

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 June 2024

Public Authority: British Film Institute (BFI)
Address: 21 Stephen Street
Saint Giles, W1T 1LN

Decision (including any steps ordered)

1. The complainant has requested BFI to disclose information relating to anti-racism training provided by What If Experiment. BFI disclosed some information but withheld the remainder citing section 43 of FOIA, which concerns commercial interests. It also said that it does not hold the information requested at part one of the request.
2. The Commissioner's decision is that BFI is entitled to refuse to disclose the remaining withheld information in accordance with section 43 of FOIA. He is also satisfied that on the balance of probabilities, BFI does not hold the information requested at part one of the request.
3. The Commissioner has however recorded a breach of section 1, 10 and 17 of FOIA.
4. The Commissioner does not require further steps to be taken.

Request and response

5. On 27 June 2023, the complainant wrote to BFI and requested information in the following terms:

“On the 27th March '23 a line appeared in a Guardian article as follows:

"Qureshi added that instead of actual solutions such as a ringfenced budget for creatives of colour, the BFI had spent a lot of money on anti-racism training of what he said was of questionable effectiveness."

<https://www.theguardian.com/film/2023/mar/27/bfi-accused-of-taking-limited-steps-to-address-systemic-racism-faisal-qureshi-british-film-institute>

Please can you send me the following:

- All the training materials to which the quoted "anti-racism training" relates.
 - The names of the companies who supplied this training and their associated contracts with the BFI.
 - The cost of the training broken down by year, or financial year if it easier."
6. BFI responded on 24 November 2023. It refused to disclose the training materials under sections 41(b) (information provided in confidence) and 43 of FOIA. It however disclosed the name of the company contracted to provide the training and the cost per year for 2021 to 2024.
 7. The complainant requested an internal review on 26 November 2023. They disputed the application of section 41(b) and 43 of FOIA to the first element of their request. No complaint was raised in relation to items two and three at this time.
 8. BFI carried out an internal review on 22 December 2023 and notified the complainant of its findings. It upheld the application of sections 41(b) and 43 of FOIA but also commented that the training materials were never held by BFI.

Scope of the case

9. The complainant contacted the Commissioner on 30 December 2023 to complain about the way their request for information had been handled. They stated that they are sceptical of BFI's more recent assertion that they never held the training materials requested, especially as this was only raised at the internal review stage. They also do not agree with BFI's application of sections 41(b) and 43 of FOIA to the same element of their request. The complainant also raised the issue that BFI had not to date addressed part of element two of his request, in which they asked for the contracts.

10. During the Commissioner's investigation BFI disclosed redacted versions of its contracts with What If Experiment. This took place on 26 April 2024. It refused to disclose some details citing section 43 of FOIA (it also applied section 41 of FOIA initially, but it later withdrew this).
11. BFI also addressed the Commissioner primary concern over element one of the request and its assertion that it does not hold the requested information for the purposes of FOIA. It was the Commissioner's primary concern, as a public authority cannot apply exemptions to information it does not hold. BFI revisited this element of the request and confirmed that it does not hold the requested information.
12. The Commissioner considers that the scope of his investigation is therefore to establish whether, on the balance of probabilities, BFI holds any training materials for the purposes of FOIA (item one of the request). In terms of the remaining elements of the contracts (item two of the request), the Commissioner will consider whether BFI is entitled to withhold this information in accordance with section 43 of FOIA.
13. The complainant disputed the scope of element three of their request and on receipt of the contracts began to question the costs BFI disclosed in November 2023. The Commissioner considers the scope of this element of their request is clear and that the information disclosed in November 2023 met the requirements of FOIA. He has not accepted the complainant's more recent questions around costs as falling in scope. These are additional requests which must be pursued separately.

Reasons for decision

Section 1 – general right of access

14. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to them.
15. In cases where a dispute arises over whether recorded information is held by a public authority at the time of the request, the Commissioner - following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
16. BFI explained at the time of the request it operated three types of training with What If Experiment.

17. Firstly, Culture of Belonging training. It stated in the summer of 2022 white identifying colleagues were asked to undertake Culture of Belonging training. Individuals were asked to go through online training outlining key concepts of anti-racism work and then discuss these with accountability partners. BFI confirmed that all of these sessions were accessible via a link provided by What If Experiment and not held on BFI servers and featured no downloadable materials.
18. Secondly, Zesting Cohorts. BFI advised that these sessions were undertaken with small groups of BFI senior managers (up to 120 personnel across several cohorts at the time of its response to the request). It stated that these training sessions were held in person on BFI premises and were a mixture of discussion and practical exercises. For the purposes of this training, it considers that no training materials are held by BFI as everything is retained by the What If Experiment. Session participants on the training could view materials via a link provided by the What If Experiment and this was password protected. This was to allow them to read the dossier they'd be working from prior to the sessions. BFI confirmed that it was not possible for any participants to download the materials via this link.
19. BFI advised that on the day of the training sessions printed versions of the dossier were provided. However, these dossiers never left the training room (which was locked during breaks) and were gathered by the What If team at the end of the training sessions. BFI staff were explicitly told they could not take copies of the dossier home with them or make any copies at any point during the training. It advised that any other training materials were slide presentations throughout the sessions which were held by the What If team.
20. And thirdly, Culture of Accountability. BFI explained that at the time of the request from September 2023 onwards all BFI staff were invited to take part in Culture of Accountability training. These were two online sessions where BFI staff had to have a culture of accountability partner and they would watch the training materials and discuss them and answer questions asked. It confirmed that these sessions were via a What If link and answers were typed directly in to that link. No materials were downloadable as a result of those sessions. Part three of the training was an in person or online workshop facilitated by BFI members of staff with the What If team providing technical support. The links for these slide decks were provided by the What If team who ran the technological aspect of these sessions and again no materials were downloadable as a result of this training.
21. BFI's position is therefore that no materials relating to any of these training programmes are held by the BFI as they were all provided via

link by What If Experiment or, for physical materials, retained by What If Experiment during and after the training.

22. The Commissioner held a telephone conference with BFI and a representative of its legal team to discuss this further and the terms and conditions of the contract. They explained how they had both attended the training themselves and had experienced firsthand how it was structured and how no training materials were handed out or left for them to take away after the events, and how there was no means or permission to download or copy any of the materials used during the sessions. They acknowledged that on the face of it, this seemed unusual and one would expect to take away literature and handouts from training sessions attended. But these courses were specifically structured around sensitive and confidential testimonies from present and past staff members, so they were strictly organised on this basis and took place in the manner described above.
23. The Commissioner and BFI discussed parts of the contract which discuss materials, information and products and potentially how the way these are phrased may give the impression that BFI would have received and therefore held training materials from What If Experiment. The representative from its legal team was involved in the contracts and how these were drafted. They explained that the contracts used followed their standard template they would use for other services like this and so they contain standard terms that would be seen in all contracts of this nature over the provision of material both from the contractor and from BFI to the contractor.
24. BFI remained certain that it does not hold any recorded information falling within the scope of this element of the request and those standard terms and conditions should not be read or interpreted to mean that it does hold information or did hold it and it has since been deleted.
25. The Commissioner has made detailed enquiries to BFI on this point and received equally detailed explanations from it as to why it holds no recorded information. The Commissioner has also seen and discussed the contracts themselves with BFI, including a representative from its legal team. Both the FOI contact for this complaint and the legal representative have attended these training courses and experienced firsthand how they were structured and how they were provided with no training materials they could take away from the sessions or that could be copied/downloaded for future reference. They explained how due to the unique structure of these training courses no training materials were given to BFI or those attending and how all were secured and retained by What If Experiment during the sessions and after.

26. BFI commented that this would appear unusual considering how training usually goes but this was due to the unique structure of this particular training, and it being based on such sensitive and confidential testimonies of past and present staff.
27. The Commissioner notes how BFI has described each of the three sessions, how these were structured and how these took place securely in order to protect that information. The Commissioner has also discussed the contracts themselves with its legal representative and they have explained how these are based on their standard template used for all contracts of this nature and do not mean or suggest that BFI did receive training materials.
28. On the balance of probabilities, the Commissioner is therefore satisfied that BFI does not hold this information.

Section 43 – commercial interests

29. Section 43(2) of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of the public authority and/or a third party.
30. It is also subject to the public interest test.
31. The redacted information is the daily rate of the What If Associates from the BFI Organisation-Wide Anti-Racism Training and Appendix one (Contract Proposal) and two (Deliverables) from the Enabling Environments Contractor's Agreement. BFI confirmed that it has discussed this request with What If Experiment and the arguments of likely prejudice have originated from it.
32. Addressing the daily rates first, BFI confirmed that these are the hourly rates of What If Experiment's individual staff members and it believes disclosure of this information would be likely to prejudice the commercial interests of BFI. It stated that it has provided the total costs of this training to the complainant but considers the disclosure of the hourly rates would allow What If Experiment's competitors to undercut its pricing in future tenders and contracts for similar work to its commercial detriment.
33. With regards to the Appendix one BFI explained this information is an outline of the What If Experiment's successful proposal, which not only outlines their methodology but also the details of how they would provide the training and the individual sessions. Appendix two outlines the broad outline of the phases of training across the organisation.
34. BFI advised that it is their contention, and confirmed by the What If Experiment, that disclosure of this information would be likely to be

prejudicial to the commercial interests of What If Experiment, which was appointed to develop and lead anti-racism training for BFI.

35. It explained that the details of the What If Experiment and their approach are in the public domain and can be found on their website. However, the What If Experiment delivers bespoke training for organisations depending on their individual needs and BFI believe that disclosure would be likely to reveal their methodology and approach. BFI stated that these are core to how they run their business and would give access to their own intellectual property and potentially allow others to copy their ethos and methodology. What If Experiment has confirmed that disclosure would be likely to be damaging to their business. It stated that it would be likely to harm its ability to enter into contracts with other companies.
36. The Commissioner is satisfied that disclosure of this information would be likely to be prejudicial to the commercial interests of What If Experiment and therefore that section 43 of FOIA applies. He accepts that What If Experiment is one of a number of companies offering training in this field and it is therefore operating and competing in a competitive market. Knowledge of What If Experiment's hourly rate for staff would be likely to enable its competitors to gain an insight into its costings and be likely to enable its competitors to undercut it or tailor their bids for further work accordingly.
37. With regards to the appendices, these detail how What If Experiment intended to deliver its training sessions, what those sessions would focus on, how the training would be delivered and their unique approach to it. The Commissioner accepts that such information would be useful to What If Experiment's competitors. It would allow them to see what they offered and the structure of the training, which made their offer to BFI successful. It would enable them to understand more closely how What If Experiment has developed its training and competitors could use this information in future tenders and bids for such work. The Commissioner accepts that this would be to the commercial detriment of What If Experiment. It has invested time, expertise and resource into developing this training and its own approach to such training (like any other company offering similar) is what will set it apart from its competitors.

Public interest test

38. BFI advised that it recognised the public interest in openness and transparency and in allowing members of the public to see how public funds are utilised and assess for themselves whether, in their opinion, value for money has been achieved. It also notes that there is a public

interest in how the anti-racism training was secured and delivered and to see how successful this was.

39. However, it considers it has been open regarding its anti-racism work and partnership with What If Experiment. It has disclosed what it is able to without damaging the commercial interests of the provider. It has disclosed the contracts and the costs per year of the training, and it considers this information goes a considerable way to addressing the public interest identified in disclosure. It commented that What If Experiment also provides information about their approach and who they are via its website.
40. BFI confirmed that it does not consider it is in the public interest to disclose the remaining withheld information, as this would be likely to prejudice the commercial interests of the provider. It referred to the transparency clause in its contracts, which it acknowledges gives it absolute discretion as to the disclosure of information under FOIA. It stated that this allows BFI to consider for itself what can and cannot be disclosed but it does not mean that there is any automatic release of any information requested. It is still required to assess disclosure in accordance with FOIA and take account of whether any exemptions apply.
41. The complainant made submissions over the balance of the public interest test too. They referred to a report published in 2022 by BFI that suggested that the independent film industry was at a point of 'market failure'. They argued that BFI is part of that industry and therefore the public interest rests in disclosure so the public can see exactly how public funds were spent. The complainant believes the public interest in disclosure is much higher than the public interest in maintaining the exemption because those funds could have been better spent on funding films with an anti-racism message instead. They have argued that disclosure is required and in the public interest to evaluate whether there has been any maladministration.
42. The Commissioner accepts that there are public interest arguments in favour of disclosure. There is a public interest in understanding how such training has been delivered and how much that has cost BFI. Significant sums of public money have been spent on the training and there is a public interest in allowing members of the public to assess for themselves whether, in their opinion, value for money has been achieved. There is a public interest in tackling racism and in seeing what sorts of training public authorities are delivering to staff to combat that.
43. However, in this case the Commissioner agrees with BFI that the costs already disclosed allow the public to see what it has spent on such training and the contracts disclosed in redacted form also allow the

public to analyse the terms and conditions that were agreed between BFI and What If Experiment. This information does go a considerable way to meeting the public interest in disclosure identified by both BFI and the complainant.

44. The Commissioner does not agree it is the public interest to disclose specific information which would be likely to prejudice the commercial interests of the provider. It is the public interest to allow What If Experiment and similar companies to continue to operate competitively and fairly within their market.
45. For the above reasons, the Commissioner has decided that the public interest rests in maintaining the exemption.

Procedural matters

46. BFI failed to respond to part of the complainant's request until the Commissioner's investigation. It therefore failed to disclose information to which the complainant was entitled within 20 working days of the receipt of their request. For this, the Commissioner has recorded a breach of section 1 and 10 of FOIA.
47. It also breached section 1, 10 and 17 by failing to respond to the request and issue its refusal notice within 20 working days of receipt.

Right of appeal

48. 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

49. 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.
50. 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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