

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 29 March 2018

Public Authority: The Big Lottery Fund
Address: 1 Plough Place
London
EC4A 1DE

Decision (including any steps ordered)

1. The complainant has asked the Big Lottery Fund (the BLF) to provide a number of items of information relating to a list of various organisations. The BLF provided some parts of the requested information. It refused to provide other parts however, citing sections 12(1) (costs of compliance) and 40(2) (third party personal data) of FOIA. The BLF also refused to confirm or deny whether it held some aspects of the requested information under sections 31(3) (law enforcement), 40(5) and 41(2) (information provided in confidence). The Commissioner has decided that the BLF correctly relied on the exemptions cited with the exception of section 40(5), which she has decided is not engaged.
2. The Commissioner therefore requires the public authority to take the following step to ensure compliance with the legislation.
 - Issue a fresh response which does not cite the application of section 40(5) of FOIA.
3. The public authority must take this step 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.

Request and response

4. The complainant's request made on 7 July 2015 was made up of two parts – a continuation of a request made in 2014, which asked for a number of items, and additional information relating to a list of named organisations. The complete wording of the request is set out in the annex appended to this notice.
5. The BLF responded on 2 September 2015. Some of the requested information was provided but the BLF also stated that other parts were being withheld, citing the 'third party personal data' (section 40(2)), 'commercial interests' (section 43(2)), 'prejudice to the prevention and detection of crime' (section 31(1)(a)) and 'confidential information' (section 41(1)) exemptions to disclosure in FOIA. The BLF further clarified that it was neither confirming nor denying whether it held details of new applications received on the grounds that to do so would be commercially prejudicial (section 43(3)). Finally, the response also indicated that it was relying on the 'third party personal data' (regulation 13(1)) exception in the EIR to withhold elements of the personal data contained in environmental information caught by the requests.
6. The complainant asked the BLF on 26 September 2015 to reconsider the decision to withhold information which had been requested. Accordingly, the BLF carried out an internal review, the outcome of which was provided to the complainant on 21 December 2015. This ultimately found that the BLF was correct to withhold the information it considered to be in scope. The BLF did though find some errors in the way that the request had been handled and made some revisions to its original position.
7. The BLF introduced the 'appropriate costs limit' (section 12) exclusion in FOIA to refuse to comply with the request for details of all meetings held. The BLF also refused either to confirm or deny whether the BLF held some parts of the information requested pursuant to the relevant provisions in the 'personal data' (section 40(5)), 'prejudice to the prevention or detection of crime' (section 31(3)), 'information provided in confidence' (section 41(2)) and 'commercial interests' (section 43(3)) exemptions to disclosure.
8. The BLF did find that there were some additional documents that had not been initially identified but it considered these contained exempt information under section 43(2) of FOIA or the 'confidentiality of commercial or industrial information' (regulation 12(5)(e)) exception in the EIR. The BLF also stated that regulation 12(5)(e) should have been

applied to parts of the information originally withheld under section 43(2) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way her requests for information had been handled.
10. Upon being notified of the complaint, the BLF proposed meeting with the complainant in order to discuss the underlying issues that prompted the request and any information that could potentially be disclosed. The complainant agreed to the proposal and a meeting was held in August 2016. Further correspondence explaining the role of the BLF in connection with the complainant's concerns was generated in December 2016.
11. The complainant subsequently informed the Commissioner of her belief that the meeting had not resolved the FOI complaint and should therefore be considered. During the course of the Commissioner's investigation, the BLF agreed to disclose records to which it had originally applied section 43(2) of FOIA and regulation 12(5)(e) of the EIR. It also decided that it could release some discrete items of information that had previously been redacted on the grounds that they comprised third party personal data.
12. In view of these developments, the Commissioner's decision notice has focused on the BLF's application of the neither confirm nor deny provisions in sections 31(3), 40(5) and 41(2) of FOIA, as well as BLF's reliance on sections 40(2) and 12(1) of FOIA.

Reasons for decision

Section 12(1) of FOIA

13. The BLF has applied section 12(1) of FOIA to the request for details of meetings with the named organisations.
14. Section 12(1) of FOIA allows that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit. The appropriate limit is not specified in FOIA but is instead set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations"). It is set at £600 for

central government departments, legislative bodies and the armed forces and £450 for all other public authorities, including the BLF.

15. The Fees Regulations state that an estimate can only take into account the costs a public authority reasonably expects to incur in: determining whether it holds the requested information; locating the information; retrieving the information; and, extracting the information. The Fees Regulations further clarify that the costs associated with these activities should be worked out at a standard rate of £25 per hour, per person.
16. A public authority seeking to apply section 12 does not have to make a precise calculation of the costs of complying with a request; instead, only an estimate is required. It must however be a reasonable estimate. The Commissioner's guidance¹ explains at paragraph 22 that what amounts to a reasonable estimate can only be considered on a case by case basis. Reference is made to the decision of the Information Tribunal in *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* (EA/2007/0004, 30 October 2007²), which said that a reasonable estimate is one that is "sensible, realistic and supported by cogent evidence" (paragraph 12).
17. The guidance goes on to explain that a sensible and realistic estimate is one which is based on the specific circumstances of the case. This means that it should not be based on general assumptions. For example, it would not be reasonable for an authority to assert that it would have to search all records, when it is likely that staff in the relevant department would know where the requested information is stored. This, the Commissioner advises, does not mean that a public authority has to consider every possible means of obtaining the information in order to produce a reasonable estimate. An estimate is unlikely to be reasonable, however, where an authority has failed to consider an immediately obvious and quick means of locating, retrieving or extracting the information.
18. In its internal review, the BLF advised that, to comply fully with the request, all 900 plus staff within the organisation would need to search their calendars/diaries to determine if a meeting had been scheduled. Other searches would then be needed to determine the exact information held and to extract any relevant records. In its responses to

¹ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

the Commissioner, the BLF has built on its explanations. This included demonstrating why a sweep of staff calendars would be required.

19. To put the estimate in context, the BLF has advised that it has a grant making database which holds records of application and grants. Separately, electronic records may be held on the personal hard drive of an employee, shared hard drives, email systems, electronic diaries and within written records. The BLF generally operates on a country specific basis where the programmes are run. However, in some cases local offices may administer UK wide programmes. There are also functions separate to the grant making process, which relate to aspects such as press, finance and audit. The BLF has approximately 900 staff. About 500 of these staff work within the grant making processes. However, this 500 would not include some staff who may also have reason to have a meeting, such as the BLF's press team.
20. With regard to the search for information itself, the BLF offered the following explanation:

For the 500 staff that could have had some form of meeting we would need to consult with them to search their own email, diaries, hard drives, shared folders and paperwork. For the electronic records this would require each member of staff to conduct an auto search on each area and for each of the eight organisations named in the request. Searching the personal drives, email and diary for one organisation, even with no records forthcoming, takes 1 minute 30 seconds. For the eight organisations, this amounts to 12 minutes. However the 12 minutes does not cater for any paper records or, if records are found, establishing whether the data found falls within the scope of the request. Therefore this could be increased to around 15 minutes on average.

Assuming that 15 minutes is the average, across 500 staff, this would equate to 125 hours.

There are currently 116 staff in the Scotland office where it is most likely that any meeting would have been arranged. Based on the calculation above, asking just these staff to search for records of meetings would take 29 hours and would put us beyond the cost of compliance limit.

Additional work may also be involved to take in to account staff that have left the organisation but for whom we may still hold records. If items were located then additional time would need to be added to the 29 hours to establish whether information fell within the scope of the request. Furthermore, although less likely, meetings could have been arranged or conducted through a wider group of staff,

which would again increase the time estimate to search for the records.

As part of the original review and internal review, contact was made with relevant staff in connection with known records held on our grant making database system. We therefore included as part of the review for meetings with the named organisations the information held from those relevant staff. Although there was no evidence or knowledge to suggest other meetings had taken place, to ensure that the request was fully considered across all our records, a wider group of staff would have needed to be consulted.

21. As referred to above, a public authority considering whether complying with a request would exceed the appropriate limit does not have to consider every possible means of obtaining information. Instead, the critical test is whether the public authority's approach is logical in the circumstances. In this case, the Commissioner observes that the request is fairly broad, in that it asks for confirmation of 'all' meetings that have taken place and further requires details of those meetings. In the Commissioner's view, this justifies the wide scope of the searches that the BLF considers would need to be employed. While not a requirement under section 12(1) of FOIA, the Commissioner also notes that in the interests of good faith the BLF did contact those staff that were known to have had contact with the organisations in order to obtain at least some of the requested information it held.
22. On the strength of the BLF's explanations, the Commissioner has concluded that section 12(1) of FOIA is engaged.
23. Where a public authority estimates that the cost of compliance would exceed the cost limit for the purposes of section 12(1) of FOIA, it is incumbent on the authority under section 16(1) of FOIA to provide advice and assistance, so far as it would be reasonable to do so. The Code of Practice issued under section 45 of FOIA (the Code) says that in this context an authority would be expected to provide an indication of what, if any, information could be supplied within the cost ceiling.
24. In this case the BLF advised the complainant as part of its internal review outcome that *'if you were to narrow the scope of your request we may be able to provide you with the information that you are seeking'*. In itself, the Commissioner considers that this would not satisfy the section 16 requirement because it fails to provide constructive guidance on how the complainant could modify her request. The Commissioner is however also aware of the BLF's wider efforts to engage with the complainant, including holding a meeting with her, in order to reach an understanding on what information could be provided. While the BLF's attempts were ultimately unsuccessful, the Commissioner is of the view

that they did constitute a sufficient, if unconventional, level of advice and assistance.

Section 31 – law enforcement

25. The BLF has refused under section 31(3), by virtue of section 31(1)(a), to confirm or deny whether it holds details of complaints or objections received in the period requested relating to the eight organisations.
26. Section 31(3) provides that the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would or would be likely to prejudice any of the matters mentioned in subsection (1). As stated, the BLF has argued that the application of Section 31(3) should be read in conjunction with section 31(1)(a). Under section 31(1)(a) information which is not exempt by virtue of section 30 is exempt if its disclosure would, or would be likely to, prejudice the prevention or detection of crime.
27. The Commissioner's guidance on section 31 explains that the prejudice in terms of section 31(3) will depend on how the request is phrased. Typically, where a request identified an individual or an organisation as the possible subject of an investigation or a particular line of enquiry a public authority could be pursuing, the more chance there is that confirming the information's existence would, or would be likely to, prejudice that investigation.
28. The guidance goes on to explain that there is a need, in some circumstances, to apply the neither confirm nor deny (NCND) provision consistently. Where confirmation or denial would reveal whether a particular party was under investigation and where this would, or would be likely to, prejudice such investigations, public authorities should be alert to the need to apply the NCND provision.
29. BLF has explained that its Audit and Investigations (A&I) team investigate possible instances of fraud, financial irregularity and corruption. Additionally, the BLF's funding teams conduct investigations either before passing them to A&I, after having received advice from A&I, or on matters that A&I would not investigate themselves.
30. The BLF considers the prejudice that may arise through confirming or denying whether the information is held is of substance. It explains that in many cases an organisation is not aware that the organisation has received concerns and are conducting an investigation. The BLF argues that if an organisation was aware that concerns were being investigated, it might alter its behaviour in a way that could affect the BLF's ability to investigate the concerns effectively.

31. The link between the action of confirming or denying and the harm cited lies in the significant risk that by publicly referencing even an unspecified concern an organisation could be alerted to the fact that an investigation is underway. The BLF has also argued that there is a further, and separate risk, which relates to the effect that providing information about concerns it had received may have on public confidence in the integrity of its processes. In many instances, a concern will be raised by a member of the public known to the organisation. Therefore, even if a release did not refer to the member of the public specifically, an organisation may still be able to identify that individual. This may therefore act as a deterrent with regard to the raising of concerns.
32. In order for a prejudice-based exemption, such as section 31(3), to be engaged the Commissioner considers that the following criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed – or if the authority was to confirm or deny whether information was held – has to relate to the applicable interests within the relevant exemption.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld – or the confirmation as to whether or not the requested information is held – and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, confirming or denying whether information is held 'would be likely' to result in prejudice or confirming or denying whether information is held 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, this places a stronger evidential burden on the public authority.

33. The Commissioner is satisfied that each stage of the prejudice test is satisfied in this case.
34. Under the reference FS50688200³, the Commissioner has recently considered a separate complaint made against the BLF, involving a request for details of concerns it had received or investigations it had undertaken in respect of an organisation, and the application of section 31(3). In that case, the Commissioner similarly accepted that the exemption was engaged based on similar arguments to those ones presented here.
35. With regard to the first stage of the test, the Commissioner found that the prejudice cited was relevant to the exemption. In relation to the second and third stages, the Commissioner said the following :

23. With regard to the second limb, the Commissioner notes that whilst the BLF does not have the power to enforce the law, she understands that it does share information about its investigations with the police and other agencies in order to prevent fraud and money laundering. The Commissioner is therefore satisfied that there is a direct connection between prejudice occurring to the BLF's investigative procedures and prejudice occurring to the prevention and/or detection of crime even if the enforcement of the law is ultimately undertaken by a different body. Furthermore, the Commissioner is satisfied that the resultant prejudice which is alleged is clearly one that is of substance.

24. With regards to the third limb, the Commissioner is persuaded that this is also met. She has reached this finding given that complying with section 1(1)(a) could undermine the BLF's investigatory procedures not just in one way but in a number of different ways [...]. In the Commissioner's view the potential for prejudice occurring in a number of different ways, rather than simply one way, increases the likelihood of the BLF's investigatory processes being undermined. Furthermore, the Commissioner believes that the ways in which the BLF considers its investigatory processes could be undermined if it confirmed whether or not it held the requested information are all logical and plausible. Moreover, the Commissioner is satisfied that the prejudice to the BLF's investigatory methods could have a direct impact on its ability to detect or prevent the fraudulent use of the funds it has allocated,

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172802/fs50688200.pdf>

and as a consequence undermine its ability to share information of such activities with the police or other law enforcement agencies.

25. The Commissioner appreciates that the approach taken by the BLF to adopt a NCND response to this request is in many ways a generic one; namely that regardless of the nature of request – and unless there are particular case specific circumstances – it would refuse to confirm or deny whether it had received a concern or was conducting an investigation into a particular grant recipient. In other words, as the BLF has argued, the prejudice which could arise from complying with this request is not limited to any impact on possible investigations regarding the MTCDDT, but risks undermining all of investigations the BLF may be conducting, or will conduct in the future.

36. The Commissioner considers that in essence the same arguments apply in the circumstances of the present case. The Commissioner has accordingly found that the exemption is engaged and gone on to consider the public interest test. In arriving at this position, it should be noted that in relation to the third stage of the prejudice test the BLF did not specifically confirm the level of likelihood – ie 'would' or 'would be likely' – that it was relying on. In the absence of such designation, the Commissioner will proceed on the basis that the lower threshold of prejudice, 'would be likely', applies. This designation has therefore been carried through into the analysis of the respective strength of the public interest arguments for and against disclosure.

The public interest test

37. The Commissioner recognises that there is a strong public interest in the BLF confirming whether it held any information falling within the scope of the request. As she acknowledged in the aforementioned case, at paragraph 30, this is because it could improve public confidence that it conducts appropriate investigations when concerns are raised and it would also assist public debate in relation to concerns potentially received against a specific organisation.
38. The BLF has concluded however that the strength of this argument ultimately suffers in comparison with the weight of the public interest in upholding the exemption. As set out above with regard to the consideration of the prejudice test, the BLF has demonstrated that the prejudice being claimed is of substance. The Commissioner equally shares the belief that there is a very significant public interest in ensuring that the prevention and detection of crime is not prejudiced. Again, as illustrated in FS50688200, the public interest will attract particular weight given that complying with section 1(1)(a) in response

to these requests risks have a much broader impact on the BLF's ability to conduct investigations.

39. On balance then, the Commissioner has concluded that the public interest in confirming or denying whether the requested information is held is outweighed by the public interest in upholding the application of section 31(3).

Section 40(2) – third party personal data

40. Section 40(2) provides an exemption to the public right to access recorded information where it is the personal data of a third party. The application of the exemption has two parts. Firstly, the information must constitute the personal data of a third party. Secondly, the disclosure of the personal data would contravene a data protection principle in the DPA. For the purposes of a disclosure under FOIA it is the first data protection principle that is likely to be relevant. This requires the fair and lawful processing of personal data.
41. Personal data is defined by section 1 of the DPA. This describes it as data which relate to a living individual, who can be identified from that data, or from that data and other information. In short, information will only be personal data where it 'relates to' a living individual, who can be identified from that data, or from that data and other information.
42. The BLF initially withheld a number of items of information requested by the complainant. At the invitation of the Commissioner, the BLF revisited the information and agreed that some of the previously redacted records could be disclosed. This decision therefore focuses on the remainder of the withheld information. This encompasses various data subjects and different categories of information.
43. When considering whether the first test is satisfied and the information therefore constitutes personal data, the Commissioner has been mindful that the process of identification involves more than the making of an educated guess that information is about someone. The possibility of making an educated guess in relation to the linking of information with an individual may present a privacy risk but not a data protection one because no personal data has been disclosed to the guesser. The fact therefore that there is a very slight hypothetical possibility someone might be able to reconstruct data in such a way that the data subject is identified is not sufficient for the information to be personal data; rather identification must be reasonably likely.
44. It is understood that it may be possible to link an individual to information, thus qualifying it as personal data, even if the information does not contain any obvious identifiers. This may occur where the

information is pieced together with other bits of information in order to facilitate data linkage. Accordingly, when considering whether requested information is personal data, a public authority must factor in what surrounding contextual information could reasonably be obtained by someone motivated to identify an individual. In certain circumstances it may also be advisable for a public authority to bear in mind the prior knowledge of an individual.

45. The remaining withheld records consist of the names of individuals, job titles, salary and fees information, or general information about individuals. In some cases the records contain direct identifiers which will mean that an individual could be easily connected to the information from those records alone. This is not the case for all the withheld information. Nevertheless, on balance, the Commissioner considers that even in the absence of a direct identifier, it is still possible to relate a record to an individual by piecing it together with other sources of accessible information. The Commissioner is therefore content that the withheld information comprises personal data.
46. The Commissioner has therefore gone on to consider whether the personal data should be placed in the public domain. This requires a decision on whether disclosure would be fair and lawful and therefore in accordance with the first data protection principle.
47. The starting point when assessing whether the release of personal data would satisfy the first data protection principle involves the consideration of whether it would be fair. To test whether it would be fair in the circumstances, the Commissioner will take into account the following competing interests –
 - A data subject's reasonable expectations of what would happen to their personal data.
 - The consequences of disclosure.
 - The balance between the rights and freedoms of the data subject and the legitimate interest of the public in disclosure.
48. For the release of personal data to be permitted, the Commissioner must also have regard to the sixth condition of schedule 2 of the DPA, as well as to the question of whether disclosure would be lawful.
49. The Commissioner considers that the original application of section 40(2) of FOIA was too broad, in that it covered information that either did not definitively identify an individual or, where it did identify an individual, would not be unfair and distressing to disclose. As stated however, the BLF has since revised its position and the Commissioner accepts that the exemption has now been applied correctly.

50. As referred to above, the Commissioner has had to consider the balance between the rights and freedoms of the data subjects with the legitimate interests in disclosure. In essence, this means that a public authority must determine whether there is a legitimate interest in the public or the requester having access to the information and then balance this against the rights of employees. In other words, balanced against the interest in disclosure must be a consideration of unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the individuals concerned.
51. In this case the Commissioner does not accept that there is a sufficient and necessary public need for the remaining information withheld under the exemption to be made available to the wider world. The Commissioner has therefore concluded that disclosure would be unfair for the purposes of the first data protection principle which, in turn, means section 40(2) of FOIA is engaged.

Section 40(5) – neither confirm nor deny whether personal data is held

52. The BLF considers that section 40(5)(b)(i) applies to those parts of the request that relate to the performance of individuals. Under section 40(5) of FOIA, a public authority is not obliged to confirm or deny that it holds information if giving the confirmation or denial to a member of the public authority would contravene any of the data protection principles, or section 10 of the DPA.
53. The Commissioner's guidance on the NCND provision in section 40⁴ explains that the subsection is about the consequences of confirming or denying whether the information is held, and not about the content of the information. It goes on to explain that there may be circumstances, for example requests for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that information can itself reveal something about the individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.

⁴ https://ico.org.uk/media/for-organisations/documents/1206/neither_confirm_nor_deny_in_relation_to_personal_data_and_regulation_foi_eir.pdf

54. The Commissioner has first considered whether the requested information would be the personal data of any person.
55. The BLF has not specifically stated how an individual could be linked to the act of confirming or denying whether performance data was held with respect to the various organisations mentioned in the request. From her own analysis, the Commissioner is also not persuaded that confirming or denying whether performance information was held would in itself tell the wider world anything about a particular individual.
56. In reaching this conclusion, the Commissioner has been sympathetic to the BLF's concerns about ensuring it is taking an appropriately precautionary approach to the safeguarding of personal data. The Commissioner has however had to consider the nature and scope of the requests when deciding whether section 40(5) of FOIA has been correctly applied.
57. For the Commissioner it is noticeable, and important, that the requests do not specify any individuals but only seek information that is held in relation to an organisation. The Commissioner acknowledges that this does not automatically rule out the legitimate application of section 40(5). As the Commissioner's Anonymisation Code of Practice⁵ identifies, the identifiability test in FOIA '*can be particularly difficult to apply in practice because different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place*' (page 19). In a particularly localised context, for example, it may still be possible for a third party to deduce correctly that performance information held by an authority referred to a given individual even though the request did not mention that person by name.
58. The Commissioner does not consider that this example would extend to the present case however. Crucially, the complainant's requests are relatively broad in that they refer to any performance or complaint information held in connection with an organisation. The length of time to which the requests relate is also not insignificant. The Commissioner has therefore concluded that by simply confirming or denying whether the information was held would not permit a third party to infer anything about an individual at any of the organisations listed in the requests.
59. The effect of this is that the Commissioner has found that the initial test relating to the application of section 40(5) – which requires that the act

⁵ <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

of confirming or denying whether information was held would represent a disclosure of personal data – is not met. She has therefore not had to go on to consider whether confirming or denying whether the requested information is held would breach a data protection principle.

Section 41(2) – neither confirm nor deny whether information provided in confidence is held

60. The BLF has applied section 41(2) to that element of the requests which asks for details of any funding applications received during the period in question. The BLF introduced its reasoning for applying the provision with the following explanation:

We have chosen to neither confirm nor deny whether information about new applications or unsuccessful applications is held on the basis that this allows us to apply a consistent stance for any future applications where public funds have not been distributed. For example, if we confirmed in response to a request that we did not hold any new applications, and a future request asked for the same information (but covering a different time period), and we confirmed that we did hold details of an application, with the information that is published about successful applications the requester might reasonably infer that those applications were unsuccessful.

61. Section 41 of FOIA states:

(1) Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

62. To reach a decision on whether section 41(2) applies, the Commissioner will first determine whether the requested information – if held – would have been obtained from a third party as described in section 41(1)(a). Should that be the case, the Commissioner will then go on to consider if the confirmation or denial of whether the information is held would constitute an actionable breach of confidence as described in section 41(1)(b).

63. Section 41(2) is an absolute exemption so the Commissioner does not have to consider the balance of the public interest when deciding whether the neither confirm nor deny mechanism has been correctly applied. The common law duty of confidence does however have a public interest test built into it. The Commissioner has therefore also given consideration to this test when determining whether the BLF was correct to rely on section 41(2).
64. As stated, the Commissioner must initially establish whether the request seeks information that would have been provided to the BLF by a third party. In this case, any funding application provided to the BLF would by its very nature come from an external body. The Commissioner is therefore satisfied that this requirement is met and has gone on to consider whether confirmation or denial would represent an actionable breach of confidence.
65. The test of confidence was established in the High Court case of *Coco v AN Clark (Engineers) Limited [1968] FSR 415* ('Coco vs Clarke'). For the Commissioner to find that the act of confirming or denying that the requested information is held would, of itself, constitute a breach of confidence, it must be shown that:
 - the requested information would have the necessary quality of confidence,
 - if it had been imparted, the requested information would have been imparted in circumstances importing an obligation of confidence, and
 - unauthorised use of the information, if held, would be of detriment to the confider.
66. The Commissioner addresses each of these tests in turn.
67. Information will have the quality of confidence if it is more than trivial and not otherwise accessible. The information does not have to be particularly sensitive, but it must be more than trivial.
68. The funding application is a key component of the process for an organisation seeking to secure money for a project. The BLF explains that applications contain detailed information about the proposed project and how the applicant will run that project. The BLF considers, and the Commissioner accepts, that the information is clearly more than trivial. Further, at the date the request was made, the information was not accessible other than through disclosure under FOIA. The Commissioner is therefore satisfied that the information, if held, has the necessary quality of confidence.

69. The Commissioner must therefore next consider whether, if it had been imparted, the requested information would have been imparted in circumstances importing an obligation of confidence.
70. The BLF has explained that it is not its usual practice to release details of applications that are still in the assessment process or those that were unsuccessful. Although not expressly stated within the application form or application guidance, the BLF considers that applicant project details are provided in confidence. The BLF has clarified that should an organisation receive a grant then the BLF will publish details of the award made. It is therefore implicit in the circumstances, according to the BLF, that applicants would not expect details of whether an application had been provided to be placed into the public domain before a decision had been taken.
71. The Commissioner recognises that there are circumstances in which there is an implicit – ie not specifically set out – obligation of confidence. In the context in which applications are made, the Commissioner's view is the requested information would, if held, have been imparted with an obligation of confidence.
72. The third stage of the test of confidence requires that the unauthorised use of the information, if held, would be of detriment to the confider. It therefore follows that, for commercial information specifically, the authority will be expected to put forward an explicit case for detriment.
73. With respect to this particular test, the BLF has argued the following:

For organisations that are in assessment to have received an unsuccessful notification it may be of harm for us to place in to the public domain information about their application. The arguments for this relate to the possible perceptions against the applicant. The Big Lottery Fund is one of the largest grant makers in the UK. If it has become known that an applicant was unsuccessful with their application then this may harm their ability to obtain funds from other sources. Another funder may infer from our decision that we had identified something that was unsatisfactory and this may therefore affect their decision. Additionally the public perception of the applicant may be affected if they do not receive a grant.
74. The Commissioner considers that the BLF has clearly and cogently demonstrated why confirming or denying whether the requested information was held would be detrimental. The Commissioner is therefore satisfied that the three steps identified in *Coco vs Clarke* have been satisfied, and to provide confirmation of whether or not information is held would represent an actionable breach of confidence.

Accordingly, she must now consider the inherent public interest test within the common law duty of confidence.

75. The Commissioner's guidance⁶ explains that, in respect of commercial impact, this is most likely to carry weight in terms of the public interest if the breach of confidence would damage the confider's competitive position or ability to compete.
76. The BLF is of the view that the public interest lies with how public funds are spent, ie when an application is successful and has received a grant. If an organisation is unsuccessful then they will not have received funds, which the BLF argues would appreciably diminish the public interest in knowing whether an application from an organisation had been received.
77. The Commissioner has found this line of argument persuasive. In her view, the public interest in disclosure is significantly outweighed by the public interest in ensuring that organisations are not disadvantaged simply by virtue of entering the funding application process. As the BLF has identified, the importance of transparency and accountability will be greater where an organisation has actually received funding in response to an application. For this reason, the Commissioner has decided that the BLF correctly relied on section 41(2) of the FOIA.

⁶ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

Right of appeal

78. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

79. 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.
80. 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

Alun Johnson
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex – information requests

I would like to request a continuation release under Freedom of Information/EIR based on my original email dated 27 July 2014. I would like to request the same information, this time dated from the last release date previously determined by Big Lottery until the present.

The request made in July 2014, referred to above, asked for the following:

1. Meetings

- All information confirming whether any meetings were held between officers or personnel of, see list attached and with officers or personnel, employed or otherwise, of BLF or which contains reference to, see list attached; including the date and purpose of each meeting and any information contained within minutes and/or notes taken in relation to such meetings.

2. Performance of, see attached list

- All information contained within documents or records regarding the performance or activities of, see list attached.
- All information contained within documents or records regarding communication with officers or personnel of BLF relating to activities of, see list attached.

3. Complaints against, see list attached

- All information contained within documents or records regarding complaints made by third parties about organisations and individuals in the attached list.
- All information contained within documents or records regarding response to complaints referred to above.

4. Contact with BLF by, see attached list

- All information contained within documents or records regarding communications between BLF and the attached list.
- All information contained within complaints made to BLF regarding the attached list.

5. Funding applications, monitoring, objectives

- All information contained within documents or records regarding applications for funding from the attached list, including copies of

such applications and all correspondence relating to such funding.

- All information contained within documents or records setting out or considering the objectives or scope of the organisations/individuals contained within the attached list and their activity regarding BLF.
- All information contained within documents or records regarding monitoring or reporting of spending by, see attached list of organisations/individuals regards funds granted by BLF.

Relating to:

- Sustaining Dunbar
- Dunbar Community Energy Company
- Dunbar Community Kitchen
- The Ridge Scotland CIC
- Dunbar Community Bakery
- Spare Wheels
- Dunbar Cycling Group

In addition I would like to request the following regarding the Ridge Scotland CIC, including the Directors' previous form, Dunbar Community Kitchen, and their present Ridge Café:

- *any new applications*
- *notification of funding in addition to Big Lottery*
- *monitoring reports*
- *correspondence*
- *recruitment procedures*
- *breakdown of budget spend and proposed*
- *revisions to original plans regarding the Ridge's Coastal communities Fund grant*
- *personnel changes*
- *planning applications*