

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 August 2022

Public Authority: Arts Council England
Address: The Hive
49 Lever Street
Manchester
M1 1FN

Decision (including any steps ordered)

1. The complainant has requested minutes produced from Arts Council England's ("ACE") Race and Disability Advisory Group meetings. ACE refused to disclose this information, citing section 36 of the FOIA - prejudice to the effective conduct of public affairs.
2. The Commissioner's decision is that ACE correctly cited section 36(2)(b)(i) and (ii) of the FOIA to the requested information and was entitled to withhold it.
3. The Commissioner does not require ACE to take any further steps.

Request and response

4. On 25 June 2021, the complainant wrote to ACE and requested information in the following terms:

"I'd like to submit an FOI request for any minutes produced from meetings of Arts Council England's race and disability advisory groups since September 2020."
5. On 26 July 2021, ACE responded. It refused to provide the requested information citing section 36(2)(b)(i) and (ii) of the FOIA.

6. On 27 July 2021, the complainant wrote to ACE and asked it to carry out an internal review of their request.
7. On 24 August 2021, ACE conducted an internal review and wrote to the complainant upholding its original decision.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way their request for information had been handled. They asked if the Commissioner considered it justified that the requested information was withheld under this exemption.
9. The Commissioner considers the scope of the case to be whether ACE appropriately cited section 36(2)(b)(i) and (ii) to withhold this information.

Reasons for decision

10. Section 36 – prejudice to the effective conduct of public affairs

11. Section 36 FOIA provides that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(b) 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...”

12. The Commissioner’s definition¹ of ‘inhibit’ in her guidance is to restrain, decrease or suppress the freedom with which opinions or options are expressed. ‘Deliberation’ refers to the public authority’s evaluation of

¹ [Section 36 \(ico.org.uk\)](https://ico.org.uk)

competing arguments or considerations in order to make a decision.

13. ACE has applied section 36(2)(b)(i) and 36(2)(b)(ii) to the whole of the requested information, which, consists of minutes produced from meetings of its Race Advisory Group and Disability Advisory Group from September 2020 up to 25 June 2021.
14. The Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
15. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person in respect of ACE is the Chief Executive, Darren Henley.
16. During the Commissioner's investigation ACE provided evidence that the qualified person's opinion was sought on 16 July 2021 and that he signed the opinion on 22 July 2021.
17. The Commissioner is satisfied that the appropriate qualified person has provided his opinion. The opinion of the qualified person was sought and provided on 22 July 2021 after having considered the withheld information. The qualified person had, in fact, attended some of the Race Advisory Group and Disability Advisory Group meetings. He signed that section 36(2)(b)(i) and (ii) were both applicable.
18. The Commissioner next needs to establish whether his opinion was reasonable.

Is the qualified person's opinion reasonable?

19. The qualified person in relation to the exemption at section 36(2)(b)(i) and (ii) must give an opinion that the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation would be / would be likely to be inhibited by the release of this information.

20. The Commissioner's guidance² regarding the definition of "reasonable" is as follows:

"In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law... The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion a reasonable person could hold – then it is reasonable."

21. The qualified person's view is that the disclosure of the information would be likely to inhibit the free and frank exchange of views and the free and frank provision of advice in future deliberations, if disclosed. The information in question relates to a number of sensitive matters discussed at ACE's Race Advisory Group and Disability Advisory Group meetings.
22. ACE explained that the role of the Race Advisory Group and the Disability Advisory Group is for ACE to take advice from members of these communities in order to improve and / or to be aware of the experience and inclusion of Black, Asian, Ethnically diverse communities, D/deaf, neuro-divergent, and disabled people and the impact ACE may or could have through its 10 year strategy and/or programmes on these communities. The groups also provide a mutual support and collective voice for Black, Asian, Ethnically diverse communities, D/deaf, neuro-diverse, and disabled within Arts Council.
23. The groups discuss issues relating to race and disability. Meetings cover a range of important and sensitive issues. The groups respectively create a space for ACE staff members of all levels to get together to enable dialogue and identify any issues or concerns regarding their experience as ACE employees. Including: discussions on racism, emerging issues and challenges faced by these communities and any resulting social injustice and inequality. Discussions in these groups may influence and contribute to ACE's policies, planning, practices, and projects regarding equality and inclusion. For these reasons, the advice of these groups is important to ACE. The Groups' discussions and deliberations are enhanced by the presence of national Council Members

² <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effectiveconduct-of-public-affairs-section-36-v31.pdf>

and internal colleagues. It also said that membership of the groups is open to individuals within the respective communities.

24. The Commissioner notes that the withheld information contains comments surrounding the ACE's internal plans, processes, and strategies (including sensitive issues), and how it handles these matters and matters related to performance, training and financial management. It also contains information about external organisations.
25. ACE states that the meetings and the text in the documents cover a full and frank unrestrained exchange of views to facilitate open discussions about matters which are confidential in nature. Such as how well the groups work, internal processes, planning, practices, and possible advice relating to the development of policies and strategies regarding equality and inclusion. The minutes provide information on the topics discussed and internal dialogue, that is the free and frank discussion of matters that are sensitive in nature. The contents, ACE argues, represent an unrestrained exchange of opinions where it is implicit that there is a reasonable expectation that these exchanges will be afforded an enhanced degree of confidentiality.
26. ACE said that membership of the groups is open to individuals within the respective communities. If this were not the case and individual views were to be made available to the world at large then this may constrict internal dialogue and not allow the development of viewpoints and planning, which would inhibit the conduct of public affairs.
27. ACE's conclusion is that, if disclosed, these documents will inhibit the conduct of public affairs and would adversely impact on the ability of the groups to discuss matters with its members. Disclosure of these opinions would be likely to have a direct impact, both now and in the future, on an individual's ability to discuss and debate these issues in a free and frank manner and the process by which these discussion takes place.
28. Much of ACE's argument under s36(2)(b)(i) and (ii) is based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making.
29. However, public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice.

30. Nonetheless, the Commissioner accepts the opinion that disclosure of the requested information would be likely to lead to the inhibition set out by ACE. The opinion is one that a reasonable person could hold and the exemption is therefore engaged.

Public interest

31. Although the exemption is engaged, the Commissioner also needs to consider the public interest in this matter. He may consider that it is in the public interest for this information to be disclosed.

The public interest in the disclosure of the information

32. The complainant expressed the view that ACE overextended its application of section 36 of the FOIA. They said that there is a public interest in transparency around the conduct and processes of ACE, and concerns about privacy and a 'chilling effect' can be managed by redacting names of participants. They also said that ACE's National Council minutes are ordinarily released and therefore the withheld information should be treated no different.
33. ACE's view is that disclosure would not be appropriate but it acknowledged the principle of the accountability and transparency of public authorities and their decision-making processes. It would allow individuals to further understand and participate in the issues debated.

The public interest in the maintenance of the exemption

34. ACE maintains that disclosure may lead to a profound 'chilling effect' resulting in ACE members and internal colleagues being reluctant to conduct free and frank discussions. This could result in a lost opportunity for real debate and discussion around important issues and impair the ability of ACE to function effectively. Any loss in the quality of decision-making caused by the 'chilling effect' would be contrary to good public administration and not in the public interest.
35. There is a need for a "safe space" for public bodies to formulate and debate issues, particularly regarding thoughts around correspondence, and / or within draft discussions and documents relating to issues tackled by the respective groups around race and disability. The meetings include members of the respective groups, which, enables ACE to develop its awareness of their experiences, provide support and improve the experience of all members of the groups. Parties may be less willing to share their opinions and provide meaningful advice within a 'safe space', ACE considers this space to be vital for open, honest and constructive decision-making.

36. It is not in the public interest to hinder ACE from providing and seeking meaningful advice from the groups on important issues, nor to risk distorting or restraining any information or advice given. ACE argues that it is not in the public interest to prevent discussions due to a fear that any views would be released at a later date.

Balance of the public interest

37. The complainant has argued that the names of attendees can be redacted from the minutes and that ACE publishes National Council meeting minutes. ACE's view is that disclosure is not in the public interest. ACE has provided arguments for a 'safe space' and around the 'chilling effect' disclosure would have on the free and frank provision of advice or the exchange of views.
38. On balance, the Commissioner has decided that it is not in the public interest to release this information. However, this is not based on compelling reasons, but on reasons that are more persuasive than the fact that ACE might choose to publish its National Council minutes but not the requested information. It is his view that redacting names of attendees in a meeting that is recorded in minutes is likely to still have an impact on the provision of advice and exchange of views. The requested information lacks detail but touches on sensitive matters such as issues discussed by the respective groups, and ACE's planning and practices regarding equality and inclusion.
39. The request was received three months after the last meeting took place and was still live at that time, matters previously discussed were also carried over. The Commissioner also notes that the matters discussed by the groups impact on ACE's consideration of issues and / or to reflect on its 10 year strategy impact and programmes. Some of the matters discussed concern how the groups work, internal processes, planning, in other words matters that require internal reflection and organisational scrutiny. Groups that have been created to explore, understand and enhance members' experiences around race and disability need to have open discussions without the imminent fear of public scrutiny which is not conducive to good decision-making. Once that time has passed, the argument might be harder to sustain.

Right of appeal

40. 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@hmcts.gsi.gov.uk

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

41. 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.
42. 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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