

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 August 2015

Public Authority: Department for Culture Media and Sport
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information from the Department of Culture Media and Sport (DCMS) about the cuts to the grant in aid for the British Film Institute (BFI). DCMS disclosed some information falling within the scope of the request, redacted some information which was out of scope and refused to disclose the remainder of the information citing FOIA section 43 – commercial interests and FOIA section 40(2) – personal information. During the course of the investigation, the complainant confirmed he did not wish to challenge the application of section 40(2).
 2. The Commissioner's decision is that DCMS has correctly applied section 43 and that the information ultimately deemed out of scope by DCMS does not fall within the scope of the request. Accordingly, DCMS has complied with section 1.
 3. The Commissioner notes that some of the disclosed information has been disclosed during the course of his investigation and therefore outside of the statutory 20 day time limit. Accordingly he finds that DCMS has breached section 10(1) of the FOIA. He also finds it to have breached section 17(1) of the FOIA in respect of the time taken to inform the complainant of the aforementioned exemptions relied upon.
 4. The Commissioner does not require the public authority to take any steps.
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Request and response

5. On 7 May 2014, the complainant wrote to DCMS and requested information in the following terms:

"Could you please provide any minutes/correspondence you may have had in the past 2 years with the British Film Institute concerning cuts to their Grant in aid. Likewise any communication the BFI has had with the new culture secretary Sajid Javid or the outgoing Maria Miller."
6. On 10 June 2014 DCMS responded. It advised that it was considering the application of the exemption at section 36 – prejudice to the effective conduct of public affairs. As a qualified exemption, DCMS advised that further time was required to consider the balance of the public interest.
7. On 8 July 2014 DCMS responded further. It provided some information within the scope of the request but refused to provide the remainder. However it no longer relied on section 36 and instead cited the following exemptions as its basis for doing so: section 43(2) – commercial interests and section 40 – personal information. DCMS provided a document which showed the redactions and the relevant section of the FOIA. Some parts of the document were also redacted as they were considered out of scope of the request. These were marked 'out of scope'.
8. The complainant requested an internal review on 22 July 2014 in relation to those redactions under section 43(2) and those where the information was considered out of scope. DCMS sent the outcome of its internal review on 3 September 2014. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 25 January 2015 to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the rationale behind all of the redactions in the documents which had been disclosed. Further correspondence from the complainant stated that he could not understand why any part of the correspondence should be redacted. However, he accepted the application of section 40(2) and this will not therefore be considered in this decision notice.
10. The Commissioner considers the scope of the investigation is to determine if, in accordance with FOIA section 1(b) the information, of the description specified in the request, has been communicated to the

complainant (has the information been correctly deemed out of scope) and also to determine whether the exemption at section 43(2) is engaged.

Reasons for decision

Information within the scope of the request to which section 43 was not applied

11. Section 1(1) of FOIA states that:

1(1) Any person making a request 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.*

12. During the course of the investigation, DCMS has explained to the Commissioner and the complainant that some of the information originally redacted as 'out of scope' was erroneously marked 'out of scope' and should instead have been withheld under section 43. This error has been explained to the complainant and those redactions will be considered under the section 43 exemption.
13. Of the two redactions remaining which are marked 'out of scope', the Commissioner accepts that neither falls within the scope of the request. One is an internal email and does not constitute correspondence between DCMS and BFI; it is not therefore in scope. The other redaction marked 'out of scope' concerns a small part of an undated letter; the majority of the letter has been disclosed and the Commissioner has considered the redacted section. He is satisfied that it does not relate to cuts to the BFI Grant in Aid and accordingly DCMS was entitled to consider that it did not fall within the scope of the request.
14. During the course of the investigation, DCMS reconsidered its position and disclosed further information which did fall within the scope of the request. This included information which had been omitted from the original bundle disclosed to the complainant but which was included in the submission to the Commissioner albeit that it had, on the Commissioner's copy, been marked 'out of scope'.
15. The Commissioner is satisfied therefore that with regard to the information falling within the scope of the complainant's request in respect of which exemptions were not ultimately relied, DCMS has

fulfilled its duty under section 1 in that it has disclosed all relevant information.

Section 43 – Commercial interests

16. Section 43(2) of the FOIA provides an exemption from disclosure for information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is therefore subject to the public interest test.

17. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered his awareness guidance on the application of section 43. This states that:

"a commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods and services"

18. In this case, DCMS has outlined to the Commissioner that it considers the exemption applies because disclosure of the withheld information would be prejudicial to the commercial interests of the BFI and any of its third party funded partners, particularly in relation to sponsorship. DCMS has confirmed that it has consulted BFI on this issue in relation to BFI and in relation to its funded partners.

19. The information DCMS has withheld under section 43(2) is contained in redacted extracts on pages 20, 26 and 27 of the document disclosed to the complainant. These extracts include descriptions and financial projections about the impacts of cuts to BFI's grant-in-aid, including potential threats to the viability of particular schemes and the associated loss of sponsorship income. The Commissioner is satisfied that this information relates to a commercial interest. He is also satisfied that the activity involved - generating and retaining sponsorship - is conducted in a competitive environment.

20. Having concluded that the withheld information is relevant to the scope of the exemption, the Commissioner has gone on to consider the prejudice test and the relevant party or parties which would be affected.

21. Section 43(2) consists of two limbs which clarify the probability of the prejudice arising from disclosure. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. He considers that "would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.

22. It is important to consider the use of the term 'prejudice' in the context of the exemption at section 43. It implies not only that the disclosure of information has some effect on the applicable interest, but that the effect must be detrimental or damaging in some way. The authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.

Likelihood of prejudice

23. DCMS has explained that disclosure of the withheld information would likely jeopardise the viability of a specific area of BFI's work which relies on sponsorship. Disclosure of the information would be likely to prejudice the ability to raise sponsorship as the confidence of potential sponsors would be undermined. Some of the information relates to the potential impact of cuts to BFI's funded partners who also rely on sponsorship for survival. Disclosing information in relation to the potential impact of any cuts would be likely to have a negative impact on the ability of those funded partners to negotiate future sponsorship which is necessary for survival.
24. Whilst the Commissioner accepts that the information which has been disclosed already sets out a general threat to one specific area of BFI work, he agrees that DCMS was correct to apply section 43(2) to the information specifically about sponsorship and how it may be affected. This is because disclosure of details about the direct and indirect economic impact of not achieving the necessary sponsorship income would be likely to undermine the confidence of those sponsors in the viability and value of particular BFI events and schemes. This would be likely to make it difficult for BFI to negotiate future sponsorship, both from existing and potential sponsorship partners. Furthermore, some of the withheld information relates to BFI's funded partners and disclosure would be likely to make it difficult for those third parties to negotiate new sponsorship or renew existing sponsorship. The Commissioner acknowledges that the withheld information relates to areas of work where sponsorship is crucial and is sought on a regular basis for specific areas of work. The Commissioner therefore considers that the possibility of prejudice is real and significant; he does not consider that the prejudice could reasonably be construed as either hypothetical or remote.

Public interest test

25. DCMS has acknowledged that there is a public interest in disclosure as it would provide transparency and allow for scrutiny of the expenditure of public money. Such transparency and scrutiny, DCMS submits, helps ensure public money is used effectively as well as demonstrating value for public money.

26. In considering why the balance of the public interest test lies in maintaining the exemption, DCMS has explained that disclosure of the information would be likely to prejudice the ability to obtain the best value for public money. Disclosure, DCMS asserts, would be likely to undermine contractual negotiations and consequently damage the relationship between BFI and its partners. Any undermining of confidence could result in lost revenue and weaken BFI's negotiating position ultimately to the detriment of the UK film industry. In conclusion, it is DCMS' position that the public interest therefore favours maintaining the exemption.
27. The Commissioner considers that there is a strong public interest in favour of disclosure as it promotes transparency and accountability in public authorities funded from public money, in this case DCMS. He notes however that the withheld information is specific in nature in that it sets out the direct and indirect impact of actions taken as a result of cuts to the grant in aid. Having agreed that disclosure would be likely to have an impact on the ability of BFI and its third party partners to effectively negotiate sponsorship, the weighting afforded to accountability and transparency must be offset against allowing BFI and its funded partners to conduct its business effectively and negotiate sponsorship competitively.
28. On balance, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption in this case.
29. DCMS has therefore correctly relied on section 43(2) in relation to the withheld information.

Other matters

30. The Commissioner has considered the handling by DCMS of this case during the course of his investigation. He finds that it falls short of what is expected of a public authority.
31. Having provided a response to the complainant's request, it became apparent during the investigation that some of the redactions which had been marked 'out of scope' in that response should have been subject to the section 43 exemption.
32. During the investigation, DCMS agreed to the disclosure of further information and advised both the Commissioner and the complainant of

the error. However, having written to the complainant, DCMS then failed to send the additional information which was to be disclosed.

33. The Commissioner requested a copy of the unredacted bundle from DCMS and noted upon receipt that one page of that bundle did not feature in the documents originally sent to the complainant, albeit the entire page would have been redacted had the complainant received it. DCMS wrote to the complainant and explained that the page had been missing initially. During the course of the investigation DCMS disclosed some of the information contained in that page, but relied on section 43 for the remainder.
34. Following receipt of the original submission, the Commissioner had to go back to DCMS as the points made in the submission did not correspond accurately to the numbered pages of the bundle provided. DCMS addressed the issues raised.
35. During the course of the investigation, the Commissioner has corresponded regularly with the complainant who remains dissatisfied with the DCMS response and has expressed distrust due to the various issues.
36. The Commissioner notes that it is understandable that the complainant has expressed concern given the procedural issues which have arisen. He has written to the complainant and explained that any procedural issues are quite separate from the application of any exemptions and if a public authority does not handle the procedural aspects of a case particularly well it does not automatically follow that any exemption is not engaged.
37. Whilst in this case the Commissioner has found that DCMS has met its duty under section 1 and has correctly engaged the exemption at section 43(2), he asks DCMS to review its general FOI case handling in order to be satisfied that there are procedures in place to ensure that any withheld information is correctly identified and that the reasons for withholding the information are correctly recorded. He would ask also that DCMS considers ways to ensure that any information to be disclosed is disclosed to relevant parties in order to avoid the situation of stating that information will be disclosed but then failing to disclose it.

Right of appeal

38. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

39. 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.
40. 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

Alexander Ganotis
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