

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 April 2025

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

Decision (including any steps ordered)

1. The complainant has requested, from the British Film Institute (BFI), information about particular funding applications. BFI issued a revised response to the complainant, during the Commissioner's investigation, in which BFI disclosed further information. However, BFI continues to withhold other information, on the basis of sections 40(2) and 43(2) of FOIA (the personal information and commercial interests exemptions).
2. The Commissioner's decision is that BFI is correct to withhold personal data under section 40(2), but has failed to demonstrate that section 43(2) is engaged for the information that BFI is withholding under that exemption.
3. The Commissioner therefore requires BFI to take the following step¹, to ensure compliance with the legislation.
 - Disclose the information that BFI is withholding under section 43(2) of FOIA (subject to any appropriate redactions for personal data).

¹ The Commissioner expects BFI to take appropriate precautions to protect any personal data when disclosing information in a spreadsheet or similar format.

4. BFI must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 13 July 2024, the complainant wrote to BFI and requested information in the following terms:

"... I am looking for documents and internal correspondence relating to the application and funding of the following productions:

- TIME AWAY - Funded by the BFI Film Fund
- INCOMPATIBLE - Funded by BFI Film Hub North

I should add this should also include correspondence and documents before the applications were made by the filmmaking team ...".

6. BFI responded on 9 August 2024. Regarding TIME AWAY, BFI said it has no record of any such project receiving BFI funding. Regarding INCOMPATIBLE, BFI disclosed information, but withheld other information, on the basis of sections 40(2), 41(1) (information provided in confidence) and 43(2) of FOIA. BFI appeared to be applying more than one exemption to the withheld information, in certain places. BFI also directed the complainant to its website, for details of final awards for the projects in question; and said it doesn't hold any information relating to "correspondence and documents before the applications were made ...".
7. Following an internal review, BFI wrote to the complainant on 9 September 2024. It maintained its original position regarding INCOMPATIBLE and sections 40(2), 41(1) and 43(2); and provided a link to its website again, for information about final awards. In addition, based on further details provided by the complainant about TIME AWAY, in the internal review request, BFI confirmed the following (but disclosed no related information):

"... we have made awards to a feature film project CARAVAN ... the first award ... included support for a pilot/proof of concept which was

entitled TIME AWAY as part of the development award for the feature project development, i.e. it was part of the application for development funding for the feature CARAVAN ...”.

Scope of the case

8. The complainant contacted the Commissioner on 30 September 2024 to complain about the way their request for information had been handled.
9. They were concerned that BFI had disclosed only some of the requested information, and said BFI was “refusing to release relevant documents”.
10. They said BFI had confirmed funding TIME AWAY but hadn’t disclosed any of the application information they had originally requested for TIME AWAY.
11. The Commissioner wrote to BFI for submissions, and a copy of the withheld information.
12. BFI then sent a revised response to the complainant, attaching three redacted documents – two regarding INCOMPATIBLE, and one regarding TIME AWAY.
13. It’s clear from the two INCOMPATIBLE documents that BFI has now disclosed much of the information that BFI originally withheld. The Commissioner, in line with his standard approach in such circumstances, therefore excludes the disclosed information from the scope of this case.
14. In the revised response, and on the redacted documents attached to it, BFI has stated that the TIME AWAY redactions fall under section 40(2), and that the remaining INCOMPATIBLE redactions fall under sections 40(2) and 43(2). BFI also commented on the Lottery Finance Committee document originally disclosed, with redactions: BFI explained that information beyond the scope of the request had been redacted from that document (ie information about unrelated applications discussed at the same Lottery Finance Committee meeting), and that other redactions in that document fall under sections 40(2) and 43(2).
15. BFI hasn’t referred to section 41 in its revised response. The Commissioner’s understanding is that BFI is no longer relying on that exemption.

16. Having compared BFI's original and revised disclosures, the Commissioner then asked BFI about some attachment titles and file names redacted from an application form that BFI originally disclosed, but missing entirely from the version that BFI disclosed with its revised response.
17. BFI replied that the omission of the attachment redactions from the revised response was an oversight. The Commissioner's understanding of BFI's comments on the attachments is that BFI is withholding two of the attachments, their titles and file names under section 40(2); and the other three attachments, their titles and file names under section 43(2).
18. The Commissioner considers that the scope of this case is to decide whether BFI is correct to rely on sections 40(2) and 43(2) to refuse to disclose the information that BFI is withholding under those exemptions.

Reasons for decision

Section 40(2)

19. Section 40(2) of FOIA provides that information is exempt from disclosure if it's the personal data of an individual other than the requester and disclosure would contravene any of the data protection principles that are set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).
20. The most relevant principle is Article 5(1)(a), which states that "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
21. The Commissioner has first considered whether the information BFI is withholding under section 40(2) can be categorised as other people's personal data.
22. Personal data is information that relates to an identifiable individual.
23. The information BFI is withholding under section 40(2) comprises names, address and other contact details, information about conflict of interest, details provided for equality and diversity purposes and other information that relates to identifiable individuals. The Commissioner is satisfied that the information in question constitutes personal data.

24. The Commissioner has gone on to consider whether disclosing that information would breach Article 5(1)(a) of the UK GDPR which, as noted above, states that personal data must be processed lawfully.
25. Personal data is processed when it's disclosed in response to a FOIA request. For disclosure to be lawful under Article 5(1)(a), the lawful basis under Article 6(1)(f) of the UK GDPR must apply to the processing; it must also be generally lawful.
26. Article 6(1)(f) states:

"Processing shall be lawful only if and to the extent that ... 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 ...".
27. In order to determine whether disclosing the personal data would be lawful, the Commissioner has considered three relevant 'tests': the legitimate interest test, the necessity test, and the balancing test.
28. At this point, the Commissioner considers that it's worth highlighting a recent decision notice he published in IC-323217-T5Z9², a case relating to a very similar, earlier request of the complainant's (albeit focusing on different productions).
29. In the present case, the complainant hasn't stated any particular interests they have, relevant to the request. However in IC-323217-T5Z9, as the decision notice for that case explains, the complainant expressed an interest in BFI's funding of certain projects, specifically whether BFI advised those projects that they'd be funded before the applications were made; the complainant considered that BFI carries out a 'pre-approval' process (paragraphs 15 and 30 of that decision notice).
30. It seems likely (eg given the similarities between the two requests, and the fact that they were made only two months apart) that the complainant had the same interest or concern, in making their request of 13 July 2024. The Commissioner accepts that it's a valid interest for

² <https://ico.org.uk/media2/migrated/decision-notice/4032417/ic-323217-t5z9.pdf>

the complainant to have; he also accepts that there's a wider, general public interest in BFI demonstrating transparency about the projects it funds (as he did in IC-323217-T5Z9 - see paragraph 30 of that decision notice).

31. The Commissioner has next considered whether disclosing the information would be necessary to meet the above legitimate interests.
32. 'Necessary' means more than desirable, but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves considering alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must be the least intrusive means of achieving the legitimate aim in question.
33. The Commissioner directs readers to paragraphs 33-36 of his decision notice in IC-323217-T5Z9. He reaches the same conclusions in the present case, for the same reasons. The general interest in transparency has already been met, through the information that BFI has already disclosed; and in this case (as in IC-323217-T5Z9), disclosing the personal data in question wouldn't shed any light on funding for the specified projects being 'pre-approved'. Furthermore, he emphasises that in IC-323217-T5Z9, BFI said it doesn't pre-approve funding applications (see paragraphs 15-16 of the decision notice in IC-323217-T5Z9).
34. The Commissioner therefore finds that disclosure isn't necessary, so he hasn't conducted the balancing test. As disclosure isn't necessary, there's no lawful basis for disclosure. Consequently BFI is correct to withhold the personal data in question under section 40(2) of FOIA.

Section 43(2)

35. Section 43(2) of FOIA provides that information is exempt if its disclosure would, or would be likely to, prejudice (harm) the commercial interests of any person, including the public authority holding it.
36. Based on BFI's brief comments in its submissions to him, the Commissioner's understanding is that the commercial interests that disclosure would or would be likely to prejudice, in BFI's view, are those of third parties – the funding applicants.

37. However, the level of likelihood that BFI is claiming ('would' or 'would be likely to' prejudice) isn't clear to the Commissioner.
38. BFI told the complainant that the information being withheld under section 43(2) is financial information, and that it's commercially sensitive. BFI has also indicated briefly to the Commissioner that some of the information constitutes the intellectual property of the applicant.
39. BFI hasn't said anything detailed to the complainant or Commissioner about the harm that BFI envisages if the information were disclosed, although BFI briefly expressed a concern about disclosure resulting in a risk that others may use the information for their own benefit.
40. In the absence of further explanation, the Commissioner is unable to accept that the envisaged harm relates to the type of interests that the exemption is designed to protect.
41. Furthermore, he considers that BFI hasn't demonstrated a causal link between disclosure of the information and the envisaged harm.
42. In addition, although BFI has indicated that the commercial interests in question are those of third parties, BFI doesn't seem to have consulted the third parties; nor has BFI demonstrated that its arguments are based on BFI's prior knowledge of the third parties' concerns, or provided evidence that they genuinely reflect the third parties' concerns.
43. In his original investigation letter to BFI, the Commissioner directed BFI to his 'Key Questions for Public Authorities'³ and asked BFI to consider and address the relevant ones, for each exemption BFI was relying on.
44. The letter also quoted part of his guidance on commercial interests of third parties (the quote was taken from his key questions about section 43); and asked BFI to clarify on what basis it had established that prejudice to a third party's commercial interests may occur, and to provide copies of any correspondence with the third parties in relation to the request.

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-foi-act-2000/>

45. BFI didn't do so; and the Commissioner emphasises that his investigation letter did say that if BFI failed to explain its position adequately, he'd be more likely to uphold a complaint against BFI.
46. As BFI has failed to demonstrate that section 43(2) is engaged, the Commissioner is unable to find that disclosure would, or would be likely to, prejudice commercial interests.

Right of appeal

47. 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

48. 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.
49. 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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