

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2014

Public Authority: Arts Council England

Address: The Hive
49 Lever Street
Manchester
M1 1FN

Decision (including any steps ordered)

1. The complainant has requested ACE to disclose information relating to the export of the City of Adelaide. ACE responded releasing some information but refusing to disclose other information under sections 40 and 36 of the FOIA.
2. During the Commissioner's investigation the majority of the withheld information was released to the complainant. Only three emails remained and ACE confirmed that it now wished to rely on section 31(a) for two of the emails and section 41 of the FOIA for one email. ACE's subsequent disclosure also meant that the complainant was willing to withdraw her complaint in relation to section 40 of the FOIA.
3. The Commissioner has considered the three remaining emails and the application of sections 31(a) and 41 of the FOIA. The Commissioner has decided that section 31(a) of the FOIA applies to the two emails withheld under this exemption. However, the Commissioner has decided that section 41 does not apply to the remaining email.
4. The Commissioner therefore requires ACE to take the following steps to ensure compliance with the legislation.
 - ACE should disclose the email previously withheld under section 41 of the FOIA to the complainant.
5. ACE must take these steps 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

6. On 30 October 2013, the complainant wrote to ACE and requested information in the following terms:

"1. Any and all advice ACE (or its predecessor body) was either asked for or was given between 28th August 2010 and 18 October 2013, internally or by any third parties, which mention or discuss the status of the *City of Adelaide* being;

a: an archaeological artefact;

b: a Class A Listed Building [Scotland] or

c: being a historical and cultural object which required her export to be considered under the Waverley criteria.

2. A copy of any material, in any medium held by ACE (or its predecessor bodies) which discusses the export of the Clipper Ship *City of Adelaide* including any correspondence between ACE (or its predecessor bodies) and the Scottish Maritime Museum Arts Council England and DCMS, ACE and Clipper Ship City of Adelaide Ltd, ACE and National Historic Ships UK and ACE and the Foreign and Commonwealth Office between 28 August 2010 and 18 October 2013."

7. ACE responded on 27 November 2013. It released some information to the complainant but redacted other information under sections 40(2), 36(2)(b)(i) and (ii) and 36(c) of the FOIA.
8. The complainant requested an internal review on 18 December 2013.
9. ACE carried out an internal review and wrote to the complainant again on 14 January 2014. It confirmed that it remained of the view that the withheld information was exempt from disclosure under sections 40(2), 36(b)(i) and (ii) and 36(c) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 4 February 2014 to complain about the way her request for information had been handled by ACE. Specifically, the complainant felt the exemptions cited did not apply and the outstanding information should be disclosed to the public.
11. During the Commissioner's investigation the majority of the withheld information was released to the complainant. This notice will therefore focus on the remaining withheld information, which is as follows:

- a) Email dated 21 October at 17:57.
 - b) Email dated 25 September 2013 at 15:51.
 - c) Email dated 22 October 2013 at 10:34 - in part.
12. ACE also withdrew its application of section 36(b)(i) and (ii) and 36(c) and stated that it now wished to rely on sections 31(a) and 41 of the FOIA. This notice will now consider the application of sections 31(a) and 41 to the remaining withheld information listed in paragraph 10.
13. As ACE disclosed the job titles and source of each communication to the complainant during the Commissioner's investigation, the complainant decided to withdraw her complaint about section 40(2) of the FOIA.

Reasons for decision

Section 31 of the FOIA

14. Section 31(a) of FOIA states that information is exempt if its disclosure would or would be likely to prejudice the prevention or detection of crime. ACE confirmed that this exemption has been applied to items (b) and (c) of paragraph 10 above and these items are emails it received from the Home Office's UK Border Force.
15. ACE explained that it does not have a law enforcement function itself. However, the Home Office's UK Border Force does and it is in the public interest to ensure the efficient and effective operation of controls operated by it, as they are intended to govern the import and export of goods from the UK and the apprehension and prosecution of offenders.
16. ACE confirmed that disclosure of this information would be likely to provide members of the public with an insight into targeting and checks, which could then result in people (including criminals) changing their behaviour to avoid detection or checks. This could then reduce or impact on the apprehension and prosecution of offenders.
17. ACE advised that it is likely that the information contained in items (b) and (c), in conjunction with other information that may be available about border targeting and checking procedures, could harm the Home Office's attempts to detect criminal activity at borders and the subsequent apprehension and prosecution of offenders.
18. ACE stated that the Home Office has informed it that disclosure of this information might enable those intent on wrongdoing to deduce the level of border protection on goods and that this might enable them to

subvert the operational effectiveness of border and other controls thereby putting law enforcement at risk. Although the emails contain only a small element of the border controls for the export of goods, disclosure of this information would give a clear insight and allow individuals to build a picture of border checks when dealing with export of cultural goods.

19. The Commissioner has reviewed these two emails. He accepts that the contents of these two communications discuss some of the border controls that are in place for the export of goods, albeit briefly. He notes that the emails discuss issues of detection, tariffs and items that may or may not be flagged to customs. He therefore accepts that disclosure of this information could be potentially used in conjunction with other information that may be available by those wishing to circumvent border controls and check. Such implications would be likely to prejudice the Home Office's ability to operation effective and efficient border controls and ultimately to prevention and detection of crime.
20. The Commissioner is unable to provide more precise arguments here, as to do so may reveal some of the withheld information itself or provide information which could be used by an individual wishing to avoid certain checks and detection.
21. However, the Commissioner is satisfied that disclosure would be likely to prejudice the prevention and detection of crime and that section 31(1)(a) is engaged in this case. The Commissioner will now go on to consider the public interest test.
22. ACE advised that it accepts there is a public interest in openness and transparency around the export licensing and custom controls relating to the export of cultural objects and that disclosure would ultimately increase public confidence and promote reassurance that attention was being focussed in this area. It is also aware of the complainant's specific issues with regards to the export of the City of Adelaide and her belief that serious maladministration has occurred, which resulted in the export of an item which was of national cultural importance.
23. However, ACE stated that there are stronger public interest arguments in favour of maintaining this exemption. It argued that disclosure would be likely to undermine and prejudice law enforcement methods for detecting crime and subsequently the apprehension and prosecution of offenders. ACE also confirmed that maintaining safe borders is integral to protecting the UK against criminals and that disclosure would be likely to cause prejudice and this is not in the public interest. Disclosure would potentially undermine checks and targeting used by the UK Border Force around the export of cultural objects.

24. ACE explained that if the same information was requested for different aspects of border checks and targets it would allow a picture to be built of the number of checks taking place. Individuals wishing to circumvent the checks could then use the information to make an assumption on how targeted checks are taking place in order to avoid detection. It would provide a wider picture to potential offenders, especially as the withheld information here discusses what would attract the UK Border Force's attention and what would potentially not be picked up by officials.
25. The Commissioner has considered the arguments for and against disclosure. He accepts that there is a public interest in transparency and accountability and in information being made available relating to custom controls and export licensing to enable members of the public to understand more fully how such issues are managed. He also understands that the complainant has specific issues with how the City of Adelaide was exported and believes the rules and regulations that govern such exports were manipulated in such a way to enable this item to be exported. The complainant is of the view that the City of Adelaide should not have been exported and therefore serious maladministration has occurred. She is seeking access to information held by ACE in relation to its export for these reasons.
26. However, the Commissioner notes that ACE has now disclosed all recorded information it holds which falls within the scope of this request with the exception of the limited information contained in the three remaining emails. The contents of the two emails in question here relate more to specific border controls that are in place generally rather than to the City of Adelaide and how this item was exported.
27. The Commissioner accepts ACE's view that even the limited amount of information contained in these emails could potentially be used by those wishing to avoid the detection of UK Border Force officials. He accepts this that information could be used in conjunction with other information available to circumvent the border checks carried out. The Commissioner considers the public interest in understanding more clearly why the City of Adelaide was exported in the way it was has to a great extent been met now by ACE's revised position to disclose the majority of recorded information it holds. The Commissioner considers the public interest in maintaining the efficiency of the UK Border Force controls and the potential prevention of further crime by those wishing to avoid border control detection carries greater weight in this case.
28. The Commissioner has therefore concluded that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exemption.

Section 41 of the FOIA

29. Section 41 of the FOIA has been applied to item (a) of paragraph 10 above.
30. Section 41 of FOIA states that information is exempt from disclosure 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.

Was the information obtained by ACE from any other person?

31. ACE confirmed that this email is information supplied to it by HMRC. The Commissioner has reviewed the information and he is satisfied that it is information supplied to ACE by another party (HMRC) and so this element of this exemption is met.
32. The Commissioner now needs to consider whether disclosure of this email would constitute an actionable breach of confidence.

Would disclosure constitute an actionable breach of confidence?

33. The Commissioner considers the relevant consideration here is whether the requested information has the necessary quality of confidence, was imparted in circumstances that gave rise to a duty of confidence and whether disclosure would cause any detriment to the confider – HMRC in this case.
34. For the information to have the necessary quality of confidence it must not be trivial and otherwise available to the public. Information which is of a trivial nature or is already available to the public cannot be regarded as having the necessary quality of confidence.
35. The Commissioner notes from the submissions he has received from ACE that it does not regard this information as trivial or otherwise in the public domain. ACE has consulted with HMRC in depth about the potential disclosure of this information and HMRC has stated that it considers this information was supplied to ACE under a duty of confidence.
36. The Commissioner has reviewed the contents of this email. While he may accept that the withheld information is not of a trivial nature and is not otherwise available to public, he remains unconvinced why a duty of

confidence was still owed to HMRC at the time of the complainant's request.

37. ACE has explained the general duty of confidence that is owed to third parties that supply it with information and has outlined generally why a duty of confidence would be owed to HMRC as a result of the tax duties it is responsible for. However, the Commissioner remains unconvinced from the submissions he has received that HMRC and ACE have fully considered the actual contents of the email in question here, the circumstances at the time of the complainant's request and the very fact that the City of Adelaide had already been exported. Given the very fact that the City of Adelaide had already been exported at the time of the request and therefore a final decision had been made, the Commissioner cannot see from the submissions he has received why the contents of this email would still need to remain confidential. The Commissioner has asked ACE several times to explain in more detail why and although it has submitted further arguments, the Commissioner remains unconvinced from these that the actual contents of this email still had the necessary quality of confidence at the time of the request.
38. The Commissioner asked ACE to confirm whether the requested information would be obvious to someone with an interest in the export of the City of Adelaide once it had been exported. ACE did not respond fully to this question. But it is the Commissioner's opinion that if the withheld information would be obvious to someone with a particular interest in the export of goods such as the City of Adelaide after the export had taken place, that it would be possible to argue that the information is of a trivial nature after the event.
39. Even if the Commissioner is incorrect of this point and the requested information does have the necessary quality of confidence, the Commissioner remains unconvinced that disclosure would cause HMRC commercial detriment.
40. Again the Commissioner considers the arguments submitted focus mainly on the general need to supply and share information on occasions with other public authorities and the need to maintain the trust and confidence of organisations that engage with ACE. While the Commissioner may accept this general argument, this does not automatically equate to any information supplied to it.
41. ACE has stated that HMRC believes disclosure would impinge on the core principle of taxpayer confidentiality and could undermine taxpayer confidence in the tax system and erode the goodwill of taxpayers, which is absolutely vital for the efficient and effective running of the tax system. Again, the Commissioner may accept this argument in some cases but he considers this would depend upon the contents of the

information in question and the circumstances at the time of the request.

42. As stated above, the Commissioner remains unconvinced that the requested information had the necessary quality of confidence at the time of the request given the fact that the City of Adelaide had already been exported. With this in mind, the Commissioner cannot see from the evidence supplied to him how disclosure could then cause HMRC commercial detriment. Given the contents of the email in question, the circumstances at the time of the request, the Commissioner remains unconvinced that disclosure would negatively impact of HMRC's ability to carry out its tax duties, would undermine the public's confidence in this system or erode the goodwill of taxpayers, upon which HMRC heavily rely.
43. For the above reasons, the Commissioner has decided in this case that section 41 of the FOIA does not apply.

Right of appeal

- (c) 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

- (d) 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.
- (e) 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

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