

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 December 2023

Public Authority: British Film Institute
Address: 21 Stephen St
London
W1T 1LN

Decision (including any steps ordered)

1. The Commissioner's decision is that information regarding an overview of services, training material and reports that the complainant has requested are exempt from disclosure under section 41(1) of FOIA. This is because it's information that was provided in confidence, and the public interest favours maintaining the exemption in this case.
2. It's not necessary for the British Film Institute (BFI) to take any corrective steps.

Request and response

3. The complainant made the following information request to the BFI on 8 June 2023:

"Could you please supply the following:

- Material provided to the BFI before awarding the contract giving an overview of what services the organisation was providing.
- Training material (i.e. handouts, survey questionnaires, video etc) intended for staff attending their courses.
- Any reports produced to monitor the effectiveness of the training."

4. The BFI's final position was that the relevant information it holds is exempt from disclosure under sections 41 and 43 of FOIA.

Reasons for decision

5. The Commissioner's reasoning focusses on whether the BFI is entitled to withhold the information the complainant has requested under sections 41 or 43 of FOIA.

Section 41 – information provided in confidence

6. The BFI has explained that it is governed by Royal Charter and is a charity, but it upholds the principles of FOI and confirmed that the only material it holds in scope of the request is the initial tender for contract of providing training to its staff. All other materials were either retained by the "What if Experiment" or submitted directly by staff to its website. It also confirmed that as training is still ongoing, no reports have been produced at this time.
7. To help maintain trust between provider and client, some information such as that provided for the tender process remains confidential.

Section 41 – information provided in confidence

8. Under section 41(1) of FOIA, information is exempt from disclosure if (a) it was obtained by the public authority from any other person and (b) disclosing it would constitute an actionable breach of confidence. Section 41 is an absolute exemption and not subject to the public interest test.
9. BFI's submission goes on to say that the information it holds had been provided purely for the tender process by the third party with an expectation that this information will be treated in confidence. Breaching this confidence would be detrimental to both the third party and to the reputation of the BFI.
10. To maintain the requirement of the tender process, BFI says, it's essential that those submitting a tender are able to do so with confidence that their information will not be disclosed. Any breach risks the tender process, which in turn would undermine the tender process.
11. In this case, BFI is content that the information provided by the provider was given with the expectation of confidentiality and that there is a real possibility that a breach of confidence would be actionable by the provider.

12. The Commissioner is satisfied that BFI obtained the requested information from another person, that being the provider's submission for tender.
13. The Commissioner has next considered whether disclosing the information would constitute an actionable breach of confidence. To do this he considers four tests.
14. First, he is satisfied that the information has the necessary quality of confidence because it is not trivial – concerning as it does, tender material for internal training provision – and because it is not otherwise accessible. If it were otherwise accessible, the complainant would not need to request it from the BFI.
15. Second, the BFI noted that the process that's designed to facilitate tenders for the provision of services has an inbuilt expectation of confidentiality between provider and client.
16. The BFI provided the Commissioner with further explanation on that point. It said that there's a reasonable assumption for privacy when someone submits material to the tender process. This could be to do with commercial sensitivity, or to people just not wanting their details shared. So, there could be a range of repercussions for the BFI if it were to disclose the requested information. These include anything from poor stakeholder relations to litigation. The BFI says that providers are very protective over the materials they provide for the tender process in order to protect their commercial interest.
17. In their complaint to the Commissioner the complainant has said that: "I believe the BFI is concealing information that is of immediate public interest to assess the quality of their anti-racism training. Their continued refusal in answering my request is not conducive to transparency." The complainant therefore disputes that the information requested is confidential.
18. It is widely expected/accepted that materials provided in relation to a tender process would be dealt with in a manner to impart privacy and confidentiality in order to allow the process to function properly without being undermined by inappropriate disclosures.
19. The Commissioner is therefore satisfied that the requested information was imparted to BFI in circumstances importing an obligation of confidence.
20. Third, the Commissioner has considered whether unauthorised disclosure of the information would cause a specific detriment to either the party which provided it or any other party. The Commissioner has noted that the approach taken by the courts in some cases is that

detriment is not always a pre-requisite to an actionable breach of confidence.

21. BFI has said in its submission that disclosing the information would be of detriment to the provider's commercial interests. This is because of the nature of their work and the likelihood that materials provided would not remain confidential therefore, giving other parties involved in any other tender process an unfair advantage.
22. BFI also said that disclosure would undermine its relations with other stakeholders. The Commissioner understands that this would be through lessening a provider's willingness to enter into a tender process or restrict the information provided. This would frustrate the ability of a fair and transparent tender process in future.
23. BFI also says that disclosure would potentially involve it in litigation with providers.
24. In terms of detriment, the Commissioner accepts that unauthorised disclosure of the information would cause a detriment to the confider (the provider) and another party (BFI), for the above reasons.
25. Finally, with reference to the three tests discussed, the Commissioner is satisfied that, with regard to the provider, disclosing the information would constitute a breach of confidence. This is because of the provider's reasonable expectations of confidentiality and what the BFI has described as the competitive nature of the tender process.
26. But for section 41 to apply the breach must be actionable. This means that there must be a good chance of such an action succeeding because the public authority wouldn't have a valid defence to such a claim.
27. A public authority can defend itself against an action for a breach of confidence if it can establish a public interest defence – that the breach of confidence was necessary in the public interest. The Commissioner isn't satisfied that such a defence would be viable here.
28. In their request for an internal review the complainant put forward their public interest arguments for disclosing the information: "I would argue that it is in the public interest to find out about the quality of anti-racism training that is being given to BFI staff so they can also judge its effectiveness. That it is to be kept under wraps under the guise of corporate IP does not help in monitoring this and highlighting any flaws in it, if any exist."
29. However, the Commissioner is satisfied that it would be an actionable breach of confidence for BFI to disclose the requested information under FOIA and, as such section 41(1) applies.

30. The Commissioner has found that the requested information is exempt from disclosure under section 41(1) of FOIA.

Other matters

31. The Commissioner notes that BFI's first refusal notice caused some confusion by stating all the information was retained by the What If Experiment and then citing exemptions in order to withhold it. BFI's first consideration should be whether information in scope of a request is held by them and if not, this should be explained clearly to the requester. If information is held, BFI then needs to consider what exemptions may apply in order to withhold the requested information.

Right of appeal

32. 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

33. 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.
34. 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

Susan Duffy
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Wycliffe House
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