

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2022

Public Authority: The British Museum
Address: Great Russell Street
London
WC1B 3DG

Decision (including any steps ordered)

1. The complainant has requested the British Museum (the museum) to disclose information relating to the membership of its Chair Advisory Group (CAG). The museum disclosed some information but withheld the remainder citing section 40 and 43 of FOIA.
2. The Commissioner's decision is that the museum is entitled to rely on section 40 of FOIA for the information it has withheld under this exemption. However, in terms of section 43, the Commissioner has decided that this exemption is not engaged. He has also found the museum in breach of section 10 of FOIA, as it failed to respond to the complainant's request within 20 working days of receipt.
3. The Commissioner therefore requires the museum to take the following steps to ensure compliance with the legislation:
 - Disclose the information it has withheld under section 43 of FOIA to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 2 February 2021 the complainant wrote to the museum and requested information in the following terms:
 - 1) Details of the British Museum Chairman's Advisory Group's (BM CAG) current mission, purpose, and formal role within the museum's governance structures.
 - 2) Any document(s) which confirm and give details of the Group's membership during 2019-20
 - 3) Details of any meetings of the BM CAG or events hosted for the BM CAG that have taken place in 2019-20. This should include copies of any meeting notes, agendas and a list of those present at the meetings.
 - 4) To disclose copies of any emails or correspondence between Peter Mather or staff from BP and the Chairman of the British Museum (and his immediate team) in relation to BP's involvement in the BM CAG. This should include emails, written correspondence or any notes/handwritten materials arising from phone or video calls. Searches should be limited to 2019-20."
6. The museum responded on 13 August 2021. It provided a response to question one. For question two it refused to disclose a list of the current membership as it considered this information to be exempt under section 40 of FOIA. It did however provide a list showing the professional backgrounds of the current members of CAG. Regarding question three, the museum said that the meetings are not minuted and again it cannot disclose the list of attendees as this information is exempt under section 40 of FOIA. It did however confirm the dates of the CAG meetings held and provided copies of the agenda for each. With regards to question four, it disclosed some information but withheld the remainder citing sections 40 and 43 of FOIA.
7. The complainant requested an internal review on 2 September 2021.
8. The museum carried out an internal review and notified the complainant of its findings on 28 September 2021. It upheld the application of sections 40 and 43 of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 1 February 2022 to complain about the way her request for information had been handled. The complainant disagrees with the application of section 40 and 43 of FOIA and believes the information should be disclosed.
10. The Commissioner has considered the application of section 40 of FOIA to the names of the members of CAG and their attendance at CAG meetings. He has not considered the application of section 40 to the names of museum employees, as no complaint has been made about this. He has also considered the application of section 43 of FOIA to the information redacted from a Confidential Briefing Note. The following section will explain his decision.

Reasons for decision

Section 40 – personal data

11. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

15. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The withheld information is the names of all members of the CAG and the attendance of those members at CAG meetings. He is satisfied that this information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

20. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

23. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

25. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”².

26. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

27. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

² Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

Legitimate interests

28. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
29. The complainant is of the view that there is a legitimate public interest in knowing who is a member of the CAG. She feels the membership has a direct role in advising the Chairman with the potential to influence the museum's strategic direction on a number of core issues. The complainant considers the museum should be open as possible about the role and membership of the CAG, as there is a strong interest in understanding who has the ability to influence the museum's most senior decision makers and how.
30. No specific arguments were submitted by the museum.
31. The Commissioner accepts there is a legitimate interest in the disclosure of this information. It would promote openness and transparency around these meetings, who attends and whose perception of the museum from the outside world has been obtained. They may not directly influence formal decision making (and the Commissioner notes the complainant and museum do not agree on this point and the complainant's view will be reflective of others in the general public) but they will discuss how the museum is perceived in various arenas and potentially consider different ideas and approaches to how the museum delivers its services to the public. There is a legitimate interest in understanding more clearly who has been invited to engage in such discussions.

Is disclosure necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

33. The Commissioner notes that the museum disclosed a list of the organisations the members represented to assist in meeting the legitimate interests in disclosure. However, it is accepted that this does not go far enough to meet the legitimate interests identified above and there are no alternative means of meeting those interests.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

34. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
35. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
36. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
37. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
38. The museum explained that the members do not take part in any decision making and are not involved in any operational or strategic management of the museum. Whilst these individuals are considered leaders in their respective fields, the museum stated that it did not engage them as representative of their companies. The name of the company that each individual works for was simply used to represent their field of expertise and as a form of introduction to their fellow members.
39. It argued that the meetings are considered more like a community forum which welcomed input from individuals to help the museum

understand current perceptions in the wider world. The individuals are not paid nor under contract with the museum; they are considered to be members of the public operating in a private capacity. They were not contacted in their professional capacities.

40. The museum considers the members therefore have a right to privacy, as they are acting in a private capacity and not in a business capacity representing the organisations they work for. The museum acknowledges that the same information was disclosed in response to a FOIA request in 2018 and this may be viewed by some to alter the member's expectation of privacy. However, it considers the museum was incorrect to disclose the information at that time and made an error. The information should not have been disclosed and the error should not now set a precedent for future release.
41. As the identity of the members is being withheld, there is no way of identifying publicly who was a member back in 2018 and remains one today. It cannot therefore be argued that those members will hold an expectation of public scrutiny in this regard.
42. The Commissioner accepts that the members are acting in a private capacity and not as representatives of the organisations they work for. They will therefore have an expectation of privacy just like any other member of the public. He accepts that the organisations are only noted to reflect the diversity of engagement across the various sectors.
43. A prior disclosure under FOIA, if this is indeed deemed to be incorrect, should not dictate how future disclosures are made, particularly where personal data is concerned. It does not set a precedent. If it is found that section 40 does apply, that should be the decision that is taken now.
44. As the members are acting entirely on a private basis, they are entitled to privacy and to hold the expectation that their contribution to the group will remain private and confidential. The complainant has stated that two members have publicly declared their involvement. The Commissioner considers that is their choice but does not take away from other members their right to privacy.
45. Taking out of the equation that a prior disclosure occurred, it is the Commissioner decision that section 40 applies. Having said above that a prior disclosure should not set a precedent and therefore should not detract from the decision taken now, it follows that it is his decision that it applies to this request.
46. The Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and

freedoms. There is no Article 6 basis for processing and so the disclosure of the information would not be lawful. Section 40 therefore applies.

Section 43 – commercial interests

47. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of the public authority or a third party. It is also subject to the public interest test.
48. The museum has argued that disclosure of the redacted element of the Confidential Briefing Note would be likely to prejudice its commercial interests. It has said that the withheld information sets out in a free and frank manner the position that it found itself in at the time and disclosure would be likely to lead to the museum losing its competitive edge. It considers the withheld information sets out its early plans for generating income as an immediate recovery to lost revenue. It believes disclosure could lead to competitors forming the same plans to target key revenue streams.
49. The museum confirmed that disclosure would be likely to lead to it losing future commercial opportunities. It said the withheld information sets out its longer term plans for how its collections can be used to increase revenue. It said that if this information was disclosed it would be likely to result in its competitors using similar methods for increasing revenue and footfall. It felt this would then in turn result in one off and regular donations and future sponsorships being diverted to other organisations and this would damage its financial position in the long term.
50. It also claimed that disclosure could potentially damage its relationship with certain individuals in central government, some of whom may have influence over the amount of funding which the museum receives going forwards.
51. The Commissioner has reviewed the withheld information and cannot see how the contents could potentially lead to the concerns or prejudice the museum has claimed. It is a very high level pitch, which does not do any more than highlight what it feels it needs to do going forward in the current economic and political climate. It does not go into any detail on what its specific plans are or exactly how it intends to meet the objectives it has described. The Commissioner cannot therefore see how the withheld information would be useful to the museum's competitors. It does not disclose any ideas or detailed plans, which its competitors could steal for example or discuss any novel ways of increasing revenue which would be useful to others.

52. For these reasons, the Commissioner has decided that section 43 of the FOIA is not engaged. As it is not engaged, there is no need to go on to consider the public interest test.

Procedural matters

53. The Commissioner notes that the museum failed to respond to the complainant's request within 20 working days of receipt. He has therefore recorded a breach of section 10 of FOIA against the museum.

Right of appeal

54. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

55. 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.
56. 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
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