

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 30th August 2007

Public Authority: Department for Culture Media and Sport
Address: 2-4 Cockspur Street
London
SW1Y 5DH

Summary

The complainant asked the public authority for information about specifications and costs for producing the 'MadforArts' project. The public authority provided some information but withheld other elements, citing the exemptions contained in sections 41, 43 and 40 of the Freedom of Information Act 2000 ('the Act'). It subsequently dropped its reliance on section 41. The complainant questioned the application of the exemptions and also expressed doubts that the public authority had identified all of the information which fell within his request. After the Commissioner's intervention the public authority identified further information, some of which it released. The Commissioner decided that some of the withheld information was exempt under section 40 but, in breach of section 1(1), the public authority had failed to disclose other information to which the section 43 exemption did not apply because there was no prejudice associated with disclosure. The Commissioner required the public authority to disclose the information which had been inappropriately withheld.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. The complainant made a freedom of information request to the Department for Culture, Media and Sport (DCMS) on 2 February 2005. He asked for:

'the original agreements between your Dept and the other stakeholders on the MFA [MadforArts] project re: the criteria employed and expected to be met by MFA by you as funders.'

'MadforArts' was a web and television project which aimed to encourage people with mental health issues to talk about public art. It later became clear that the complainant wanted information relating to salaries, fees, expenses and costs for parties contracted by the public authority to provide goods and services for the 'MadforArts' project.

3. DCMS replied on 2 March 2005. It stated that the requested information was 'set out in the contract agreed between DCMS and the Community Channel on 14 April 2004', which it enclosed. It stated that a small amount of the information in the contract was covered by the exemptions under sections 41, 43 and 40 of the Act. Certain names of individuals had been deleted as amounting to personal data under section 40 of the Act. Section 41 related principally to financial information, which had been provided to DCMS by another party in confidence. DCMS claimed that the same information would prejudice the commercial interests of both itself and its contractor, within the meaning of section 43, and that the public interest favoured non-disclosure, although it did not propose to address this in detail because the same information was covered by section 41. DCMS also advised the complainant that the project had been reviewed and monitored through 'regular Board meetings and informal dialogue between the Culture Online team...and the project partners', although minutes of the advisory panel were not taken because the group was not a formal one. It advised the complainant how to request an internal review of its decision.
4. The complainant sent further emails on 7 and 8 March 2005. He queried whether DCMS had provided all disclosable information. He sent further emails in which he requested information about attendees at the 'MadforArts' Project Board and Editorial Advisory Board.
5. DCMS replied on 7 April 2005 with information relating to the two Boards.
6. The complainant requested an internal review on 27 May 2005:

'I am respectfully requesting to be informed about the cost of the project "Mad for Arts". It would be ideal if you could breakdown those costs to the best of your ability'.

7. He emailed DCMS again on 26 July 2005. He noted that 'MadforArts' had now published its running costs up to April 2005 – £316,44 plus VAT – but had failed to provide a breakdown of these costs.
8. On 1 August 2005 DCMS provided its internal review decision. It stated that the Community Channel had agreed that the overall cost of the 'MadforArts' project could be released – DCMS reported that the figure was £316,000 plus VAT. However, DCMS expressed the view that 'disclosure of the detailed costs of the project would damage the commercial interests of the Community Channel', and that this information was therefore exempt under section 41 and section 43 of the

Act. It informed the complainant of his right to complain to the Information Commissioner.

The Investigation

Scope of the case

9. The complainant contacted the Commissioner on 30 August 2005. He claimed that the exemptions did not apply. He also suggested information which DCMS might provide in the way of a breakdown of costs, since he was not satisfied with the global figure provided by DCMS. In a further letter on 14 May 2006 he pointed out that the 'MadforArts' project had closed early in 2006.

Chronology

10. There were telephone conversations between the Commissioner and DCMS on 22 September and 16 October 2006 in an effort to bring about an informal resolution. The Commissioner then wrote to DCMS on 26 October for clarification of various issues.
11. On 17 November 2006 DCMS provided a copy of the contract which it had sent to the complainant, as well as some other documentation. It commented that information had been redacted from the contract: names of individuals, and the project budget. In addition, it pointed out that its internal review had only addressed the complainant's request for budget information and a breakdown of the costs of the project (to which it had applied the exemptions under sections 41 and 43), and for the identities of the members of the Project Board (to which section 40 applied). DCMS complained that the Commissioner's letter of 26 October 2006 had been the first time that it had been informed of the costs information which the complainant was seeking. It stated that it was now willing to provide the project budget, on the grounds that this would not prejudice the commercial interests which it had been seeking to protect, *'on the understanding that, by doing so, we are able to satisfy the complainant's request and thus bring this matter to a mutually agreeable conclusion.'*
12. There was a telephone conversation between the complainant and a representative of the Commissioner on 24 November 2006 to confirm what information the complainant was seeking and that he was amenable to an attempt to resolve matters informally. As a result, DCMS wrote to the complainant on 4 December stating that it had *'agreed to resolve this matter informally by providing you with the information requested in your letter of 30 August [2005] to the ICO to the extent that it is contained in the project budget'* (emphasis added). It provided some of the information which had been identified in the complainant's letter.
13. The Commissioner informed the complainant on 5 December 2006 that in light of DCMS' provision of the information further investigation would not be warranted.

14. On 6 December 2006 the complainant informed the Commissioner that he did not believe that DCMS' letter contained all of the requested information that it had been agreed would be supplied – in particular because it did not include information about the partner organisations, expenses and prizes, or about an overrun to which the project appeared to have been subject.
15. The Commissioner wrote to DCMS on 11 December 2006, noting that DCMS' letter of 4 December 2006 suggested that it had only disclosed information which was available in the project budget, rather than considering all potential sources. In a further conversation on 13 December DCMS expressed its view that the complainant's latest requirements amounted to a new request. It agreed to reconsider matters further with a view to deciding whether it would disclose additional information. The Commissioner informed DCMS on 13 December that the terms of the complainant's original request had not been restricted to information contained within the project budget.
16. On 19 December 2006 DCMS stated that it was prepared to provide an attached table which *'contains the actual cost of the Mad for Arts project as delivered, including the cost of all new activity agreed after the original budget was approved'*. It responded to the points in the complainant's letter of 6 December 2006.
17. The complainant confirmed in a telephone conversation with the Commissioner that he did not consider that DCMS was justified in applying any of the exemptions and that he was entitled to further information. The Commissioner therefore wrote to DCMS on 18 January 2007 asking for clarification of the application of the exemptions and copies of the requested information.
18. DCMS replied on 24 January 2007. It claimed that it was now uncertain as to what information the complainant still required. It also stated that the complainant's:

'conduct in relation to the project ...gives us reason to consider [his] requests as potentially vexatious. Could you please reflect on this point?.'
19. On 12 February 2007 the Commissioner issued an Information Notice to DCMS, requiring it to furnish him with specified information, which included the information withheld from the complainant.
20. DCMS provided that information on 13 March 2007. It transpired that there was considerably more financial information than the project budget which had already been supplied to the complainant. DCMS also commented further on its application of the exemptions, and stated that it was no longer relying on section 41.
21. The Commissioner replied on 21 March 2007 to queries which DCMS had raised, particularly its claim that the complainant had made what amounted to a new request. He also requested that DCMS indicate which exemptions were being applied to each element of the withheld information.

22. DCMS did so on 17 April 2007, and in the case of the section 40 exemption also provided details of the relevant Data Protection Principles.

Analysis

23. During the course of this case DCMS has cited sections 40, 41 and 43 in order to justify withholding part of the information requested by the complainant. However, in its letter to the Commissioner on 13 March 2007 it stated that it was no longer relying on section 41.

24. As part of his investigation the Commissioner required DCMS to provide him with a copy of the withheld information marked to show which elements were covered by the claimed exemptions. He notes that DCMS has not marked all of the information, and appears to have withheld documents in their entirety even though only part of each was subject to an exemption. The correct course of action would have been for DCMS to disclose the documents with the exempt parts redacted. The Commissioner has therefore decided that in failing to provide the complainant with those elements of the information which it presumably recognised were not exempt DCMS has breached section 1(1) of the Act, which provides that:

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

25. Of the remaining information, DCMS applied section 43 to some and section 40 to the rest.

Exemption – section 43

26. Section 43(2) provides that:

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

Having considered the information to which DCMS is applying this exemption, the Commissioner notes that it relates to salaries, fees, expenses and costs for parties contracted by the public authority to provide goods and services for the 'MadforArts' project. The Commissioner considers that this information is part of DCMS' procurement activity for the project, and therefore accepts that it is 'commercial' information.

27. To engage the exemption it is necessary for the public authority to demonstrate that disclosure of the information would prejudice some party's commercial interests. Furthermore, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The prejudice test

28. In relation to prejudice, DCMS claimed that there was a likelihood of prejudice to the commercial interests of both the contractors for the 'MadforArts' project and itself.
29. Regarding alleged prejudice to the commercial interests of the contractors, DCMS stated in its letter to the Commissioner of 17 April 2007 that:

If it were to be made known how much those contractors were paid for their services, we believe that this could have a genuinely prejudicial effect on their ability to negotiate rates on future, non-charitable projects'.

DCMS expressed its view that, while the exemption was likely to erode with time, since the project had only closed on 16 December 2005 it did *'not believe that a sufficient period of time has thus far elapsed to diminish outright'* any commercial prejudice resulting from disclosure. DCMS also claimed that *'any "kudos" which the contractors may derive from public knowledge that they have worked on such a project'* would be outweighed by the prejudice arising from disclosure of the commercial information.

30. In the view of the Commissioner, those contracting with public authorities must expect a somewhat robust approach to the issue of commercial sensitivity. As he recorded in his Decision Notice FS50063478, which dealt with another case in which the section 43 exemption had been asserted:

'The Commissioner is of the view that those who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about the details of those activities than had previously been the case prior to the Act coming into force.'

31. Furthermore, when considering prejudice to a third party's commercial interests the Commissioner believes that it is not sufficient for a public authority to speculate about the prejudice which might be caused. Instead, the relevant arguments are those made by the third party itself.
32. This stance was established by the Information Tribunal in the case of *Derry City Council v The Information Commissioner* (EA/2006/0014). In that case the public authority had claimed that releasing the requested information would prejudice the commercial interests of a third party with which it had a commercial relationship, and the Commissioner had considered the public authority's arguments in this respect. The third party was not represented at the Tribunal or joined in to the proceedings. The Tribunal decided to disregard the third party's commercial interests when reaching its decision on the grounds that the public authority could not expound them on behalf of the third party:

'Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that [the third party's] commercial interests would be likely to be prejudiced'.

33. The Commissioner has not concluded from this that only arguments provided by the third party itself can be taken into account. It may be that, due to time constraints for responding to requests, arguments are formulated by a public authority based on its prior knowledge of the third party's concerns. Where a public authority can provide evidence that such arguments genuinely originate in and reflect the concerns of the third party involved then the Commissioner may take them into account. Nevertheless, he considers that there is a presumption that, when an argument is adduced which relies on alleged prejudice to third parties, then evidence will be presented that the perception of potential prejudice is one which was shared by those third parties. In this case DCMS has not offered such evidence that any of the third parties themselves have expressed the opinion that their commercial interests might be prejudiced by disclosure of the information. In the circumstances, the Commissioner does not consider that DCMS has demonstrated that there is a likelihood of prejudice sufficient to engage the section 43 exemption.

34. In addition to prejudice to the commercial interests of the contractors, DCMS also claimed that disclosure of the requested information in this case would lead to commercial prejudice to itself. It stated that its:

'ability to secure commercial services at favourable rates would also be prejudiced if we were to disclose this information as we believe contractors will be discouraged from working with us at reduced rates if details of those reduced rates were likely to be made public.'

35. The Commissioner notes that DCMS has not provided any specific evidence that the contractors in this case did in fact make any commercial concessions to DCMS. Furthermore, to the extent that DCMS has obtained preferential terms, public knowledge of that could be regarded as likely to encourage contractors to agree similar concessions in the future rather than to refuse them. Be that as it may, since the Commissioner has concluded that there is no evidence that the contractors in this case would suffer a prejudice as a result of disclosure, he is unable to accept that there is any reason why potential future contractors would be deterred from negotiating with DCMS in circumstances where the sort of information requested in this case is likely to be disclosed, nor that they would be deterred from agreeing reduced rates in the future.

36. Furthermore, the Commissioner is mindful of the Information Tribunal case of *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005). In that case the National Maritime Museum had refused to disclose commercial information about work commissioned from a particular artist

on the grounds that it would be likely to prejudice its bargaining position during contractual negotiations with other artists. The Tribunal ruled that disclosure of the information would not in fact be likely to prejudice the commercial interests of the museum. While it accepted that:

'the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction',

it noted that whether or not prejudice was likely *'would depend on the nature of the information and the degree of similarity between the two transactions'*. In that case, the likelihood of prejudice was not judged to be sufficient because of the nature of the information relating to the negotiations already disclosed, and because the types of work created by the named artist and the artist in subsequent negotiations were so different that they could not be treated as truly comparable.

37. In this case the contractors provided goods and services for setting up and running the 'MadforArts' project, which was a web and television project which aimed to encourage people with mental health issues to talk about public art. The Commissioner considers that this was a very specific and in some ways unique project and that it is unlikely that there will be transactions in the future so similar as to be comparable to the 'MadforArts' project. In addition, the Commissioner believes that in general DCMS is in a strong negotiating position with respect to contractors seeking to sell goods and services because it is a government department with the capacity to offer relatively large amounts of work on an ongoing basis. There are also potential advantages (ie what DCMS referred to as 'kudos') accruing to any contractor involved in supporting a charitable project of public benefit such as 'MadforArts'. The Commissioner considers that these advantages will tend to offset any deterrent effect of contractors agreeing financial terms below their normal 'market rate'.
38. In light of all of these factors the Commissioner has concluded that potential future commercial negotiations by DCMS will not be prejudiced by disclosure of the information in this case so as to engage the section 43 exemption. He therefore directs that DCMS disclose to the complainant the information which was withheld as being exempt under section 43.

Public interest test

39. Since the Commissioner does not consider that there is sufficient prejudice in this case to engage the section 43 exemption, he has not gone on to consider the public interest test.

Exemption – section 40

40. In its comments on 13 March 2007 DCMS pointed out that the complainant had not previously challenged its reliance on section 40. On 17 April 2007 it claimed that the Commissioner did not have *'standing to rule on our use of [section 40] in any Decision Notice'* because its reliance on the section had not previously been

challenged. However, the Commissioner notes that the refusal notice and internal review took place at a time when section 40 was only being applied by DCMS to a limited amount of information – ‘*certain names of individuals*’ which DCMS did not consider to be central to the request – whereas it is now clear that there is a large amount of further information being held by DCMS. The Commissioner takes the view that, in order to consider whether the complainant’s information request has been satisfactorily addressed, it is necessary to assess whether section 40 was properly applied. Whether or not the complainant can be said to have objected to the application of the exemption, the Commissioner does not accept DCMS’ claim that he has ‘no standing’ to consider section 40, because his role is not simply to address specific points of complaint brought to him, and he has the discretion to determine the general issue of whether requested information should be disclosed.

41. In its letter to the Commissioner dated 17 April 2007 DCMS claimed that section 40 applied to certain elements of the requested information, which included bank details, credit/debit card details, personal addresses and other contact details. Section 40(2) of the Act allows public authorities to exempt information that constitutes the personal data of third parties if, among other things, disclosure would breach any of the data protection principles (as set out in schedule 1 of the Data Protection Act 1998). In this case the public authority has argued that disclosure of personal data would breach the 1st and 2nd Data Protection Principles.
42. Having considered the information identified by DCMS as falling within section 40 – bank details, credit/debit card details, personal addresses and other contact details – the Commissioner has concluded that it does indeed constitute information that falls within the definition of ‘personal data’ as set out in section 1(1) of the Data Protection Act 1998.
43. DCMS stated that releasing such data would breach the 1st and 2nd Data Protection Principles, which state:

‘Personal data shall be processed fairly and lawfully...’, and

‘Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.’

DCMS expressed its view that it would be unfair to disclose personal addresses and financial details which would be severely prejudicial to the rights and freedoms and legitimate interests of the relevant data subjects. Further, the data subjects were members of the public and not employees of the public authority, and had provided the information for the purpose of invoicing services rendered:

‘It is entirely reasonable to assume that they did not intend for those details to be disclosed to a wider audience and we consider that wider dissemination of this information would not constitute fair processing’.

44. The Commissioner agrees with DCMS' argument that disclosure of the bank details, credit/debit card details, personal addresses and other contact details would breach the 1st Data Protection Principle. He therefore accepts that the information which DCMS claimed was exempt under section 40 should be redacted from the information which he has directed should now be disclosed to the complainant. Since the relevant information is exempt from disclosure he has not considered it necessary to consider whether the 2nd Data Protection Principle applied.
45. Furthermore, the Commissioner notes that within the withheld information there are bank statements from the personal accounts of some of the contractors. Although DCMS has not marked these as falling within section 40, the Commissioner takes the view that these constitute personal data, and that disclosure of them would breach the 1st and 2nd Data Protection Principles. Accordingly, he has concluded that this information should not be disclosed.

The Decision

46. The Commissioner's decision is that DCMS did not deal with the request for information in accordance with the Act because it did not comply with its obligations under section 1(1) to communicate to the complainant information to which he was entitled, by failing to provide documents from which exempt information could have been redacted, and inappropriately claiming that other information was exempt from disclosure under section 43.

Steps Required

47. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- DCMS should provide the complainant with the information identified in the separate Schedule which has been provided to it.

The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

48. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

49. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

50. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 30th day of August 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.