

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2022

Public Authority: Tate
Address: Millbank
London
SW1P 4RG

Decision (including any steps ordered)

1. The complainant has requested information about certain staff guidance. Tate disclosed some relevant information and withheld some under section 22, section 41 and section 43 of FOIA which concern information intended for future publication, information provided in confidence and commercial interests respectively.
2. The Commissioner's decision is that Tate is entitled to withhold some of the information the complainant has requested under section 22(1) and section 41(1) of FOIA. Tate breached section 10(1) and section 17(1) of FOIA as it did not communicate information or issue a refusal within the required timescale of 20 working days.
3. The Commissioner does not require Tate to take any corrective steps.

Request and response

4. On 18 March 2022, the complainant wrote to Tate and requested information about guidance for staff relating to 1) the use of language 2) diversity and inclusivity and 3) the use of gender pronouns.
5. Tate responded on 13 May 2022. It provided some relevant information. Tate withheld its 'Inclusion at Tate Part 1' guidance, its 'Language and Etiquette' guides and its Dignity and Respect policy under section 43(2) of FOIA. Finally, Tate withheld some information in its 'Inclusion at Tate

Part 2' guidance under section 41. Tate upheld its reliance on section 43(2) following its internal review and said section 22 was also engaged with respect to that material. The review did not discuss its application of section 41.

Reasons for decision

Section 22 – information intended for future publication

6. Under section 22(1) of FOIA information is exempt information if a) the public authority holds it with a view to its publication at some future date b) it was already held with a view to such publication when the request was made and c) it is reasonable in all the circumstances to withhold the information until it is published.
7. Tate explained to the complainant that it was in the process of reviewing and updating some of the guidance that fell within scope of their request. Tate said that it expected the review process to be completed "this year". Tate also said that its Directors are currently working on a post-pandemic business strategy. Renewed objectives and actions that support organisational change and Tate's commitment to diversity and inclusion will be shared on Tate's website "later this year".
8. The complainant is sceptical but the Commissioner sees no reason to doubt that, at the time of the request, Tate was reviewing certain of its guidance material with a view to publishing updated versions of that material later in 2022. The Commissioner considers it is reasonable for Tate to be allowed to focus on completing its process of reviewing and updating the material, which concerns relatively sensitive subjects, to its own, planned timescale. It would be unreasonable for Tate to have to disclose what would be out of date material, or to attempt to complete its review more quickly than it had planned in order to disclose its updated material. The Commissioner therefore finds that Tate is entitled to withhold this material under section 22(1) of FOIA.
9. With regard to the public interest test associated with section 22, the complainant has not advanced any public interest arguments for the information's release. There is a general public interest in public authorities being transparent but the Commissioner considers that Tate has met this through the information it did disclose. The Commissioner is satisfied that there is greater public interest in Tate being able to carefully review and update its guidance for staff to its planned timetable, to ensure that guidance is accurate and appropriate.

Section 41 – information provided in confidence

10. Under section 41(1) of FOIA, information is exempt information if a) it was provided to the public authority by another person and b) disclosing it would constitute an actionable breach of confidence.
11. Under section 41 Tate has withheld 12 slides contained in its 'Inclusion at Tate Part II' guidance, the remainder of which it disclosed. Tate explained that the withheld presentation contained sensitive information imparted in circumstances where the disclosers were assured that the information would only be made available for internal use.
12. Tate has provided the Commissioner with a copy of the presentation it is withholding. It has explained that the slides were created based on information provided by Tate employees (the 'confiders') regarding their experiences at Tate. The confiders agreed to share their experiences in the interests of strengthening the culture of diversity and inclusion within Tate. Despite the sensitivity of the information provided, the confiders agreed to provide such information on the basis that (1) they would remain anonymous and (2) it would only be used for internal training purposes.
13. Tate goes on to say that although 'Inclusion at Tate Part 2' sessions run monthly, the confiders have an expectation of confidentiality, insofar as the training is only provided internally at Tate. Participants are made aware of the sensitivity of the content (the presentation includes trigger warnings to ensure trainees treat the exercises respectfully).
14. Tate says that when it was considering applying the section 41 exemption Tate's FOI Group took the view that the information contained in the slides was only shared by the confiders for a specific, restricted purpose (internal training). Using the information beyond this stated purpose would be a breach of their confidence. As an employer, Tate says, it must be sensible about the way it uses information provided to it by its employees. Tate feels very strongly that disclosing the information regarding its employees' sensitive personal experiences in circumstances where it may then be shared publicly is clearly outside the permitted purpose for which the information was originally provided to it. Disclosure would undermine the confiders' expectation of confidentiality. Tate's FOI Group therefore held that there were strong grounds to withhold such information in accordance with section 41.
15. Given the sensitivity of matters associated with 'inclusion' and how those matters can impact on people, Tate had assured those who volunteered information that it would only be used internally within Tate.

16. The Commissioner is satisfied first, that the confided information has the necessary quality of confidence as it is more than trivial and is not otherwise available ie it is not available to non-staff and the outside world. Second, the Commissioner is satisfied that the confiders would reasonably expect their information to be handled confidentially, ie that it would not be placed into the wider public domain as the result of a FOIA request. Finally, since the Commissioner considers that because the confiders would not expect the information to be disclosed, disclosing it would cause detriment to those individuals.
17. Section 41 is not subject to the public interest test but the common law duty of confidence contains an inherent public interest test. Again, the complainant has not advanced any public interest arguments for this information's disclosure and they have been provided with the remaining information in the 'Inclusion at Tate Part II' guidance. The Commissioner considers that there is greater public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant. In this case, this will also encourage others to contribute to Tate's future guidance and training material, helping to make that material engaging and relevant.
18. The Commissioner therefore finds that Tate is entitled to withhold some of the information in scope of the request under section 41(1) of FOIA.

Procedural matters

19. Under section 10(1) of FOIA a public authority must communicate requested information within 20 working days of the request. Under section 17(1) it must issue a refusal notice in respect of any exempt information within the same timescale. In this case, the complainant submitted their request on 18 March 2022 and did not receive relevant information or a refusal until 13 May 2022. Tate therefore breached section 10(1) and 17(1) of FOIA.

Right of appeal

20. 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

21. 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.
22. 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

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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