

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 July 2020

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested Arts Council England (ACE) to disclose the "update on the Arts Council's preparations for the Spending Review" provided by Richard Russell at ACE's National Council meeting on 19 June (referred to in item 5 of the minutes).
2. ACE refused to disclose the requested information citing section 36(2)(b)(ii) and 36(2)(c) of the FOIA.
3. The Commissioner's decision is that section 36(2)(b)(ii) is engaged and the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. She therefore does not require any further action to be taken.

#### **Request and response**

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4. On 21 October 2019, the complainant wrote to ACE and requested information in the following terms:  
  
"Please could you provide the "update on the Arts Council's preparations for the Spending Review" provided by Richard Russell at ACE's National Council meeting on 19th June (referred to in item 5 of the minutes)."
5. ACE responded on 18 November 2019. It refused to disclose the requested information citing section 36(2)(b)(ii) and 36(2)(c) of the FOIA.

6. The complainant requested an internal review on 26 November 2019.
7. ACE responded on 23 December 2019. It upheld the application of the exemptions cited.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 17 January 2020 to complain about the way his request for information had been handled. He stated that he believes there is a public interest in sharing the withheld information.
9. The Commissioner considers the scope of her investigation to be to determine whether ACE is entitled to refuse to disclose the withheld information in accordance with section 36(2)(b)(ii) and/or 36(2)(c) of the FOIA.

### **Reasons for decision**

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10. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
  - (b) would, or would be likely to, prejudice –
    - (i) the free and frank provision of advice, or
    - (ii) the free and frank exchange of views for the purposes of deliberation, or
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
11. ACE confirmed that the qualified person for the purposes of section 36 of the FOIA is the Chief Executive Mr Darren Henley. He approved the application of section 36(2)(b)(ii) and 36(2)(c) of the FOIA on 18 November 2019.
12. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that

the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.

13. ACE confirmed that the withheld information relates to an eight page document referred to in the minutes of the meeting on 19 June 2019, available here:

[https://www.artscouncil.org.uk/sites/default/files/download-file/2019-06-19%20NC%20Minutes%20\(FINAL\)\\_0.pdf](https://www.artscouncil.org.uk/sites/default/files/download-file/2019-06-19%20NC%20Minutes%20(FINAL)_0.pdf)

14. It is a series of slides used in a presentation by ACE's Chief Operating Officer, Mr Richard Russell. The purpose of the presentation was to have a confidential discussion between the executive and the trustees of the Board as to ACE's objectives and priorities for its Spending Review Submission, as well as predictions of the outcome, once concluded by the Department for Digital, Culture, Media and Sport (DCMS). It stated that the notes to the document make it clear that it concerned ACE's position regarding funding for a number of years, since it recorded that the organisation was preparing the ground for the 2020-23 spending review. It said that the presentation recognised that there might be a need for ACE to prepare for a one year settlement if political or other changes meant that the longer spending review would take place at a later stage. There were discussions between ACE and DCMS about ACE's proposed case for the original spending review period but in the end government's decision was to provide ACE with a one year settlement, which was a rollover of its funding plus a percentage increase.
15. ACE received confirmation of its settlement for 2020-2021 on 18 November 2019; the date it first responded to the request.
16. Initially it stated that the withheld information did not reflect any forward thinking relating to future spending reviews and that it was the qualified person's opinion that the withheld information could easily be misconstrued and could have a damaging impact on ACE's reputation and relationship with both its funded organisations and with central government. It also advised that it was the qualified person's opinion that disclosure would be likely to have a chilling effect on future confidential discussions because the accompanying notes were designed to facilitate open and confidential discussions and it would remove the ability to have free and frank discussions on potentially sensitive matters going forward. These were its main arguments at the refusal notice and internal review stage and those presented to the complainant.
17. However, during the Commissioner's investigation it clarified that it was incorrect to state initially that the withheld information did not reflect any forward thinking for spending reviews 2021-2022 and 2022-2023. It

confirmed that it did, as the wording in the presentation slides suggested. At the time the request was received it had not been informed of the 2020-2021 settlement (although this very quickly changed, as confirmation was received the date it first responded to the request) and work had already commenced internally on the next review. The withheld information therefore contained ongoing sensitive discussions relating to funding, the programmes which may be supported by that funding and forecasts for the future.

18. It stated that it is the qualified person's opinion that the exemption is designed to protect the ability of staff and others to deliberate and provide advice, to express themselves openly, honestly and completely, and to explore options. The withheld information contains a variety of speculative figures and projections, as well as internal views on the likely conduct of the review by departmental officials and the impact of political matters on the decision. It is the qualified person's opinion that disclosure would be likely to place real limits on the ability of staff to present this range of scenarios and to debate them with key decision makers. The qualified person recognised the need for a safe space and how this was still required at the time of the request. The contents of the withheld information were still live; it had not been notified of the settlement for 2020-21 and the contents were being used in work already commenced by ACE staff for the next review.
19. The qualified person argued that disclosure would be likely to prejudice the ability of its staff to exchange views and options, offer advice and deliberate freely, frankly and candidly.
20. It also stated that it is the qualified person's opinion that as the ultimate plans approved under the spending review have moved on significantly since the presentation was delivered and the timing of the request, publication at this stage would not effectively present an accurate image of the procedure and the outcome of the funding process.
21. The Commissioner considers it is a reasonable opinion to hold that disclosure would be likely to prejudice ACE's ability to freely and frankly exchange views for the purposes of deliberation. She notes at the time of the request the discussions were still live, the 2020-21 settlement was pending (although confirmation was received the same day ACE responded to the request) and the contents were being used for its internal preparations for the next review. She accepts that it is a reasonable opinion to hold that disclosure would be likely to prejudice the safe space ACE staff required to discuss and evaluate its options.
22. For these reasons, she accepts that section 36(2)(b)(ii) is engaged.

23. For section 36(2)(c) to also apply, ACE would need to present arguments that demonstrate that disclosure would be likely to, otherwise, prejudice the effective conduct of public affairs. The Commissioner therefore considers it would need to provide different arguments to those that would be considered to come under section 36(2)(b)(i) or (ii). In this case, ACE has not presented any other arguments. Just the need for safe space whilst staff deliberate and freely and frankly exchange views and opinions. These appropriately come under section 36(2)(b)(ii).
24. As ACE has not presented any arguments to demonstrate why disclosure would be likely to otherwise prejudice the effective conduct of public affairs, the Commissioner does not consider section 36(2)(c) applies.

### **Public interest test**

25. ACE confirmed that it recognises the public interest in accountability and transparency and in members of the public having access to information which enables them to understand more closely how decision making operates and how particular decisions are made. It accepts that disclosure would further understanding and public participation in the issues under discussion.
26. However, it considers the public interest rests in maintaining the exemption. It stated that there is a stronger public interest in maintaining the need for safe space to enable government and public authorities to formulate and debate issues, particularly those surrounding audit and assurance. It also argued that there is the potential for disclosure to weaken the decision making process going forward. Disclosure would be likely to lead to less candid and robust discussions taking place and hard choices being avoided due to the fear of premature public scrutiny. It argued that disclosure would inhibit the free and frank exchange of views for the purposes of deliberation.
27. The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
28. The Commissioner recognises the public interest in openness, transparency and accountability. She also notes the public interest in members of the public having access to information which enables them to understand more clearly how decisions are made, what plans and preparations are being considered to secure funding, over what period and for what. Access to information promotes public debate and enables the public to scrutinise how public authorities are being managed and what challenges they are facing.

29. However, considering the circumstances at the time of the request and ACE's more recent assurances that the withheld information was live at the time of the request and being used in preparations for the next spending review, she is satisfied that there are stronger public interest arguments in favour of maintaining the exemption. ACE has assured the Commissioner that at the time of the request, the 2020-2021 settlement was pending (although confirmation was received on the date of its first response to the complainant and so weakens the reliance on this point somewhat), the withheld information discussed candidly funding and plans over the 2020-2023 period and the information was being used in internal preparations for the 2021- 2022/2023 spending review. She therefore accepts that there was still a need for safe space at the time of the request to enable ACE officials to discuss and deliberate internally, freely and frankly, the options available to it for the next spending review. The contents of the withheld information were still live.
30. The Commissioner accepts that disclosure at the time of the request would have been likely to prejudice ACE's ability to deliberate freely and openly. Safe space is required to enable public authorities to explore and discuss options, especially when the matters under discussion are still live and ongoing. This ensures that appropriate decision making takes place and the best possible decisions are made. She does not consider it is in the wider interests of the public to hinder or prejudice these processes. At a time when deliberations are still ongoing and the issues under discussions are live, she accepts that the consequences of disclosure are likely to be more severe and extensive.
31. She is however not wholly convinced that the balance of the public interest would be the same now if a fresh request was made. ACE has mentioned its concerns with the information being misconstrued by the public as a result of matters having moved on significantly. Such arguments seem to suggest that the sensitivity of the information has reduced since the request was made and its main concern today is how the information will be interpreted, given the situation has changed so much. The Commissioner is of the opinion that the public will expect funding issues and plans to change frequently as the economic climate fluctuates and objectives inevitably change. ACE can also supplement any public disclosure with additional information to alleviate such issues.
32. She also notes that although restrictly speaking ACE was not aware of the 2020-2021 settlement at the time of the request and so from this viewpoint it can be argued that the 2020-2021 was still live, this very quickly changed. ACE received confirmation of the settlement on the date it issued its refusal notice. It also had an opportunity to reconsider the application of the exemption and the balance of the public interest at the internal review stage in December 2019. This does weaken ACE's reliance on the need for safe space somewhat when considering where

the balance of the public interest lies. However, because ACE has assured the Commissioner that work was already underway for the next spending review and the withheld information was being used for that, she accepts that there remained a need for safe space at the time of the request to consider the next spending review and the withheld information discussed funding and ACE's proposals up to 2023.

## Right of appeal

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33. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.
35. 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

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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