

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 July 2020

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

Decision (including any steps ordered)

1. The complainant has requested a Performance and Audit Committee Update and any associated documents and the agenda and minutes from this committee's meeting on 7 March 2019 from the Arts Council England ("ACE"). 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 36(2)(b)(ii) 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 16 August 2019 the complainant made the following request for information under the FOIA:

"I'd like to make a freedom of information request to Arts Council England:

- Please provide the "Performance and Audit Committee Update" referred to in item 11 of the minutes of ACE's National Council meeting on 20th March 2019. (Please include any documents provided to the National Council as part of this update).

- Please provide the agenda and minutes from ACE's Performance and Audit Committee meeting on 7 March 2019."

5. ACE responded on 16 September 2019 and refused to provide the requested information, citing the following – sections 36(2)(b)(ii) and 36(2)(c).
6. The complainant requested an internal review on 21 October 2019. He commented that he appreciated that some of the information was sensitive but asked if ACE could consider redaction and the publishing of the requested information.
7. ACE provided an internal review on 13 November 2019 in which it maintained its original position.
8. During the course of the Commissioner's investigation ACE cited section 36(2)(b)(i) and (2)(b)(ii) and did not continue to rely on section 36(2)(c).

Scope of the case

9. The complainant contacted the Commissioner on 26 November 2020 to complain about the way his request for information had been handled. He asked if the Commissioner considered it justified that the requested information was withheld under this exemption.
10. 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

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..."

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 competing arguments or considerations in order to make a decision.

12. ACE has applied section 36(2)(b)(i) and 36(2)(b)(ii) to the whole of the requested information which consists of the agenda and minutes for the Performance and Audit Committee meeting 7 March 2019 and an update report item regarding the Performance and Audit Committee in the National Council of ACE's meeting on 12 March 2019.
13. 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.
14. 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.
15. During the Commissioner's investigation it became clear that the qualified person had not signed to that opinion, apparently due to his unavailability at the time, though the matter had been discussed with him. The original opinion was sought on 11 September 2019 and given on 16 September 2019. ACE has acknowledged that this should not have occurred and amended its processes accordingly.
16. Consequently, the Commissioner expressed the view that this matter needed to be put before the qualified person and that he should give his opinion regarding the situation at the time of the request. The Commissioner is satisfied that the appropriate qualified person has now provided his opinion. The opinion of the qualified person was sought and provided on 20 May 2020 after having considered the withheld information. The qualified person had, in fact, attended the Committee

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

meeting. He signed that section 36(2)(b)(i) and (ii) were both applicable.

17. The Commissioner next needs to establish whether his opinion was reasonable.

Is the qualified person's opinion reasonable?

18. 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 inhibited by the release of this information.

19. 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."

20. 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 related to sensitive matters discussed at ACE's Performance and Audit Committee meeting.

21. ACE explained that the Performance and Audit Committee is a scrutiny committee, where a range of sensitive matters are covered at the meetings. The role of the Committee is to review risk, assurance, performance, and financial management and to address any issues identified. The Committee discusses how ACE oversees all areas of risk and internal control within the business to ensure that there are appropriate systems and safeguards in place. The Committee's deliberations are enhanced by the presence of internal and external auditors from private firms.

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

22. ACE stated that there are comments surrounding the Art Council's processes and controls systems and how it handles its risks and matters related to performance and financial management.
23. The public authority explained that it wanted all attendees to feel that they are in a safe space and can contribute to discussions without fears or worry about what may or may not be disclosed publicly. Without this, participants may be reluctant to offer free and frank advice or share concerns. To get the most out of the attendee's knowledge and perspective on the issues being discussed, it had created an environment to ensure candour, confidentiality and trust. Opinions shared were supplied under the assumption that they would not be released to the world at large.
24. ACE states that the text in the documents covers a full and frank exchange of views to facilitate an open discussion about matters which are confidential in nature such as how well the Committee works, financial management and what are the strategic risks. The agenda, minutes and the National Council report of the discussion provide information on the topics to be 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.
25. ACE's conclusion is that, if disclosed, these documents will be prejudicial to the conduct of public affairs and would adversely impact on the ability of the Committee to discuss matters with members of the Senior Executive team and external audit advisers. Disclosure of these opinions would be likely to have a direct impact, both now and in the future, on an individual's ability to debate these issues in a free and frank manner and the process by which this discussion takes place.
26. 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.
27. 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.
28. 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

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

The public interest in the disclosure of the information

30. The complainant expressed the view when he requested an internal review that other public bodies publish information regarding discussions of audit and assurance as it is acknowledged to be in the public interest.
31. 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

32. ACE maintains that disclosure may lead to a profound 'chilling effect' resulting in internal colleagues being reluctant to conduct free and frank discussions and to provide updates to the trustees. 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.
33. There is a need for a "safe space" for public bodies to formulate and debate issues, particularly regarding audit and assurance. Parties may be less willing to provide meaningful advice within a 'safe space', ACE considers this space to be vital for open, honest and constructive decision-making.
34. It is not in the public interest to hinder ACE from providing and seeking meaningful advice from the Committee 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.

The balance of the public interest

35. The complainant has argued that other public authorities publish audit and assurance information. ACE's view is that disclosure is not in the public interest. Although ACE talks about the need for a 'safe space' its primary argument centres around the 'chilling effect' it would have on the free and frank provision of advice or the exchange of views.

36. 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, just reasons that are more persuasive than the fact that other public authorities might choose to publish this type of information. The requested information lacks detail but clearly touches on sensitive matters such as ACE's internal systems, audit and risk. The request was received five months after the meeting took place and was still live at that time. Some of the matters discussed concern performance and audit, in other words matters that require internal reflection and organisational scrutiny. Committees 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

37. 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

38. 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.

39. 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

**Pamela Clements
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Wycliffe House
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