Neutral citation number: [2025] UKFTT 00541 (GRC)

Case Reference: FT/EA/2024/0242

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Decided without a hearing
Decision given on: 20 May 2025

Before

JUDGE KIAI
TRIBUNAL MEMBER GASSTON
TRIBUNAL MEMBER SCOTT

Between

PETER STEAD

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Refused

Substituted Decision Notice: No Steps are ordered.

REASONS

Background to the Appeal

1. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 20 June 2024 (IC-279048-W6F0, the "Decision Notice". The appeal relates to the application of the Freedom of Information Act 2000 ("FOIA"). It concerns information requested from the British Film Institute ("the BFI"), relating to anti-racism training provided by What If Experiment.

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber)Rules 2009 (as amended).

The Request

3. On 27 October 2023, Mr Stead wrote to the 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 has spent a lot of money on anti-racism 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 is easier".*

The Response

4. On 24 November 2023, the BFI responded to the request:

    a. It provided some information within the scope of the request, in that it disclosed the name of the company contracted to provide the training and the cost per year for 2021 to 2024.

    b. It refused to disclose the training materials under section 41(b)(information provided in confidence) and section 43 of FOIA. *It later stated that it did not hold the training material.*

Internal Review

5. Mr Stead requested an internal review on 26 November 2023. He maintained that sections 41(b) and 43 of FOIA did not apply to the first element of the request.

6. An internal review decision was relayed on 22 December 2023:

    a. The BFI maintained the application of section 41(b) and section 43 of FOIA.

    b. It further asserted that the training materials were never held by BFI.

Referral to the Information Commissioner

7. Mr Stead referred the matter to the Information Commissioner on 30 December 2023. In particular he highlighted that the BFI's response did not give sufficient weight to the public interest factors in favour of disclosure. He challenged the assertion that the BFI did not hold the training materials and the application of the exemptions.

8. During the course of the Commissioner's investigation, the Appellant challenged the BFI's interpretation of the scope of the third part of his request for training costs, submitting that it ought to include expenses as part of the cost of the training.

9. During the course of the Commissioner's investigation, the BFI disclosed redacted versions of its contracts with the What If Experiment (on 26 April 2024). At one point the BFI relied on section 41 of FOIA, but later withdrew this. The BFI continued to rely on section 43 of FOIA. It maintained that it did hold the information in relation to section 1 of the request.

Clarification re 'Cost' of training

10. On 28 May 2024, Mr Stead asked BFI to confirm whether the figures provided in the email of 24 November 2023 of '*£17,500.00, £82,500.00 and £132,511.02, include VAT and include the expenses which have been cited in the contracts'*.

11. On 13 June 2024, the BFI responded and confirmed that the figures did not include VAT: '*The figure provided in our response of November 2023 reflected what we had actually spent on What If training when your request came in. The figure quoted above was our total spend for the year'*.

12. On 13 June, Mr Stead amended the figures to add VAT and asked the BFI to confirm that the expenditure was correct:

    '*2021-2022: £17,500 plus 20% of VAT of £3,500 = £21,000*

    2022-2023: £82,500 plus 20% VAT of £16,500 = £99,000

    2023-2024: £219,135.70 plus 20% VAT of £43,827.14 = £262,962.84

    This gives a grand total of £382.962.14?' (later amended to £382,962.84).

13. On the same day, the BFI confirmed that the figures were correct; this was the correct final total.

14. On the following day, Mr Stead emailed the BFI: '*Please also tell me, as per my email to you of the 28th May 2024, what expenses the BFI paid as part of the programme. For example, the anti-racism agreement stipulates expenses of £15,750. So if you could let me have the amounts and whether this, too, would attract VAT''*. He asked the BFI to confirm if the expenses would be <u>on top</u> of the previously discussed fees.

15. On 8t July, the BFI confirmed:

'*2021-22 - £17,500.00 no record of claimed expenses*

2022-23 - £82,500.00 no record of claimed expenses

2023-24 - £219,135.70 of which £6,465.69 was claimed as expense – both amounts are exclusive of VAT'.

16. On the same day, the Appellant asked if '*the £6,465.69 is included in the £219,135.70 figure but would attract VAT also?'.*

17. Again, on the same day, the BFI responded '*Yes that is my understanding – it would be part of the overall VAT total we've previously agreed for that year'.*

18. The following day, Mr Stead emailed the BFI and asked:

'*Question 1:*

So you're saying the £219,135.70 includes expenses of £6,465.69?

So £219,135.70 cost - £6,465.69 expenses = £212,670.01 fees?

Question 2:

So what does the £15,750 expenses mentioned in the 'bfi organization-wide anti racism agreement signed certificate – redacted contract relate to?'

19. The Appellant did not receive a response to this.

The Decision Notice (Dated 20th June 2024)

Scope

20. The Commissioner considered that the scope of his investigation is to determine

    a. Whether, on the balance of probabilities, the BFI holds any training materials for the purposes of FOIA (item 1 of the request).

    b. Whether BFI is entitled to withhold the remaining elements of the contracts in accordance with section 43 of FOIA.

21. The Commissioner noted that Mr Stead '*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.'*

Request 1: Whether the BFI holds any training materials

22. The Commissioner concluded that it had made detailed enquiries with BFI and received detailed explanations as to why it held no recorded information. The Commissioner had also seen and discussed the contracts with BFI – including a representative from its legal team, noting that both the FOIA contact and the legal representative had attended the training courses and experienced firsthand that they were provided with no training materials to take away from the sessions and/or copied/downloaded for future reference. They had explained that due to the 'unique structure' of the training courses (being based on sensitive and confidential testimonies of past and present staff), no training materials were given to BFI or those attending in order to protect that information. They had also described how the materials were secured and retained by What If Experiment during and after the sessions. The Commissioner noted that the legal representatives had explained how the contracts were based on their standard template used for all contracts of this nature and did not mean or suggest that BFI did receive training materials.

23. On the balance of probabilities the Commissioner was therefore satisfied that BFI did not hold the information.

Section 43 – Commercial Interests

24. The Commissioner notes that the redacted information is (i) the daily rate of the What If Associates; (ii) Appendix 1 and (iii) Appendix 2 of the relevant contract. BFI confirmed that it had discussed this request with What If Experiment and noted the arguments of likely prejudice had originated from them.

(i) Daily Rates

25. BFI confirmed that these are the daily rates of What If Experiment's individual staff members and it believed that disclosure would likely prejudice the commercial interests of BFI. It stated that it had provided the total costs of the training, but disclosing daily rates would allow What If Experiment's competitors to undercut its future tenders and contracts for similar work which be detrimental to its commercial interests.

(ii) Appendix 1

26. BFI explained that this information is an outline of their successful proposal, addressing their methodology and how they would provide the training and individual sessions. They maintain that disclosure of this information would be prejudicial to the commercial interests of What If Experiment.

(iii) Appendix 2

27. BFI explained that this outlines the broad outline of the phases of training across the organisation. They maintain that disclosure of this information would be prejudicial to the commercial interests of What If Experiment.

28. BFI contend that the details of the What If Experiment and their approach are in the public domain and can be found on their website. However, they deliver bespoke training for organisations depending on their individual needs and disclosure would reveal their methodology and approach. BFI argue that this would give access to their intellectual property and potentially allow others to copy their ethos and methodology. It would be damaging to their business and likely to harm their ability to enter into contracts with other companies.

29. The Commissioner concluded that disclosure would be likely to be prejudicial to the commercial interests of What If Experiment and therefore that sections 43 of FOIA applies:

> '36…*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 it 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

30. The Commissioner then went on to consider the Public Interest. He accepted that there are public interest arguments in favour of disclosure:

    a. There is a public interest in understanding how such training has been delivered and how much that has cost BFI. There is a public interest in allowing members of the public to assess whether in their opinion, value for money has been achieved;

    b. There is a public interest in tackling racism and in seeing what sorts of training public authorities are delivering to staff to combat that.

31. However the Commissioner concluded it would be in the public interest to maintain the exemption. He agreed with the BFI that the costs already disclosed allowed the public to see what it had spent on such training and that the contracts disclosed (in redacted form) allowed 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'. He found that it would not be in 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.

Procedural Matters

32. BFI failed to respond to part of the Appellant's request until the Commissioner's investigation. It therefore failed to disclose information to which the Appellant was entitled within 20 working days of receipt of the request. For this the Commissioner recorded a breach of section 1 and 10 of FOIA.

33. 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.

34. *However it later recorded that it had quoted the incorrect date of the request and from there incorrectly recorded a breach for a late response.*

Notice of Appeal

35. Mr Stead appealed to the Tribunal on the basis that:

- There must be more contracts than the two sent to him – the amounts don't add up to the cost of the training which the BFI originally told him in their original response to his request. Similarly the dates don't match. There are big holes in the time period. This was ignored in the DN;

- Even if the materials are held by What If Experiment and not BFI, they will still be held by BFI for the purposes of 3(2)(b) of the FOIA. Furthermore, the BFI have a contractual right to these materials (last sentence, Clause 4(a) of [3][4]).

- If it were, however, true that these training materials were not obtainable, this raises the public interest. The BFI has spent vast amounts of money and time on a kind of training which has given them no training materials. Yet they claim in their Internal Review Response '*the work…is about putting learnings that will inform positive change within developing anti-racist day to day operational practice'*. How are they doing this – from memory? It appears unusual.

- When the BFI first told him their amounts of the cost of the training, they added up to £23,511.02. They said in an email to him that this was 'gross'. However when he reviewed the contracts, he saw that the figures excluded VAT, which he then asked them about. This led to BFI admitting VAT would be on top and further admitting that they only gave him part of financial year 2023-4. The figure then rises to £382,962.84. He is still waiting for the BFI to tell him, the expenses on top of that but £15,750 has been mentioned. Added

together the real cost is just under £400k so far. This increases the public interest.

- The ICO excluded these latter cost revelations in the DN. There is no justification for their stance.

- Having told him the real cost, the BFI are withholding the daily rates from the contracts, they say this is to avoid What If Experiment being undercut by competitors. This would not present a bigger risk than the figures they have already released, so they should release these too.

- BFI have redacted appendices in the contracts to protect the unique approach taken by What If Experiment. For the reasons above, it would be in the public interest to examine the 'unique approach'.

- The public interest in spending lots of public money trumps the commercial interests of public consultancy.

Legal Framework

36. The relevant provisions of FOIA are as follows:

1. General right of access to information held by public authorities.

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

2. Effect of the exemptions in Part II.….

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolutely exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

43(2) Commercial Interests

"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)".

37. 'Commercial interests' should be interpreted broadly. The ICO Guidance states that a commercial interest relates to a person's ability to participate competitively in a commercial activity.

38. The exemption is prejudice based. 'Would or would be likely to' means that the prejudice is more probable than not or that there is a real and significant risk of prejudice. The public authority must show that there is some causative link between the potential disclosure and the prejudice and that the prejudice is real, actual or of substance. The harm must relate to the interests protected by the exemption.

39. Section 43 is a qualified exemption, so that the public interest test has to be applied.

40. In considering the factors that militate against disclosure the primary focus should be on the particular interest which the exemption is designed to protect.

41. In **APPGER v ICO** [2013] UKUT 0560 (AAC) the Upper Tribunal gives guidance on how the balancing exercise required by section 2(2)(b) of FOIA should be carried out (paragraph 75):

> *"… when assessing competing public interests under FOIA the correct approach is to identify the actual harm or prejudice that the proposed disclosure would (or would be likely to or may) cause and the actual benefits its disclosure would (or would be likely to or may) confer or promote. This … requires an appropriately detailed identification of, proof, explanation and examination of both (a) the harm or prejudice, and*
>
> *(b) benefits that the proposed disclosure of the relevant material in respect of which the exemption would (or would be likely to or may) cause or promote".*

42. The question of whether information was held at the time of the request is determined on the balance of probabilities.

Issues and Evidence

43. The issues in this case are:

    a. What was the scope of the request?

    b. On the balance of probabilities does the BFI hold materials within the scope of the request?

c. Was the BFI entitled to rely on section 43(2) FOIA to refuse to disclose the remainder of the Request.

44. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:

    a. An agreed bundle of open documents;

    b. A closed bundle of documents containing the withheld information and unredacted versions of the contracts.

Discussion and Conclusions

45. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

1. What was the scope of the request?

46. As part of the Appellant's request, he asked to be sent "*The cost of the training broken down by year, or financial year if it is easier*".

47. On 24 November 2023, he was sent the cost per year from 2021-24.

48. On 28 May 2024, he asked if the figures included VAT and expenses (as cited in the contracts).

49. On 13 June 2024, the BFI responded that the figures did not include VAT and clarified that the initial figures reflected what they had actually spent when the request came in. They provided new figures.

50. Various emails were exchanged following this relating to VAT and expenses.

51. The Commissioner considers that the information disclosed in November met the requirement of FOIA. He does not accept that the questions that followed (relating to VAT and costs), fall within scope. The Appellant disputes this.

52. The Appellant contends that he asked questions because he identified that VAT and expenses were not included, but he believed they should be. He raised this and the BFI confirmed that their response in November 2023 reflected what they had *actually spent when the request came in*. He maintains that he asked about 'cost' which should not have been limited to only money which had been paid out. He emphasises that

he did not use the word 'fees' and did not indicate that any component of the cost should be left out (ie VAT or expenses).

53. The Tribunal makes the following findings:

    a. We find that the Appellant only requested the 'costs of the training'. He did not indicate if he wanted the net cost or gross cost. He was consequently provided with the cost of the training on 24 November 2023 and then amended costs of the training on 13 June 2024 – we note here that the BFI also failed to indicate if this was the net cost or gross cost.

    b. We further find that the Appellant requested that it be '*broken down by year, or financial year if it is easier'*. The BFI did not clearly indicate how the costs were broken down, other than 2021-2022, 2022-2023, 2023-24. This is regrettable. We find that the Appellant was entitled to query this. He received a full response and correct figures on 13 June 2024.

54. We conclude that the information provided on 24 November 2023 and 13 June 2024 met the requirements of FOIA. However those being requested after 13 June 2024, did not form part of the original request and therefore falls outside of the remit of this tribunal. We have no jurisdiction to consider them. We appreciate that Mr Stead wishes further disclosure to be made, however, we find that this did not form part of the original application, and therefore a further request will need to be made if Mr Stead wishes to pursue this.

2. On the balance of probabilities does the BFI hold materials within the scope of the request?

(a) Training Materials

55. The Appellant requested "*All the training materials to which the quoted "anti-racism training" relates".*

56. The BFI maintain that they held no such material at the date of the request.

57. The Appellant is skeptical of this claim, in part, because the BFI did not claim this initially (their initial email dated 24 November 2023 stated that all documents and materials were the property of the What If Experiment, therefore the BFI was unable to release them) and because it would be 'extraordinary' to have training where the lessons learned are not shareable to better inform practice/policy.

58. The Commissioner accepted the BFI's submissions and therefore concluded that the BFI had been right to say that, on the balance of probabilities, it did not hold any information falling within the scope of the information request.

59. The Appellant appealed the Commissioner's DN to this tribunal.

60. In summary, the Appellant asserts that:

    a. Even if the contractor has deleted the information, the BFI was sent copies (set out in the email dated 27 April 2024).

    b. BFI have a contractual right to the materials: Clause 4(a) of the contract (set out in the Grounds of Appeal). Plus the material generated by their personal is the intellectual property of the BFI as per clause 5 of both contracts (set out in the Appellant's response).

    c. If the materials are held by the Contractor and not BFI, they are being held for the purposes of 3(2)(b) of FOIA (set out in the Grounds of Appeal).

61. We address each of these in turn. We remind ourselves that we need to consider whether the information was held at the date of request.

    (i) Were the BFI sent copies?

62. Based on the evidence before us, we conclude that the BFI were *not* sent copies of the training material. We accept the information as set out in the email dated 22 April 2024 which detailed the sets of training that operated:

    a. 'Culture of Belonging Training' – Individuals were asked to go through online training outlining key concepts of anti-racism work and discuss these with partners. All the sessions were accessible via a link provided by the contractor and were not held on the BFI servers. There were no downloadable materials;

    b. 'Zesting Cohorts' – These were held in person. Participants could view the material via a link provided by the contractor – this was password protected. Materials could not be downloaded. On the day of the training, printed versions of the dossier were provided – these did not leave the room which was locked during breaks and gathered by the What If team at the end of the sessions. BFI staff were expressly told they could not take copies of the dossier home or make copies. Any other training comprised slide presentations throughout the sessions which were held by the contractor;

    c. 'Culture of Accountability' – these were two online sessions. They had to watch training materials and discuss them. These were via a What If link and answers were typed directly into the link. No materials were downloadable. Part 3 of the training was in person or online workshop. The links for these slide decks were provided by the What If team who ran the technological aspect of those sessions and again no materials were downloadable.

63. We find that the evidence provided by 'Sian' from the BFI and a representative from the General Counsel to the Commissioner plausible and attach significant weight to it. Their evidence was recorded in the Commissioner's file note dated 13 June 2024.

64. They confirmed that they had both attended the training and therefore could provide first-hand evidence as to how it was structured and arranged. They explained that because the training was sensitive and based on real testimonies of past *and present* employees, it was delivered without any training materials being handed over or left with BFI or its employees. Everything was used by the trainers at the training, rooms were locked during breaks, there was no facility to download/print/retain any materials. They discussed that it was unusual for there to be no handouts/material to take away.

65. We acknowledge that it would be unusual for there to be no handouts from training, however the circumstances of this training do seem unusual. In light of the very sensitive nature of the information that was discussed – and the fact that it referred to testimonies from *current* employees, it is plausible and understandable that that information was restricted to the training room only. The specifics of the case are unusual and we find that it is the specific facts of this case that led to this unusual situation where the BFI were not sent copies of training materials.

(ii) Do the BFI have a contractual right to the documents?

66. Again we attach significant weight to the information contained in the file note dated 13 June 2024. This records the discussion between the BFI representative, General Counsel and the Commissioner, where they discussed the contract and how clauses may have suggested that the BFI would be entitled to materials.

67. We accept the evidence from General Counsel (who has a professional duty not to mislead the Court) that the reference in the contract to returning or deleting data was simply a standard clause that was left in the contract, because the standard contractor template was used. We accept that in relation to this specific contractor, training materials were never provided to the BFI and were never intended to be. We accept that the BFI did not retain copies of the information at the date of the request (and based on the evidence before us, they have not received it since).

(iii) Does the Contractor 'hold' the materials for the BFI for the purposes of 3(2)(b) of FOIA?

68. In its response, the Commissioner concludes that BFI did not physically hold the training materials. It further found that due to the sensitivity of the training and the method of its delivery, the training materials could not be said to be held by the BFI or held by the company on behalf of the BFI, even account for the provisions in the contracts. The Commissioner made reference to the Upper Tribunal case of *Department of Health v IC and Lewis* [2015] UKUT 0159 (AAC), where it was held:

> "*In my view, the application of this approach indicates that:*
>
> *(i) Before an authority can be said to "hold" information a matter of ordinary usage of language it will have been given it, or have obtained it, or have created it, and*

(ii) The reasons why it was given it, or obtained it or created it inform on whose behalf it holds the information and thus whether it holds the information solely for another person, or solely, or partly for itself".

69. In its reply, the Appellant maintains the cases cited do not change the fact that the contractor held the materials on behalf of the BFI.

70. We apply the caselaw to the facts of this case. We find that BFI was neither 'given', nor 'obtained' nor 'created' the materials. Due to the manner in which the training was delivered (ie nothing was ever provided to the individuals to take away and they were *explicitly* told they were not permitted to remove anything from the training room – which was locked during breaks) and the sensitivity of the information contained therein (in particular the information from *current* employees), we conclude that the information was not 'held' by the Contractor on behalf of the Appellant.

71. The regime established by FOIA does not authorise this Tribunal to determine whether a public body should have created a record of information in particular circumstances. The Tribunal's jurisdiction is limited to determining whether it did hold such a record at the time when it received an information request. For the reasons set out above, we are satisfied on the balance of probabilities that the information was not held by the BFI or on behalf of the BFI.

(b) Contracts

72. The Appellant requested *'The names of the companies who supplied this training and their associated contracts with the BFI'.*

73. The BFI provided the name of the company and their associated contracts.

74. The Appellant submits in the grounds of appeal '*There must be more contracts than these. The amounts in the two contracts don't add up to the cost of the training which the BFI originally told me...in their original response to my request. Similarly the dates also don't match, there are big holes in the time period…My point on this to the ICO was ignored in the DN'.*

75. The Commissioner addresses this in his Response:

> *'22. The Commissioner can see no reason why, given the disclosures already made, the BFI would withhold any further contracts. Furthermore the disclosed contracts do cover the period 10 January 2022 – 10 October 2022, and 13 February 2023 – 12 February 2024, which broadly reflects the disclosed costs figures for the financial years 2021-2022, 2022-2023 and 2023-2024. As the request and disclosure was made by reference to financial years the financial year sums would each comprise part of the relevant contracts term.*

23. He is also conscious that whilst these are the contracts, other payments could have been discussed and arranged outside the references within the contracts, but on the basis of the terms in the contracts such as the daily rates. Such additional payments would not fall within the scope of this part of the request which was for the contracts themselves, which have been provided subject to redaction'.

76. The Appellant responds:

> *'As I laid out to the Information Commissioner in my email to him of the 16th May 2024…I pointed to a gap of at least £46,761.02 between the stated cost in their original response and what the contract amounts add up to.*
>
> *However, when the full cost later came through, this gap widened dramatically.*
>
> *The actual cost is at least £382,962.84. Therefore the true gap is: £382,962.84 cost - £170,000 contracts (released so far) total = £212,962.84 gap.*
>
> *It is therefore not difficult to deduce that there must be missing contracts which relate to this gap'.*

77. The Appellant further adds:

a. It is flimsy reasoning to conclude that because disclosures have already been made, the Commissioner can see no reason why BFI would withhold any further contracts – and this ignores the possibility that the missing contracts may be due to an error and not intentional;

b. When the Commissioner states that other payments may have been made outside the references within the contracts but based on the terms in the contracts such as the daily rates, this is guesswork;

c. If this were true, it would raise the public interest. One possibility is that the original cost was meant to be £170,000 (excluding VAT) but the cost ballooned to nearly double that, in which case the BFI paid out a large amount of public money outside the control mechanism which the contract provides. This would seem imprudent.

78. The Appellant also explains that the BFI's initial response stated that the training was a 'three year programme', however the dates of the contracts cover 20 months.

79. Based on the evidence before us, the Tribunal has concluded that all the contracts have been served. We find that the BFI holds no further contracts and therefore is unable to serve them.

80. We have noted that there is a gap in the sums and dates set out in the contracts, however we conclude that payments may well have been made, that were not covered by the contracts – and/or, as suggested on the basis of the terms of the

contract. There is nothing implausible about this statement. It would not be an unusual situation for one party to a contract to spend more than stipulated in a contract – this could be based on a change in project scope or unanticipated costs. It could involve agreeing to additional payments for example to pay for more staff/high pay grades. We note the Appellant's suggestion that it is simply guesswork to suggest that payments could have been made outside the reference in the contracts, however, where the Tribunal is considering whether it accepts certain assertions (ie there are no more contracts), it is required to consider possible explanations for those assertions (ie what could have led to the difference in sums/dates).

81. We note that the Commissioner commented that he could not see any reason why they BFI would withhold further contracts given the disclosures already made. The Appellant suggests that this is flimsy reasoning and ignores the fact that it may not be deliberate. We have considered this submission. We have taken into account the suggestion that the BFI may not be deliberately withholding further contracts, however the BFI have repeatedly stated that there are no more contracts – we accept that they must have searched for further contracts during this process, in order to be able to make that assertion. We agree with the Commissioner that it would be unlikely that the BFI would deliberately withhold this information. The Appellant asserts that one conclusion is that the original cost of £170,000 ballooned to nearly double that set out in the control mechanism of the contract and 'that would seem imprudent'. These are conclusions that the Appellant may well draw – we conclude that if there was a further contract, the BFI would serve it, in order to prevent such conclusions. There seems no reason to withhold it.

82. We note the assertion by the Appellant that if it is true that the BFI spent nearly double what was agreed in the contract, this raises the public interest. We note here that there is no public interest test when considering if the information is held. In terms of the public interest test relating to redacted information, we shall come to this later.

Was the BFI entitled to rely on section 43(2) FOIA to refuse to disclose the remainder of the Request.

83. The BFI redacted:

    a. The daily rates of What If Experiment's individual staff members;

    b. Appendix 1 (this outlines their successful proposal, addressing their methodology and how they would provide the training and individual sessions).

    c. Appendix 2 (this outlines the phases of training across the organisation).

84. The Commissioner concluded that disclosure would be likely to be prejudicial to the commercial interests of What If Experiment because:

    a. Competitors could use the information relating to daily rates to undercut the Contractor or tailor their bids accordingly;

    b. The information contained in the appendices would be useful to the Contractor's competitors, as they could use the information for future tenders and bids for work

85. The Appellant appealed on the basis that:

    a. Revealing the daily rates would not present a bigger risk that the figures that have already been released;

    b. It would be in the public interest to see the 'unique approach' set out in the appendices.

86. In its response, the Commissioner maintained that:

    a. Disclosure of the daily rates is significantly more granular than grand totals and would naturally give a competitor valuable information as to how they cost their training;

    b. The Commissioner accepts there is a public interest in disclosure to enable the public to understand and challenge the decisions taken by public authorities, facilitate accountability and transparency in the spending of money, however also recognises there is a public interest in protecting commercially confidential information.

87. In its reply, the Appellant responds:

    a. Granular does not mean more sensitive, there has been no explanation as to why daily rates are more sensitive.

    b. In terms of the methodology set out in the appendices, it is accepted that the training is unusual – this should increase scrutiny. It raises the public interest.

88. We deal first with the Appellant's point that revealing the daily rates from the contracts would not be any different to disclosing the 'real' cost (which has been disclosed). The Appellant submits that the risk of being undercut by competitors would be no bigger from disclosing the daily rates – daily rates are not more sensitive. We do not agree. There is a world of difference between paying a set sum of money (for example £100) for 1 day of work or paying the same for 10 days of work. At present, competitors are unable to undercut What If Experiment based on the total cost – because they do not know exactly how many days were paid for or at what rate. If the daily rate was disclosed, all of this information would become accessible, which would make it much easier for another company to cost their

training in such a way as to undercut What If. We attach significant weight to the fact that it was the company itself who initially put forward concerns.

89. The Appellant further submits that the BFI have redacted appendices in the contracts to protect the unique approach taken by What If Experiment. For the reasons given, he submits that it would be in the public interest to examine the 'unique approach'. Again, we do not agree. The information that has been redacted sets out the details of the company's successful proposal. It details their methodology and – importantly – how they will provide individual sessions and training. It includes the phases of the training. It, in effect, sets out their creations/their work (which is the reason the BFI initially referred to it as their intellectual property). We accept that the release of this information would be prejudicial to the commercial interests of their company, as it could easily be plagiarised. It could be used for future bids/tenders. As they explained, their general approach is set out on their website, but the difference here is that they offer bespoke training. Disclosure would reveal their methodology.

90. We accept the Appellant's point (as set out in his email dated 27 April 2024) that the contracts state that the BFI have discretion about whether any of the content of the agreement is exempt from disclosure. However simply because they are not compelled by the contract to prevent disclosure, does not mean that they can or should disclose this information. They need to consider FOIA and make a decision based on that.

91. We find that disclosing the methodology and approach of the winning proposal in response to the BFI tender, would be prejudicial to the commercial interests of the contractor. Other companies offering anti-racism and inclusion training could copy their materials or develop similar training based on the redacted information. The consequence of this would be that it could deny the contractor's further business opportunities. It is information which has significant commercial value. Revealing their methodology and approach is core to how they run their business. We conclude that it could cause the contractor commercial detriment if disclosed and impact negatively on their ability to participate competitively in commercial activity

92. We accept and attach significant weight to the submission that What If Experiment are *currently* trading and seeking further similar business opportunities (the tendering process is a commercial interest) - if they were not trading, or this was old/out of date information, our decision would have been much more likely to be order disclosure.

93. We also accept the submission that to release this information would damage BFI's ability to enter into contracts with other companies as the other companies may then be concerned that their details would also be released. The BFI operates in the commercial sector and so this risk is not insubstantial.

Public Interest

94. Section 43 provides a "qualified" exemption, as such we are required to weigh the public interest in maintaining the exemption against the public interest in disclosure.

Lengthy submissions have been made on this issue by both parties. The Appellant in essence maintains that '*Blocking the release of the requested materials would mean that the BFI would have no proper transparency and face no accountability for running certainly a very expensive, possibly dubious programme, which potentially helps no one – even the people it is intended to help'.*

95. The Appellant contends:

- The public interest in spending lots of public money trumps the commercial interests of public consultancy.

- The BFI has spent almost a quarter of a million pounds on training. It is in the public interest to understand if this money was well spent and really does help the cause of diversity, particularly in understanding what its measures of success are. If the BFI has spent nearly double what was agreed in the contract, this increases the public interest;

- It's in the public interest to understand whether the company is competent or credible in its approach (their website refers to 'white supremacy' not 'racial bias' – this is surely a controversial notion);

- If there are no materials available, this raises the public interest;

- Some of the wording on their website mentions 'intersectionality', which leads to the question of whether they are teaching critical race theory – something often associated with the far left (and controversial in other sectors). This can lead to the question whether the BFI is politically biased when as a public authority it should be apolitical.

- The training has been ongoing at a time of considerable racial controversy at the BFI. Reference is made to an article where states that 35% of the productions the BFI has supported have been from ethnically diverse practitioners – well in excess of the percentage of non-whites in England and Wales (18%). This raises the question whether the BFI now discriminates against whites.

- The BFI produced a report in 2022, around the time they engaged the What If? Experiment training, which suggests that independent film is at the point of 'market failure'. Given that the BFI, themselves, fund and produce independent films, it is reasonable, therefore, to investigate whether the BFI are part of this 'market failure' problem, by wasting very high amounts of public money on expensive consultants, which instead could have been beer spent on, for example, funding filmmakers to make their first film, perhaps with an an-racist message.

- The BFI '*abjure any notion of assessing its effectiveness'*. In his email of 27April, Mr Stead makes the following points:

> *"In your email of the 26th April '24, with regard to the paragraph which commences 'When making the decision regarding document release…' you display an aversion to any assessment as to whether the training has, as you put it's been successful or 'worked''. Given the sensitivity of this issue, the BFI's prominent place in the filmmaking landscape and the very high cost, this betrays perhaps a very lax attitude on the part of the BFI, not only to its commitment to anti-racism, but also to the value for money component, which surely must always be assessed in some way where public money is involved.*
>
> *It is also self-contradictory. If the BFI has been 'putting learnings that will inform positive change within developing anti-racist day to day operational practice and behaviour' – this from the same paragraph – then surely some kind of assessment has actually been made that the training is, or has been, 'successful' enough to be incorporated into your practices".*

96. The BFI asserts 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 and submits that this does not mean there will be an automatic release of information requested, it simply gives it absolute discretion as to the disclosure of information under FOIA. It is still required to assess disclosure in accordance with FOIA and take account of whether any exemptions apply.

97. The ICO concluded:

> *'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'*

Public Interest: Our Findings

98. We accept that transparency is important in relation to the operation of the BFI because it is spending large amounts of money, some of which derives from public funds. We further accept that where such significant sums are spent as in this case, this increases the public interest in disclosure.

99. There will always be a general public interest in transparency and in this case a public interest in transparency about the issue the information relates to. There is a public interest in tackling racism and seeing what sort of training is being provided to combat that. We accept that concerns are raised by the Appellant in relation to content of the training provided and that there is a public interest in allowing members of the public to assess for themselves if in their opinion, value for money has been achieved and to assess how successful it has been.

100. We further accept that the information would provide at least some information that would be of value to other companies, to other public authorities or to members of the public in general, in relation to what was provided and how. That adds some weight to the public interest in disclosure – however it also (substantially) weighs against disclosure as addressed below.

101. We find that the extent to which the above public interests are served by the redacted information is limited in relation to most of it, and moderate in relation to some of it.

102. Much of the withheld information cannot address how effective the training has been – it merely outlines the training that was provided. This contributes very little to informing the public debate in relation to this.

103. In relation to the public interest in the hourly rates, we find that this was served by disclosure of the total amount of money spent on the training. Nothing (or at the most, very little) is added to the general public interest in transparency by knowing the exact daily rates of each member of staff named. We do not accept that it is reasonably necessary to release the daily rates of each individual for the purpose of this general public interest. It is unclear how knowing the daily rate of each individual involved would significantly further openness and transparency.

104. We find that the public interest in transparency is already met to some extent by the information that BFI has disclosed in response to the request (namely the sums of money spent on training and the detail of the contracts) and also information available on their website.

105. We accept that there is a public interest in the details of the work the contractor is providing to BFI. However general information about the What If Experiment can be found on their website. This addresses who they are and their general approach. We note that the potential concerns Mr Stead has about the suitability of the trainers/training, arises from the information he found on the contractor's website. Members of the public have access to that information on the website and can complain if they wish about the suitability of the training deployed. We do not accept that the Appellant is unable to do this without a breakdown of the training provided. We find that an assessment of the company's competency and credibility can be made from their website and information available therein – a breakdown of their specific methodology or the specific material used to train the BFI is obviously

not available on the website, however we conclude that this in and of itself does not tip the balance in favour of disclosure. We conclude that this is outweighed by the considerations set out below.

106. We do not find that the public interest in spending significant amounts of money always 'trumps' the commercial interests in public consultancy, especially in a case such as this where competitors could exploit that information to copy their intellectual property and significantly undercut them in future projects/bids. This would have not just a detrimental impact on the contractor in question (which we attach significant weight to), but would also damage the BFIs ability to hire companies in the future to do important work, if those companies fear that their confidential work will be disclosed to the world. We find there is a strong public interest in not prejudicing the BFI's ability to reach the best possible deal in negotiations in the future. *It is a charitable organisation operating in a highly competitive market and it is only partly reliant on public funding*. Indeed if the BFI's ability to hire companies is damaged as feared, this would likely lead to a limited pool of companies willing to engage with them in the future, which may well lead to inadequate and unnecessarily costly contracts.

107. We find there is a strong public interest in not prejudicing both the contractor's and BFI's ability to reach the best possible deal in future negotiations and in avoiding other harm to both What If's commercial interests and the BFI's interests. There is, in addition, a clear public interest in not causing damage to the commercial interests of those private companies who work with publicly funded bodies.

108. Taking all the above into account we take the view that the public interest in disclosure is outweighed by the public interest in maintaining the exemption.

Signed

Judge Kiai

Date:

1st May 2025