

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 June 2023

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

Decision (including any steps ordered)

1. The complainant has requested information relating to a grant awarded during the pandemic.
2. Arts Council England ('ACE') disclosed information but also withheld information.
3. The Commissioner's decision is that:
 - On the balance of probabilities, ACE has identified all information within the scope of the request.
 - The majority of the withheld information can be withheld.
4. The Commissioner requires ACE to take the following steps:
 - Disclose a copy of the grant withdrawal report with the information identified by the Commissioner, and all personal data, redacted.
5. 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.

Background information

6. The Culture Recovery Fund ('CRF') was a programme of funding setup by the government during the coronavirus pandemic, designed to help cultural and creative venues across the UK. The criteria for the CRF programme was set by DCMS. Arts Council England (on behalf of DCMS) administered, awarded and monitored the CRF Programme grants.
7. In November 2020, complaints¹ were made to ACE about its decision to award Sundissential Limited ('Sundissential'), a music venue in Birmingham, a grant of £224,000 even though it was reported that the venue was no longer operating. ACE announced that the grant had been frozen and no monies paid whilst it investigated these allegations of fraud. The grant was later withdrawn.

Request and response

8. On 14 April 2022, the complainant wrote to ACE and requested:

"Please supply all materials relating to Sundissential Limited's application to the ACE Culture Recovery Fund, and ACE's subsequent investigation into Sundissential Limited following their decision to award funding. This should include:

 1. All application forms, attachments or other information submitted to ACE by Sundissential
 2. All correspondence between ACE and Sundissential or its representatives
 3. All ACE assessment or marking documents relating to Sundissential's application
 4. All records of ACE meetings at which Sundissential was discussed
 5. Any ACE reports or findings produced as a result of ACE's investigation into Sundissential

¹ [Arts Council England freezes £223k grant over fraud allegations | News | ArtsProfessional](#)

6. Any other materials relating to Sundissential, the decision to award funding, ACE's calculation of the amount to be awarded, or the withdrawal of any funding awarded."
9. ACE responded on 29 April 2022, it disclosed a copy of Sundissential's application form with redactions made under section 43(2) (commercial interests) and section 40(2) (personal information). It refused to provide the remainder, citing section 43(2) and section 41 (information provided in confidence). It also explained 'We can neither confirm nor deny whether any form of investigation was undertaken in relation to the application' but it didn't cite a specific neither confirm nor deny provision within FOIA, as it should have done.
10. Following an internal review ACE wrote to the complainant on 29 June 2022. It disclosed further information, including copies of meeting minutes and the grant withdrawal letter. Again, some information was redacted under section 43(2) or section 40(2).
11. During this investigation, on 24 January 2023, ACE disclosed correspondence between it and Sundissential, again with redactions made under section 40(2) and section 43(2). ACE also confirmed that other information was not held and confirmed that some information had been withheld in full. It introduced a reliance on section 31(1)(a) (law enforcement).

Scope of the case

12. The complainant expressed concerns that ACE has failed to identify all of the information that would fall within the scope of the request. The complainant has also expressed concerns about the information that ACE is choosing to redact or withhold in its entirety.
13. The Commissioner will first consider whether ACE has identified all of the information within scope. Then, he will consider whether ACE is entitled to withhold the information that it has. ACE's final position is that section 43(2), section 41, section 31(1)(a), section 31(3), section 21 (information reasonably accessible to applicant via other means) and section 42 (legal professional privilege) all apply.
14. The Commissioner won't consider ACE's application of section 40(2) because the complainant has indicated they don't wish to receive any third-party data.

Reasons for decision

Section 1 – information held/not held

15. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it's likely, or unlikely, that the public authority has identified all information relevant to the request.
16. In order to make his determination, the Commissioner asked ACE to explain the searches it had undertaken to locate all information and explain why these searches would have been likely to locate all of the information in scope.
17. ACE explained that it consulted the following staff about the request: senior members of staff at Director title and above (or who were at the time), those responsible for the relevant funding programme and for internal and external communications and those within the complaints team (or who were at the time) that considered the complaints about Sundissential. For each consulted member of staff, searches were carried out in their Outlook Inbox (including but not limited to shared Outlook folders and Outlook Calendars); OneDrive and personal device.
18. The Commissioner understands that the terms 'Sundissential' was used, as well as 'Sundisential.' ACE has also provided details of half a dozen other search terms that it used, including references for the application in question and the name of a Sundissential contact.
19. During this investigation ACE confirmed that 'The relevant individual that conducted the search for information has left Arts Council England meaning we could not re-interview them about their search for information.' So, ACE essentially reconducted this search again. Upon reconducting this search ACE identified more information that would fall within scope but has explained this information is exempt.
20. Looking at the targeted searches that ACE has conducted, for a second time, the search terms used and the fact that further information has now been identified, the Commissioner is satisfied that, on the balance of probabilities, ACE has identified all information that would fall within the scope of the request.
21. The Commissioner will now go consider the information that ACE has withheld in response to the request.

Section 21 – information reasonably accessible to applicant via other means

22. The scope of this request is broad, it encompasses **all** information relating to Sundissential's application to ACE. Whilst it hasn't explained this to the complainant directly (and it should have) ACE has identified that some of the information that falls within the scope of this complaint is available to the complainant via other means. Section 21 exempts information from disclosure under FOIA if it's available to the requestor via another route – there is no public interest test to consider.
23. ACE has explained 'The CRF Programme's key information, applicant guidance, application and more information about the programme is available on our website.²'
24. Furthermore, the statement that ACE released in response to the complaints it received about Sundissential has been reported on in local and mainstream media, including the article that the Commissioner has cited in footnote 1.
25. There is other relevant information, for example, the announcement of Sundissential as a 'successful' recipient in round one of the CRF programme funding, ACE's anti-fraud measurements³, its raise a concern process⁴ and direct messages about Sundissential that ACE received on its social media, that ACE considers is all available to the complainant via other means.
26. The Commissioner is satisfied that all of the aforementioned information is in the public domain and he has seen no evidence that indicates that this information is not accessible to the complainant. Therefore, section 21 is engaged and the information is exempt from disclosure.

Section 43(2) – commercial interests

27. Section 43(2) states that information may be withheld if its disclosure would, or would be likely to, prejudice the commercial interests of any legal person (including the public authority holding the information). Section 43(2) is a qualified exemption which means it's subject to the public interest test – information may engage section 43(2) but it can

² [Culture Recovery Fund: Grants | Arts Council England](#)

³ [Grants Management Function - GOV.UK \(www.gov.uk\)](#)

⁴ [Making a complaint | Arts Council England](#)

only be withheld if the public interest in doing so outweighs the public interest in disclosure.

28. ACE has explained that disclosure would be likely to prejudice the commercial interests of: Sundissential, DCMS and ACE itself. The complainant has expressed concerns that the allegations of fraud imply that Sundissential is no longer operating commercially and therefore there is no commercial interest to protect. ACE has identified that Sundissential is the registered trade mark owner of six trademarks, including Sundissential.
29. ACE has explained that the information it's withholding under section 43(2) 'includes (but is not limited to) the use of the "brand" and registered trade mark of "Sundissential"; the fees to be paid for the use of the same; and the fees for hiring venues.' ACE envisages that disclosure would be like to prejudice 'either/and/or be Sundissential Limited's competitiveness; ability to negotiate; to the underlying culture and creativity market.'
30. The Commissioner accepts that, whether Sundissential itself is still operational, the prejudice envisaged could extend to the other businesses registered with the Intellectual Property Office.
31. Furthermore, ACE has explained that disclosure of the withheld information would be likely to prejudice its own commercial interests. It's explained that, upon applying for funding under the CRF programme, applicants must 'open up' their organisation's 'inner workings'; cashflow; management accounts; snapshot of a balance sheet.' The Commissioner notes that Sundissential's actual application has been disclosed, without the attachments that make up this financial information.
32. ACE is concerned that, if such information was released in relation to Sundissential's application, it might deter applicants from applying for funding, or engaging with ACE, because applicants have concerns that their confidential, and commercially sensitive, information could be disclosed to the world at large.
33. ACE is also withholding the final withdrawal report which outlines why ACE withdrew its funding from Sundissential under section 43(2). To reiterate, ACE has disclosed to the complainant (and therefore to the world at large) the grant withdrawal letter that accompanied this report.
34. If fewer applicants engage with, or apply for funding from ACE, this would be likely to prejudice the commercial interests of ACE and, by extension, DCMS. Whilst it's not the primary aim of ACE to operate commercially or to generate profit, its ability to achieve its strategy and

remain functional and operational, would be likely to be prejudiced if applicants are more hesitant to work alongside ACE.

35. With the above in mind, the Commissioner is satisfied that the exemption is engaged. He will therefore go onto consider whether the public interest lies in maintaining the exemption or in disclosure.

Section 41 – information provided in confidence

36. Section 41(1) of FOIA states that information is exempt from disclosure if: it was obtained by the public authority from any other person (including another public authority), and disclosure (otherwise than under this Act) by the public authority holding it would constitute an actionable breach of confidence.

37. ACE is applying section 41(1) to information including the concerns, and any accompanying evidence, that it received from individuals, about Sundissential's grant. It is also withholding evidence that Sundissential provided during ACE's investigation. All of this information has clearly been provided by another person, either to ACE directly or via the process referred to in footnote 4.

38. Now the Commissioner must consider if disclosure of this information would represent an actionable breach of confidence. In doing so, he must consider:

- Does the information have the necessary quality of confidence?
- Was the withheld information imparted in circumstances importing an obligation of confidence?
- Would unauthorised disclosure cause detriment to the party providing the information or to another party?
- Is there a public interest defence?

39. Information will have the necessary quality of confidence if it's not otherwise accessible, and if it's more than trivial. If an individual feels that they have concerns, and evidence, to show why Sundissential was, or wasn't, fraudulently in receipt of CRF funds – this information isn't otherwise accessible (in the sense that the individual is providing what they believe to be relevant, and previously unknown, context to ACE about Sundissential), and is more than trivial.

40. Furthermore, the Commissioner notes that in ACE's concern form, it explains:

"We do not make public information about investigative procedures. Doing so would allow individuals and organisations to circumvent our checks and jeopardise our ability to protect public funds...As part of our review of your concerns we may need to contact the organisation that we have funded. If we do we will respect your anonymity and will honour any specific requests that you make regarding confidentiality."

With the above in mind, the Commissioner is satisfied that the concerns, and the defence that Sundissential provided during the investigation, were done so in circumstances importing an expectation of confidence.

41. The Commissioner is also satisfied that disclosure of this information would cause detriment to both the confider and ACE. Keeping in mind the circumstances in which the complaint is made, there is the possibility that disclosure would open the confider up to unwanted contact from Sundissential or associated businesses. Furthermore, for the same reasons outlined in paragraphs 32 and 33, disclosure might deter individuals from bringing similar concerns to ACE or cooperating with any internal ACE investigations in the future. In turn, this would impact ACE's ability to investigate such concerns.
42. Although section 41 is an absolute exemption (and there is no requirement to consider the public interest test), it's accepted that if there is an overriding public interest in disclosure it can be a defence to an action of breach of confidentiality.

Section 31 – law enforcement

43. Again, the scope of the request is broad. It captures the information held in relation to ACE's internal investigation into Sundissential but also 'any other material...relating to the withdrawal of any funding awarded,' the Commissioner notes this will extend to any referral that ACE may have made to any external bodies.
44. Section 31(1)(a) states that information may be withheld if its disclosure would, or would be likely to, prejudice the prevention or detection of crime. Section 31(1) states that a public authority may refuse to confirm or deny whether specific information is held if to do so would, in itself, prejudice the prevention or detection of crime. Section 31 can be claimed by any public authority, even if it doesn't have statutory powers in relation to law enforcement.
45. Section 31 is a qualified exemption which means it's subject to the public interest test – information may engage any subsection of section 31 but it can only be withheld (or a neither confirm or deny response provided) if the public interest in doing so outweighs the public interest in disclosure (or providing that neither confirm or deny response).

46. To reiterate, ACE has previously withheld under section 21 details of Spotlight, the government's online automated due-diligence tool. An overview of how Spotlight operates is available to the complainant as per footnote three. However, ACE is withholding 'correspondence in relation to Spotlight, which includes (but is not limited to) our instructions and the reports – whether in draft or final form – produced by Spotlight to be part of our counter fraud measures' and therefore exempt under section 31(1)(a). ACE has also applied section 31(1)(a) to the final grant withdrawal report, as well as section 43(2).

47. ACE has explained:

"It is critical to our operations and as a custodian of public funds to ensure that our processes and procedures by which fraud cases are detected, investigated, and prevented are not compromised and/or diminished and/or are subject to undue influence. By releasing this information, we would 'open up' our 'inner workings' of our counter fraud processes and procedures. This would place us, and public funds, at a greater risk by reason that fraudsters would have a better understanding of how to circumnavigate these processes and procedures. Alternatively, fraudsters would develop new or innovative ways of making fraudulent applications by reason of this information being made public. As a result, we would need to 'catch-up' with any new or innovative ways of fraudsters, which would mean that our abilities around counter fraud measures are compromised and/or diminished."

With the above in mind, the Commissioner is satisfied that section 31(3) is engaged.

48. ACE has also explained that:

"when we use the term 'fraud' or 'fraudulent' this does not mean to say that all applicants and/or applications 'captured' within this process are indeed or confirmed to be fraudulent. There may be 'innocent' or 'innocuous' reasons why an applicant and/or applications may be caught by our counter fraud measures. Spotlight is an automated process, but no 'automated' decision is made by Spotlight. Any decision is referred to a member of Arts Council England staff to consider."

ACE has also explained:

"Whilst there is information in the public domain concerning Sundissential Limited's application to the CRF Programme, and our investigation into the same, there is no 'authoritative' or 'definitive' statement as to the investigation and/or its conclusion."

49. With this in mind, ACE is refusing, under section 31(3) to confirm or deny whether it holds any information relating to Sundissential and any other investigatory body which may have any statutory powers in relation to law enforcement or, more specifically, fraud.
50. It's important to note that ACE's refusal to confirm or deny that any further information is held should not be interpreted either way to suggest that specific information is, or is not, held. The starting point, and the main focus for the Commissioner in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held. Nothing in this decision notice should be taken as confirmation that the information in question is, or is not, held.
51. If ACE confirms or denies that it holds information relevant to any referral it has made to a law enforcement body, it's essentially confirming or denying whether Sundissential (and individuals within it) are, or have been, the subject of a criminal investigation. The Commissioner notes that not only is this criminal offence data according to the Data Protection Act 2018 ('DPA18') but would allow any associated party to take steps to conceal evidence, otherwise obstruct or circumvent, or avoid any investigation. The Commissioner is satisfied that section 31(3) is engaged.

Section 42 – legal professional privilege

52. Section 42(1) states that information may be withheld if it's subject to legal professional privilege. Section 42(2) states that a public authority may refuse to confirm or deny whether specific information is held if doing so, in itself, would disclose any legally privileged information.
53. ACE is refusing, under section 42(2), to confirm whether any legal advice is held in relation to Sundissential. A public authority can only refuse to confirm or deny whether it holds information about legal advice it has sought or received if to do so would reveal something about the substance of that advice. 'Substance' means the content, rather than simply the general subject of the advice.
54. Looking at request, the Commissioner doesn't consider that confirming or denying that legal advice is held in relation to Sundissential would disclose the substance of any such legal advice. Therefore, he'll move onto consider whether this legal advice can be withheld under section 42(1).
55. Section 42(1) protects a client's ability to speak freely and frankly with their legal adviser; the ability to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of

LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings.

56. ACE has explained:

“The exemption exists in order to encourage clients to be frank and open with their legal adviser. It is important that we are able to seek legal advice so that we can make our decisions in the correct legal context. The legal adviser must be in possession of all material facts in order to provide sound advice. We must therefore feel confident that we can disclose all relevant facts to our legal advisers. We should be able to do so without fearing that this information will be disclosed to the public.”

57. As a class-based exemption, there is no requirement for ACE to demonstrate that disclosure of its legal advice would, or would be likely to, result in any prejudice. If the information is captured by LPP, and in this instance the Commissioner is satisfied that it's captured by advice privilege, section 42(1) will be engaged. However, it's also a qualified exemption and therefore subject to the public interest test.

Public interest test

Factors in favour of disclosure

58. ACE has identified that disclosure of the requested information would demonstrate transparency and accountability, specifically on how it considers legal matters, ensures instances of fraud are reduced to the absolute minimum and how it detects and deals with such allegations.

59. These are quite generic public interest arguments and whilst ACE acknowledges that 'Sundissential Limited interests the public in that the organisation and their application to the CRF Programme is a topic of discussed in the media,' it doesn't consider 'there is a public interest at stake.'

60. However, the Commissioner notes that if there is a plausible suspicion of wrongdoing, this may create a public interest in disclosure. And even where this is not the case, there is a public interest in releasing information to provide a full picture. He considers there is a public interest in the CRF programme in general – including the instances in which funds may have been awarded inappropriately and subsequently withdrawn.

Factors in favour of maintaining the exemptions

61. There will always be a public interest in maintaining the appropriate exemption, whether that be protecting ACE's commercial interests,

maintaining the common law duty of confidentiality, preventing and detecting crime or protecting the fundamental right of LPP in the English legal system.

Balance of the public interest

62. The Commissioner recognises that there is a public interest in this information. However, he doesn't consider it strong enough to outweigh ACE's ability to prevent and detect crime and the Commissioner finds the public interest lies in maintaining section 31(1) and section 31(3), especially taking into account that, at the time that the request was made, grants were still being distributed.
63. In relation to section 41, the Commissioner takes the view that a duty of confidence should not be overridden lightly, particularly in the context of a duty owed to the confider. He accepts that there is a public interest in how ACE came to award a grant to Sundissential and whether this was appropriate. However, the Commissioner is not convinced that the information contained within the concerns will address any due diligence that ACE conducted into Sundissential, or any action it took or processes in place to deal with the concerns. Having considered the circumstances of this case, the Commissioner does not consider that there would be a public interest defence in disclosure of the withheld information, therefore the information should be withheld under section 41(1).
64. Likewise, the general public interest inherent in section 42(1) will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. Again, in this instance he considers the public interest lies in maintaining the exemption.
65. In relation to section 43(2), the Commissioner doesn't consider that disclosure of the 'inner workings' of Sundissential's application would shed any light on how it came to be awarded the grant in the first place and he does accept that disclosure of such detailed financial information (that is not otherwise available) would be likely to deter future or current applicants from engaging with ACE.
66. However, the Commissioner is not convinced by the extent or severity of the prejudice that would occur if the grant withdrawal report was disclosed (with any information that might engage section 31(1)(a) redacted). ACE has already disclosed a copy of the grant withdrawal letter (albeit with certain redactions) which confirm the action that ACE has taken. Therefore, disclosure of the report would shed light on why ACE considered this action appropriate and the due diligence it had carried out. It also touches upon the circumstances surrounding

Sundissential's application without discussing the detailed financial information above.

67. The Commissioner isn't persuaded that disclosure of this report would deter current, or future, applicants from engaging with ACE, and therefore prejudice ACE's commercial interests, given the circumstances surrounding the grant and its revocation. With that in mind, he is ordering its disclosure with all personal data redacted, alongside other redactions (that he has identified to ACE only, in a confidential annex).

Procedural matters

68. ACE's refusal notice of 29 April 2022, and subsequent correspondence, failed to comply with the requirements of section 17 (refusal of request) in that it failed to explain what information it was providing a neither confirm nor deny response to, and what neither confirm nor deny provision within FOIA it was relying upon and why.

Other matters

69. This case took a long time for the Commissioner to conclude, largely due to delays on ACE's side. Whilst he appreciates, and encourages, public authorities that might wish to revisit the way it has handled a request (with a view to disclosing more information), a public authority should endeavour to get it right the first time and provide the Commissioner with the information he needs as quickly as possible.

Right of appeal

70. 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

71. 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.
72. 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

Alice Gradwell
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