as a result.
21. NI Screen asserted that the commercial interests of the various production companies involved in the specified projects would be likely to be prejudiced if the withheld information was disclosed. It argued that no distribution companies would wish the cost of the content they are selling to be publicly known as this would influence the buyers of the content and may cause the buyers to offer lower license fees for the content.

22. NI Screen further argued that all production companies regard the cost of their productions as commercially sensitive information. The commercial sensitivity can play out in many different ways. For example, other production companies can undercut them; key talent or actors can demand greater payment; other buyers of the programming might realise they've paid too much for other similar content from the production company.
23. With regard to NI Screen's own commercial interests, it stated that disclosure of the withheld information would undermine those commercial interests as other companies would see the potential for disclosure of their commercial information and would be reluctant to do business with NI Screen as a result.
24. NI Screen is a public funder, which does not want the cost of production placed in the public domain as this would be likely to prejudice its ability to attract other projects. Production companies, distributors, film studios, broadcasters and Video on Demand companies are all extremely secretive about their budgets and financial affairs and NI Screen considers that they would not wish to do business with an organisation that is obliged to release information that the company can otherwise keep private.
25. Having considered all of the above arguments, the Commissioner accepts that the prejudice outlined above would be likely to occur if the withheld information were to be disclosed. Therefore NI Screen has demonstrated that there is a clear causal relationship between disclosure of the withheld information and the likely resulting prejudice to both its own commercial interests and those of the production companies.
26. The Commissioner therefore considers that section 43(2) of the FOIA was correctly engaged and she has gone on to consider the public interest test in this case.

Public interest arguments in favour of disclosure

27. There will always be some public interest in disclosing information which would promote transparency and accountability of how a public authority operates in its decision-making and in its expenditure of funds. NI Screen recognises this and the Commissioner gives significant weight to this as a public interest factor in favour of disclosure of the withheld information.

Public interest arguments in favour of maintaining the exemption

28. NI Screen argues that it is a public body charged with growing the screen industry in Northern Ireland. It has to engage in the commercial world to pursue that aim. Releasing the withheld information would fundamentally undermine Northern Ireland Screen's ability to pursue the goal it is tasked with, which would not be in the public interest.
29. NI Screen informed the Commissioner that it regularly asserts to potential applicants that it will keep information relating to their applications to it private. This assertion is extremely important to the credibility and reputation of Northern Ireland Screen in the global marketplace. Many projects would not consider Northern Ireland as a production base if they were obliged to reveal their budgets, which would clearly not be in the public interest.

Balance of public interest arguments

30. The Commissioner has considered the public interest arguments both in favour of disclosure and of maintaining the section 43(2) exemption. She notes the importance of transparency and accountability with regard to the expenditure of public authorities, however she considers that the ability of NI Screen to pursue its goal of growing the screen industry in Northern Ireland is extremely important for the Northern Ireland economy and anything causing detriment to this ability would not be in the public interest.
31. The Commissioner therefore considers that, in all the circumstances of the case, the public interest is in favour of maintaining the exemption.

Section 17(1) of the FOIA

32. Section 17(1) of the FOIA states that: -

“a public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

33. As NI Screen did not specify in its initial refusal of the complainant's request for information that it was applying section 43(2) of the FOIA, the Commissioner considers that it has breached section 17(1) of the FOIA.

Right of appeal

34. 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: 0870 739 5836

Email: grc@justice.gov.uk

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

35. 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.
36. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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