

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2024

Public Authority: National Lottery Community Fund
Address: Apex House
3 Embassy Drive
Birmingham B15 1TR

Decision (including any steps ordered)

1. The Commissioner's decision is that the National Lottery Community Fund is entitled to rely on section 36(2)(c) of FOIA to withhold the requested information about funding recipients. This is because disclosure would be likely to otherwise prejudice the effective conduct of public affairs.
2. It's not necessary for the National Lottery Community Fund to take any corrective steps.

Request and response

3. The complainant made the following information request to the National Lottery Community Fund (NLCF) on 5 June 2023:

"This is an information request relating to discussions and meetings held by the National Lottery Community Fund regarding (potentially) controversial funding decisions for the year 2022 to 2023.

Please provide the following:

- A list of meetings held concerning controversial funding recipients, including the name of the organisation concerned, amount of time spent in the meeting, and the date of the meeting.

- Any minutes or other information associated with the aforementioned meetings, such as list of attendees, the names of the meeting in calendars, summaries of the meetings and the like.
- The same data should also be provided for any funding recipients considered 'engagement sensitive'.

I would prefer a response via email, but if this is not possible, I will gladly accept letters to the address below."

4. NLCF advised in its response of 28 July 2023 that it doesn't hold information about "controversial funding recipients" as this isn't a term it recognises. NLCF refused to confirm or deny it holds information about 'engagement sensitive' recipients under section "36(2)" of FOIA. (In fact, the correct section 36 exemption for neither confirming nor denying information is held is section 36(3).)
5. The complainant requested an internal review on 16 August 2023 in respect of NLCF's section 36 response ie point 3 of their request. NLCF didn't provide an internal review and Commissioner accepted the subsequent complaint without a review having been carried out.

Reasons for decision

6. Having indicated in its response to the request that it was relying on section 36(3) of FOIA, the material NLCF provided to the Commissioner suggested that it was relying on sections 36(2)(b)(ii) and 36(2)(c) to withhold the requested information. NLCF subsequently confirmed that it's relying on those two exemptions and, in addition, section 43(2) of FOIA, which concerns commercially sensitive information. In the first instance, this reasoning will focus on NLCF's reliance on section 36(2)(c) to withhold the information. If necessary, he'll consider its reliance on section 36(2)(b)(ii) or 43(2), or both. The Commissioner has discussed the matter of the internal review under 'Other matters.'
7. To confirm, NLCF has applied the above exemptions to the request for a list of meetings held concerning 'Engagement Sensitive' recipients, including the name of the organisation concerned, amount of time spent in the meeting, and the date of the meeting and the request for any minutes or other information associated with these meetings, such as list of attendees, the names of the meeting in calendars and summaries of the meetings.
8. In its submission to the Commissioner, NLCF has explained that the term 'Engagement Sensitive' as used by the Fund has a wide scope. Whether a project should be categorised as 'Engagement Sensitive' is considered **after** the project has been awarded funding. 'Engagement

Sensitive' is used to notify communication teams about projects which may require additional support or a communication strategy due to their sensitivity.

9. Importantly, being labelled 'Engagement Sensitive' is time-limited and doesn't impact a project's eligibility for funding. It's not taken into consideration during the grant-making process. As above, discussions about engagement sensitivity begin once a funding decision has been reached.
10. The term 'Engagement Sensitive' is an internal designation and isn't shared with external organisations. Labelling a project as 'Engagement Sensitive' may erroneously suggest, to external organisations or the public, ongoing media coverage, potential issues, reputational risks, or past instances of breaches of terms and conditions or fraud in managing previous grants.
11. Under section 36(2)(c), information is exempt if, in the reasonable opinion of a qualified person, its disclosure would or would be likely to otherwise prejudice the conduct of public affairs.
12. To determine, first, whether NLCF correctly applied this exemption, the Commissioner must consider the opinion of the qualified person (QP) as well as the reasoning that informed the opinion.
13. NLCF has confirmed that its QP was its Chief Executive, David Knott, and the Commissioner is satisfied that David Knott is the appropriate QP. NLCF has provided the Commissioner with evidence that the QP gave his opinion on 26 July 2023 and the Commissioner is satisfied that the timing of the opinion is appropriate. The QP's opinion was that the prejudice envisioned under section 36(2)(c) would be likely to occur if the requested information were to be disclosed and the Commissioner accepts this lower level of likelihood.
14. The Commissioner has considered whether the QP's opinion about section 36(2)(c) is reasonable. It's important to note that 'reasonableness' isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
15. The test of reasonableness isn't meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
16. However, for the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In his published guidance on section 36 the Commissioner notes that it's in public authority's interests

to provide him with all the evidence and arguments that led to the opinion, to show that it was reasonable. If this isn't done, then there's a greater risk that the Commissioner may find that the opinion isn't reasonable.

17. NLCF has provided the Commissioner with a copy of the submission it provided to the QP. This shows that the QP was provided with a copy of the request, a description of the withheld information, arguments for why the envisioned prejudice would or could occur, and counter arguments; namely, public interest arguments for disclosing the information.
18. The QP was advised that disclosure would be likely to otherwise prejudice the effective conduct of public affairs because if staff were inhibited from discussing 'Engagement Sensitive' projects and so didn't allocate necessary resources to those projects, unrepresented groups might not receive the necessary NLCF support. This would negatively impact the beneficiaries of those projects. Alternatively, 'Engagement Sensitive' projects could receive funding, but those projects could present a reputational risk to NLCF and, by connection, the UK Government. The QP was also advised that organisations may also be deterred from managing projects if they knew that NLCF had categorised them as 'Engagement Sensitive' for a period of time. As noted, this categorisation is an internal categorisation and for NLCF's purposes only.
19. The Commissioner considers that one of the above points made to the QP are more relevant to section 36(2)(b)(ii), which concerns the exchange of views and 'safe space/chilling effect' arguments. In addition, the advice the QP is given about reputational risk to NLCF and the UK Government doesn't make a clear link between disclosure of the information otherwise prejudicing the effective conduct of public affairs. However, the Commissioner considers that organisations being deterred from managing projects categorised as 'Engagement Sensitive' if the information were to be disclosed is credible.
20. The Commissioner is satisfied that the QP had sufficient appropriate information about the request and the section 36(2)(c) exemption to form an opinion on the matter of whether relying on that exemption was appropriate regarding the information being withheld.
21. Since he's satisfied that the relevant considerations have been addressed, he must accept that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that NLCF correctly applied section 36(2)(c) of FOIA to the request. He's gone on to consider the public interest test.

Public interest test

22. In their request for an internal review, the complainant presented the following arguments in favour of disclosing the information:

- They aren't seeking any personal data contained in the information. As such NLCF's future discussions about these matters won't be prejudiced because participants will still have an expectation of privacy even if their discussions are disclosed in future.
- There are numerous cases of major publications reporting on national lottery funding recipients and their political activities, and some have elicited ministerial interventions. In 2002, the Home Secretary called on the National Lottery to reconsider a grant to the National Coalition of Anti-Deportation Campaigns. In 2019, the NLCF said "Following public interest regarding the proposed grant to Mermaids UK, The National Lottery Community Fund undertook a review of a number of concerns expressed in relation to the charity". Therefore, NLCF already acknowledges that there's a public interest in grant proposals and providing this information need not prejudice the NLCF's "safe space" for discussing such projects.
- Over its lifetime the National Lottery has disbursed at least 47 billion in funding through its distributors. Therefore, it should be possible for members of the public to scrutinise funding decisions especially those which are likely to be controversial. It seems unlikely that, with such a large amount of funding available, organisations will be dissuaded from applying due to this type of disclosure.
- It's impossible to see how releasing this information can impede accessibility of funding or prevent under-represented groups from applying for funding. Since the National Lottery's funding decisions are already public information, any organisation which is dissuaded from applying because information relating to its application could become public would be unlikely to apply anyway.
- Moreover, it's commonplace for both recipients of National Lottery funding and the Lottery itself to advertise projects and funding recipients and particularly those that serve under-represented groups. This suggests that it's not true that publicity is likely to deter funding or community projects that serve under-represented groups.

23. In its submission to the QP, NLCF acknowledged that it's a public body with a fiduciary duty to ensure that the public funds entrusted to it to distribute are protected and used in compliance with its terms and conditions.
24. NLFC also noted that there's a strong public interest in how public money is spent and who is receiving public funds. Disclosure would address the general public interest in transparent decision-making and would enhance public understanding of the NLCF's work. However, NLCF says, it's dedicated to transparency and actively shares information regarding the funding it offers and the projects that it funds.
25. NLCF has also discussed why it considers that it's in the public interest to maintain the two section 36(2) exemptions it's applied.
26. Regarding section 36(2)(c), NLCF says that disclosing the requested information would reveal that, after its decision to fund a project, NLCF has categorised the project as 'Engagement Sensitive.' This has the capacity to be misinterpreted by the public, as it implies that the managing organisation or project itself, or both, shouldn't have received public funds - and this isn't accurate.
27. Disclosure could discourage organisations managing 'Engagement Sensitive' projects from applying for funding from NLCF, ultimately affecting their beneficiaries. This is contrary to NLCF's purpose and mission because it "enthusiastically supports projects from diverse groups and communities."

Balance of the public interest

28. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition.
29. The QP in this case was NLCF's Chief Executive, and, as such, had the requisite knowledge of how their organisation works and the consequences of any disclosure. The Commissioner therefore gives their opinion a measure of respect.
30. Regarding timing, the internal categorisation of 'Engagement Sensitive' is one that NLCF used at the time of the request and continues to use; in that sense the use of that categorisation is 'live'.
31. Finally, the Commissioner has considered the severity, extent and frequency of the envisioned prejudice.
32. NLCF's position is that the term 'Engagement Sensitive' could be misinterpreted and erroneous conclusions may be drawn about funded

projects given that categorisation. The Commissioner considers it's possible that NLCF could receive queries and attention about any of those projects – from the public or from the media, or both – which would be a distraction for NLCF. Of more significance, the Commissioner accepts that it's possible that projects may be deterred from applying for funding from NLCF if they thought that they could be categorised as 'Engagement Sensitive' and that their categorisation as such could be disclosed to the wider world under FOIA. Similarly, an organisation may be deterred from managing a project if it thought it and the project would be the subject of unwanted attention because of the project's categorisation as 'Engagement Sensitive'.

33. Regarding NLCF, the Commissioner considers that the frequency, extent, and severity of the envisioned prejudice to NLCF itself – through unjustified attention and enquires – may be limited. The Commissioner accepts too that the frequency of the envisioned prejudice occurring through projects, and organisations that could potentially manage projects, being inhibited may be low or moderate. However, the consequences of projects being deterred from applying for funding, and organisations being deterred from managing projects, would be extensive and severe in terms of the number of potential beneficiaries of those projects who wouldn't get the support they needed.
34. The Commissioner is satisfied that the public interest in the number and types of projects that NLCF funds is satisfactorily addressed through the information it proactively publishes. He considers there's less public interest in the public being able to know if, internally, NLCF categorised a project as 'Engagement Sensitive' for a period of time. It's publishing this particular information that might inhibit a project from applying for funding, not publishing that a project has received funding.
35. The Commissioner considers that there's greater public interest in diverse groups and projects not being dissuaded from approaching NLCF for funding. That includes those that might be considered to be sensitive or that some might consider to be controversial. The Commissioner also considers that there's greater public interest in NLCF being able to meet its purpose and mission to fund diverse projects, and to be able to focus on this without being unnecessarily distracted. On balance, the Commissioner considers that the public interest favours maintaining the section 36(2)(c) exemption in this case.
36. Because the Commissioner has found that NLCF correctly applied section 36(2)(c) to the requested information and that the public interest favours maintaining this exemption, it's not necessary to consider NLCF's application of section 36(2)(b)(ii) and 43(2) to the same information.

Other matters

37. In its response to the request, NLCF invited the complainant to request an internal review if they weren't satisfied; the complainant requested a review, but NLCF didn't provide one. Offering, and providing, an internal review is a matter of good practice and can make a complaint to the Commissioner unnecessary. The Commissioner has recorded NLCF's omission on this occasion, for monitoring purposes.

Right of appeal

38. 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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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