

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2024

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 from Arts Council England (ACE) about Edsential Community Interest Company (CIC). ACE provided some information but relied on sections 41 (information provided in confidence), 43(2) (commercial interests) and 40(2) (third party personal information) of FOIA to withhold the remaining information.
2. The Commissioner's decision is that the public authority has incorrectly relied on section 40(2) of FOIA in withholding some of the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the names or job titles of the members of the Governance Board of Edsential CIC in the requested information. No other personal data should be disclosed.
4. The public authority must take these steps within 30 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 8 March 2024, the complainant wrote to the public authority and requested information in the following terms:

"Please can I request:

1. A copy of the bid document which led to Edsential being selected as the current Hub Lead Organisation for Wirral.
 2. Copies of Edsential quarterly returns to the Arts Council including evidence of Board Meetings (list of attendees, agendas and minutes if included) since 1 January 2022 from Edsential (HLO for Wirral).
 3. If this is not included in (2) above, copies of documents relating to self evaluation, including Smart Objectives and any finance reports submitted from Edsential (HLO for Wirral)
 4. If available, the current bid document submitted by Edsential (HLO for Wirral) in relation to the new strategic Music Hubs."
6. ACE responded on 8 April 2024 in the following way to the four parts of the request:
1. Information not held;
 2. and 3. Provided some information but redacted some of it, citing section 40(2) of FOIA;
 4. Withheld under sections 41 and 43 of FOIA.
7. On the same date the complainant made an internal review request as follows:

'I would like to request a review of one minor part of your response. I would like to request that the names or job titles of the members of the Governance Board are released, not least because it shows the adherence to the ACE requirement on external membership/chair in line with the "Standard terms and conditions for Music Education Hubs 2023-24".'

8. Following an internal review, ACE wrote to the complainant on 7 May 2024 and maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 13 May 2024 to complain that they had not been provided with the information they had requested concerning the Governance Board.
10. The Commissioner considers that the scope of his investigation is to establish whether ACE is entitled to withhold the requested information under section 40(2) of FOIA. As the complainant solely requested the names or job titles of the members of the Governance Board of Edsential in their review request, the Commissioner does not propose to look at the redaction of the personal information of any other individuals from Edsential or ACE.

Reasons for decision

Section 40 - personal information

11. Section 40(2) of 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). 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 FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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. ACE outlined to the Commissioner the broader personal data of Edsential and ACE staff it had withheld in its refusal notice such as names, job titles, email addresses and signatures. However, the internal review request only asked for the Governance Board of Edsential's names or job titles.
20. ACE argues that there is no -

“published list of the Governance Board of Edsential CIC...We could not find any evidence of this being public knowledge and therefore considered this to be personal data not already in the public domain”.
21. Names are clearly personal data and job titles can often be linked to an individual. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

24. 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”.
25. 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.

26. 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

27. 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”¹.

28. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.

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

Legitimate interests

30. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that

¹ 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) 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”.

such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.

31. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. ACE's view is that these "names and titles of the attendees at the meetings are not available elsewhere in this context, and therefore the disclosure of the Personal Data is necessary to contribute to" the complainant "being satisfied of that legitimate interest". It suggests that there are other methods the complainant could use, such as contacting "Edsential CIC directly to enquire about the information".
34. ACE explained to the Commissioner that it did engage with the complainant in an attempt to resolve matters. It stated that it could not disclose the personal data of third parties because it would be in breach of personal data legislation but that it does "publish contact details for all Hubs" on its website and had provided the complainant with a link to that page.
35. ACE also suggested that the complainant could contact one of the local authorities that own Edsential CIC – Cheshire West and Chester Council and Wirral Council and try to obtain the information in this way.
36. It understands that the legitimate reason for the complainant's request is "to be satisfied that the organisation had complied with the Arts Council England's Standard Terms and Conditions for Music Education hubs". ACE directed the Commissioner to these Terms and Conditions and the necessary requirements "in respect of the Hub Governance model". ACE provides the example of "transparency, and that the members have a range of different backgrounds and skills". These terms are a requirement on the grantee and they are monitored and assessed by ACE. The "individual circumstances of one grant recipient" are not discussed with other parties by ACE.

37. Following the assessment in the balancing test in the internal review ACE had concluded that disclosure of the information was not necessary enough to outweigh the interests of the individual data subjects or to justify releasing the information for the legitimate interest.
38. The complainant considers the disclosure of this information to be necessary because they argue that a "governance board looking after taxpayers' money should not be shrouded in secrecy and hide behind GDPR to avoid proper and reasonable scrutiny". They query whether any "external person" is "chairing this board" which the complainant suggests is "to avoid scrutiny" rather than for data protection reasons. The complainant adds that Edsential is "owned and operated by Wirral and Cheshire West and Chester Council..."
39. Given that ACE concluded that Edsential did not want personal information disclosed, the Commissioner considers it unlikely that Edsential would have disclosed this information directly itself. For the same reasons, the councils are unlikely to have disclosed it. Although he accepts that there are controls in place to monitor grantees, including transparency, the complainant argues that Edsential wants to withhold this particular information "to avoid scrutiny". The Commissioner is therefore satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

40. 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 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.
41. 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.

42. 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.

43. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

44. ACE acknowledged in its internal review that -

"there is a legitimate interest in the Arts Council disclosing the Personal Data, for the assurance that the grant recipients funded by the Arts Council using public funding are acting in compliance with the Arts Council's requirements for public funding."

45. ACE contends that the release of some of Edsential's personal data such as "(for example, as attendees at a meeting with a specified date and time) may reveal information about their private life, such as location on a particular day".

46. ACE explained to the Commissioner that -

"in respect of the individuals from Edsential CIC, all applicants to the Arts Council England's funding programmes are made aware that Arts Council England is a public authority subject to FOIA, and that we may be required to disclose certain information about their application and related grant information".

47. Set against this, ACE says that it makes it clear in its published guidance "How we treat your application - Freedom of Information" that it "may not release information that is covered by one or more exemptions under FOIA, including personal information". This guidance states that ACE will "routinely check for a removal any information that is deemed to be personal information". For this reason it suggests that Edsential CIC and its staff "would have a reasonable expectation for Arts Council England to follow this". ACE did seek consent from Edsential to release this information but this was declined. It concluded that,

"it would therefore not be reasonable, transparent, or compliant of Arts Council England to divulge personal information of applicants, because it was shared with us in confidence on the basis of this reassurance which is also published publicly".

48. The Commissioner does not consider that the individuals in question would have a reasonable expectation of privacy regarding their position

as members of a Governance Body. They are responsible for the governance of an organisation that receives public funding.

49. The Commissioner understands ACE's arguments but he is not convinced by them. He has already queried the advice given to the complainant by ACE about asking Edsential or the councils concerned for this information.
50. The complainant has not pursued all the information withheld under section 40(2) of FOIA, except for individuals in positions of governance. They have also provided an alternative of providing names or job titles.
51. The Commissioner is satisfied that the legitimate interests being pursued by the complainant are not overridden by the interests or fundamental rights or freedoms of the individuals here. He is therefore satisfied that the lawful basis under Article 6(1)(f) of the UK GDPR does apply to the disclosure of the names or job titles of the Governance Board, and that disclosure of this information would therefore be lawful.

Is disclosure fair and transparent?

52. Though he considers that disclosing the names of the Governance Board under FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent.
53. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons. The requirement for transparency is met because as a public authority, ACE is subject to FOIA.
54. The Commissioner has decided that ACE has failed to demonstrate that disclosing the names or job titles of the Governance Board of Edsential is unfair. He does not accept that disclosure would be beyond the reasonable expectation of members of a Governing Board of a CIC owned by two councils and utilising public funds. In this instance, he has decided that transparency outweighs the data subjects' rights and freedoms.

Right of appeal

55. 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

56. 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.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF