

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 02 August 2019

**Public Authority:** The English Heritage Trust  
**Address:** The Engine House  
Fire Fly Avenue  
Swindon, SN2 2EH

#### Decision (including any steps ordered)

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1. The complainant made a request to the English Heritage Trust (the Trust) for information about filming at English Heritage properties for the television series 'The Crown'. The Trust refused the request under the section 43(2) (commercial interests) exemption.
2. The Commissioner's decision is that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

#### Request and response

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3. On 24 January 2019 the complainant requested the following items of information about filming at English Heritage properties:

*'Please note that I am only interested in information which relates to the period January 1 2018 to the present day. My requests concern the television drama The Crown which launched in 2016 and which is now filming its third series. Please note that the reference to the producers of The Crown should be taken to mean the companies Left Bank Pictures and Netflix [sic], their representatives and or anyone else known to be scouting for and securing locations on behalf of The Crown.'*

*Please redact any confidential financial information from the documents provided.*

1. *At any stage during the aforementioned period were the producers of The Crown given permission to film on a property and or a site and or a location owned and or managed by English Heritage.*
  2. *If the answer to question one is yes can you please provide the following details. Can you please identify the relevant site(s), location(s) and property(ies). In the case of each site, location and property can you specify when filming took place. Can you also state the duration of filming. Can you state whether the relevant site, location or property was filmed as itself or whether it was standing in for another location or property. In each case can you please identify the property or location it was standing in for.*
  3. *In the case of each site, property or location used by the makers of The Crown can you please provide copies of the original requests to film (including emails) which were received from the producers of The Crown.*
  4. *Did English Heritage and or anyone acting on its behalf for whatever reason take photographs of the filming taking place at any of its sites and or locations and or properties. If so can you please provide copies of these photographs.*
  5. *During the aforementioned period did English Heritage refuse the producers of The Crown permission to film at any of its sites and or properties and or locations.*
  6. *If the answer to question five is yes can you please provide the following details. In the case of each of these requests can you please provide copies of the written requests (including emails) received from the producers. Can you also provide copies of the replies sent by English Heritage.'*
4. On 1 March 2019 the Trust refused to provide the requested information citing section 43, commercial interests.
  5. The complainant requested an internal review on 5 March 2019. The Trust sent him the outcome of its internal review on 3 April upholding the decision.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 4 April 2019 to complain about the way his request for information had been handled.
7. The Commissioner has focussed her investigation on whether the Trust correctly applied the exemption under section 43(2) of the FOIA.

## Reasons for decision

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### Section 43(2) - Commercial interests

8. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.
9. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.
10. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
  - Firstly, the actual harm which the Trust alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
  - Secondly, the Trust must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.

#### *Commercial interests*

11. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her awareness guidance on the application of Section 43. (<https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>). This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*
12. The Trust has explained that it operates in an extremely competitive environment and disclosure would affect the economic interests of the

English Heritage Trust. It is losing its grant in aid funding and needs to generate its own income and become financially independent by 2022/23.

13. The Trust explained to the complainant that it is *'not just a matter of removing the figures and then releasing all the documents requested. On the contrary it concerns wider commercial relationships and interests and whether they would be prejudiced by the release of the information as a whole. EH do have a clear commercial interest at stake here as this revenue stream is important to its business plan and its ongoing aspiration to reduce dependence on government subsidy'*.
14. The Commissioner is satisfied that the actual harm alleged by the Trust relates to its commercial interests. Accordingly, she is satisfied that the first criterion is met.

#### *Causal link*

15. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some *causal* link between the potential disclosure and the prejudice.
16. The Trust has provided the Commissioner with details of the way in which it believes its commercial activities would be affected by disclosure of the requested information.
17. During the Commissioner's investigation, the Trust again contacted its Head of Hospitality, Events and Filming and English Heritage's Filming Manager to ask whether any information can now be released given the time that has passed. The Trust stated that disclosure *'would be hugely detrimental to the commercial interests of the Trust'*.
18. The Trust explained that the production of Season 3 of the Crown has not yet reached the screens, *'and so to divulge any information, or lack of information for that matter, could give an insight into the plans of the production company itself.'* The Trust also stated that the producers of 'the Crown' Netflix series have indicated that they are looking to make further seasons of programming, making this a long running series.
19. The Trust also explained that *'story lines, cast, locations and designs are all part of the intellectual property of the production, and any information released could be used by other third parties to block a production, raise its costs or encourage a copy cat production.'*
20. Given the value of confidentiality to the Trust's clients across the close knit filming industry, disclosure under FOIA, even answering the *'everyday business questions'* in the request would be *'catastrophic'*.

21. The Trust also stated that its fees are commercially sensitive but '*releasing any information about this process even without giving any financial details would not alleviate the commercial disadvantage to the Trust.*'
22. As part of its submissions, the Trust advised the Commissioner of the considerable monetary value that filming contracts have brought to the Trust since it became a charitable trust in 2015.
23. The Commissioner understands that timing is very important in this case especially at the early stages of filming a new television series. Even though it may become apparent that certain scenes were filmed at certain locations (and the organisation may become famous for the location e.g. Lyme Park as the fictional Pemberley) at the time of choosing, planning and preparing to film on a location, complete confidentiality is considered vital by the producing companies. Breaking this confidentiality would risk breaking the close relationship and trust that the Trust has with the location managers and hence the production companies.
24. Therefore, the Commissioner accepts that even to answer 'yes or no' to parts of the FOIA request would divulge information to competitors about the plans for the production (in this case series 3 of the Crown) before it has been screened and prejudice the Trust's commercial interests.
25. The Commissioner is satisfied that the Trust has provided reasonable arguments to suggest that there is a causal link between the requested information and its commercial interests.

#### *Likelihood of prejudice*

26. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] the Tribunal said:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."(paragraph 33)
27. In this case, the Trust has confirmed that it is now relying on the higher threshold to engage the exemption. The Trust has argued that disclosure would prejudice its commercial interests. The Commissioner's view is that this places an evidential burden on the public authority to show that the risk of prejudice is more probable than not to occur (ie a more than a 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).

28. The Trust stated that disclosure *'would damage not only English Heritage's relationship with the filming company in question with regard to this request and any future work they may wish to seek with us, but that relationships with any other filming companies that may wish to seek to approach English Heritage in the future would also be compromised if they thought that confidential correspondence and information could be released under Access to Information legislation in an untimely manner [sic] or at all, most crucially before and during the release of a new television series.'*
29. The Trust explained that there is a small group of location managers based in the UK that work on the top feature and television productions across the globe: *'These freelance individuals work across multiple productions, studio funders and countries within the course of a year.'*
30. The Trust pointed out that knowledge of the disclosure of information on one production would quickly spread and would seriously prejudice its ability to compete for hires within its property estate, as confidentiality is absolutely vital to the filming industry. *'Therefore, the release of information on just one production, especially one as high profile, lucrative and popular as 'The Crown' television series which can arguably be described as a 'top feature television production', would be known throughout the Trust's entire current and potential customer base extremely quickly.'*
31. The Trust concluded that in the close knit filming industry, disclosure would be *'catastrophic for English Heritage's business and ability to generate revenue in this way.'*
32. The Commissioner has seen the withheld information and she is satisfied that it would be of use to a competitor by providing valuable insight into the relationship between, and practical details discussed by, the Trust and the location managers. She accepts that disclosure of this type of information in such a close knit filming community that relies on confidentiality would upset the Trust's ability to gain further revenue and become financially self-sufficient.
33. The Commissioner is satisfied that the Trust has demonstrated sufficient support for the higher level of prejudice - to show that the risk of prejudice is more probable than not to occur (ie a more than a 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so).
34. This is not in itself a reason not to disclose the information under FOIA. However, it does indicate the importance that the Trust attaches to this information and the prejudice that would be caused if it was disclosed.

35. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and therefore has now gone on to consider the public interest test.

### **Public interest test**

36. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

### **Public interest arguments in favour of disclosure**

37. The complainant stated that *'the public has a right to know how the organisation is caring for the properties and assets in its care and what it is doing - if anything - to maximise revenues'*.
38. The Trust considered that the factors in favour of disclosure included transparency and accountability for the spending of public money.

### **Public interest arguments in favour of maintaining the exemption**

39. As regards the public interest in maintaining the exemption the Trust said that there was a public interest in ensuring that
- it is able to negotiate and compete in a commercial environment, and
  - it is able to generate income to replace the reducing grant in aid funding to continue to conserve and safeguard its collection of unique monuments and sites.

### **Balance of the public interest arguments**

40. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
41. However, the Commissioner's view is that in this case there is a stronger public interest in protecting the commercial interests of the Trust and ensuring that it is able to compete fairly in the lucrative filming industry.
42. The Commissioner understands that release of the information into the public domain would undermine the Trust's competitive advantage and impact on current and potential revenue.

43. Therefore, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

## Right of appeal

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44. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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