



Ms Liz Hill

[Liz@artsprofessional.co.uk](mailto:Liz@artsprofessional.co.uk)

**15th November 2017**

Dear Ms Hill

**Freedom of Information Request - Ref: FOI – 11580**  
**Request for an Internal Review**

I am writing to you following your request for an internal review which you made via [Liz@artsprofessional.com](mailto:Liz@artsprofessional.com) sent at 10.08 on 20 October 2017. Arts Council England ("Arts Council") confirmed that you would receive a response to your internal review request by 16 November 2017.

Your original request was made on 19 September 2017 ("Request"), and Arts Council provided a response to your request on 16 October 2017 ("Response"), within the 20 working day deadline.

**The Request**

Your Request was for the following information:

- 1. Please would you provide me with all documents and correspondence between Arts Council England and all the organisations, agencies and government departments, in the UK and Europe, involved in the procurement process for the Quality Metrics tender. Please include both email and hard copies of all correspondence both received by and sent by the Arts Council. This should include, but not be limited to, correspondence and documents from and to the following:*

*The European Commission  
Millstream Associates Limited  
OJEC/OJEU  
Crown Commercial Service*

**Arts Council England**, 21 Bloomsbury Street, London WC1B 3HF [www.artscouncil.org.uk](http://www.artscouncil.org.uk)

Phone: 44 (0) 845 300 6200 Fax: 44 (0)20 7973 6564 Text Phone: 44 (0) 20 7608 4100

Email: [enquiries@artscouncil.org.uk](mailto:enquiries@artscouncil.org.uk)

2. *Please provide me with all correspondence between Arts Council England and the company Counting What Counts Ltd in connection with a) the decision to award that tender to that company and b) the delay to the awarding of that tender.*
3. *Please provide any and all documents that were supplied to members of ACE's National Council for the meeting dated 30th May 2017, in connection with item 10, Quality Metrics Procurement.*
4. *Please provide the National Council minutes for May 2017, item 10, which has been redacted on the basis of commercial confidentiality and forthcoming publication. Given the halt to the procurement process, withholding under section 22 no longer applies, as the original timetable has been abandoned. Also, given that the National Council approved the award of public money for this contract, the information should not be held as confidential.*

### **The Response**

In the Response Arts Council provided some documents but confirmed that it was withholding information under sections 40(2) FOIA (information provided in confidence) and section 43(2) FOIA (commercial interests). It also neither confirmed nor denied that information was held in respect of specific organisations named in the Request.

### **Internal Review**

You requested:

*"Thanks you for your response to my FOI request, but I am not satisfied that you have applied FOI rules appropriately and therefore request an Internal Review of this decision.*

*This is because:*

- 1) *The procurement process I am referring to has been completed. This is evidenced by the fact that the Arts Council identified a preferred supplier (Counting What Counts Ltd) and the decision to appoint this supplier was endorsed by the National Arts Council. It is therefore inaccurate to say that the process is incomplete. It was completed.*
- 2) *Arts Council England has subsequently been engaged a review of its tender following allegations of breaches of EC procurement rules. This review is therefore part of a formal process which is a matter of public record and the Arts Council therefore has no grounds for refusing access to the documents relating to this process.*
- 3) *You have attempted to mislead me by telling me that you can neither confirm nor deny the names of any companies that were involved in the process for this*

*tender. The tender was completed and the name of the successful bidder is actually on your own website.*

*Therefore please release the documents I have requested, and remove the redactions."*

The purpose of an internal review is to review the law in the original Response and ensure it was correctly applied.

As explained in the Response, the OJEU procurement has detailed and complex requirements and on review of the procurement process Arts Council halted the Quality Metrics procurement to review some aspects and consider options for meeting the OJEU procurement requirements. This delayed the awarding of the contract. Arts Council have since taken the decision to change the name of Quality Metrics to Consumer Insight Toolkit to better reflect what it will do and will be procuring a supplier to start in early 2018 with a view that the framework will be in place for band 2 & 3 NPOs from April 2018. Accordingly, the Quality Metrics procurement did not complete and no contract was awarded.

It was not Arts Council England's intention to mislead you by neither confirming nor denying whether information was held in respect of specific companies named in the Request. Details of a 'successful bidder' were uploaded to the Arts Council's website in error and should have been redacted from the minutes of the National Council meeting. These details have since been taken down from the website.

## **Section 41 FOIA**

Section 41 FOIA states:

- (1) *Information is exempt information if -*
  - (a) *it was obtained by the public authority from any other person (including another public body), 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.*

Information is covered by section 41 if:

1. The information is obtained from another person
2. Its disclosure would constitute an actionable breach of confidence
3. A legal person could bring a court action for that breach of confidence

#### 4. That court action would be likely to succeed

In considering whether disclosure would constitute an actionable breach of confidence, I have considered whether the information has the necessary quality of confidence (i.e. it is more than trivial and not otherwise accessible), whether it was imparted in circumstances importing an obligation of confidence and whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Arts Council does not have consent from the organisations concerned, nor any other party to the request, to disclose the information. Information is therefore imparted with an expectation of confidence and I consider that releasing this information would constitute an actionable breach of confidence.

This is an absolute exemption so there is no need to consider the public interest test.

I have therefore concluded that the exemption under section 41 FOIA should be maintained because release of the information would represent an actionable breach of confidence. For the reasons given above, I believe the decision to withhold the information was correct.

#### **Section 43(2) FOIA**

Section 43(2) FOIA states:

- (2) *Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*

Arts Council can apply this exemption when complying with the request would prejudice or would be likely to prejudice an individual or organisation's commercial interests.

The information you have requested contains information related to a procurement process including information provided during that tendering process. Information about the procurement of goods and services is usually considered to be commercially sensitive as it relates to the commercial activities of the organisations involved in the procurement, as well as the commercial activities of Arts Council itself.

Arts Council considers that releasing the requested information would be likely to prejudice the commercial interests of the organisations involved in the tender as well as the commercial interests of Arts Council. If Arts Council released information about a tender that is in progress or did not complete, there is a strong possibility that this may deter organisations from bidding for work and impact Arts Council's ability to participate competitively in a commercial activity and procure the best value for money services.

Section 43(2) FOIA is a qualified exemption, therefore it is necessary to carry out the public interest test to determine whether the public interest in withholding the commercially prejudicial information outweighs the public interest in disclosing the information.

There are factors in favour of disclosure of the requested information. Disclosing the information would enhance transparency and accountability. There is a public interest in encouraging competition for public sector contracts and greater transparency about the tendering process, and the negotiation of public sector contracts may encourage companies to take part in the process and help them improve their bids. This will increase competition and therefore help public authorities to get value for money.

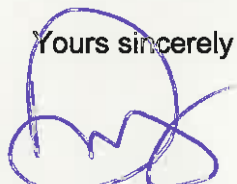
However, there is also a public interest in allowing public authorities to withhold information which if disclosed would reduce its ability to negotiate or compete in a commercial environment and where disclosure of the information may cause unwarranted reputational damage to a public authority or another organisation whose information it holds, which may in turn damage its commercial interests. It would not be in the public interest to reveal information that would be detrimental to Arts Council's negotiations in the re-branded Quality Metrics procurement.

In this instance I have carefully considered the factors in favour of disclosure and the factors against disclosure (including that public money has not yet been spent) and I believe that the public interest in withholding the requested information outweighs the public interest in disclosure. Therefore I have concluded that the exemption under section 43(2) FOIA should be maintained.

I appreciate that you may find this decision disappointing. If you are not content with the outcome of this internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire SK9 5AF  
[www.ico.gov.uk](http://www.ico.gov.uk)

Yours sincerely



Darren Henley  
Chief Executive Officer