

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 March 2008

Public Authority: British Broadcasting Corporation (BBC)
Address: MC3 D1,
Media Centre,
Media Village,
201 Wood Lane,
London,
W12 7TQ

Summary

The complainant requested the names and salary details of the top 25 presenters at the BBC. The BBC refused to provide this information on the basis that it was held for the purpose of journalism, art or literature. During the course of the investigation the BBC, without prejudice to their position on the derogation, also sought to rely on exemptions under the Act to withhold the information.

The Commissioner has investigated and concluded that the BBC misapplied the Schedule 1 derogation and that the information requested falls within the scope of the Act. The Commissioner investigated the BBC's application of the exemptions and found that the names and salaries of the presenters are exempt under section 40 of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). In the particular circumstances of this complaint, this duty also includes making a formal decision on whether the BBC is a public authority with regard to the information requested by the complainant. This Notice sets out his decision.

The Request

2. The complainant has advised that on 24 January 2005 he made the following request for information to the British Broadcasting Corporation (BBC):

"I would like to ask for a list of the 25 highest paid BBC presenters in each of the last three available years. I would like to make it clear that I am asking for a list of individuals and their accompanying salaries in each of these three years."

3. The BBC responded on 21 February 2005. It advised that *"the Corporation and other public service broadcasters are covered by this legislation only in respect of information held for 'purposes other than those of journalism, art or literature'.* *This derogation effectively excludes information held for the purposes of creating the BBC's output or information that supports, and/or is closely associated with, these creative activities"*. Consequently, the complainant was informed that the BBC is not obliged to supply information held for the purposes of creating its output (i.e. its programmes) or information that supports and is closely associated with these creative activities. The BBC informed the complainant of the procedure required to request an internal review of their decision not to provide the requested information.
4. The complainant requested an internal review of this decision on 18 March 2005.
5. The BBC completed its internal review on 4 May 2005 and communicated its findings to the complainant. The review found that BBC presenters are employed solely for the purpose of working on its programme output. The BBC describes the individuals concerned as 'talent', and they have no other function in the general management or running of the BBC. The BBC found that the information relating to the employment of talent such as presenters is covered by the journalism, art and literature derogation.

The Investigation

Scope of the case

6. On 15 July 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public interest in disclosure of this information.

Chronology

7. On 9 February 2006 the Commissioner began his investigation by writing to the BBC. The Commissioner requested further arguments from the BBC and also asked if the BBC wished to use the arguments presented in previous cases with the Commissioner.
8. The BBC responded on 16 March 2006. The BBC reiterated its view that the information requested is not covered by the scope of the Act. The BBC listed a number of cases which were under investigation by the Commissioner and provided some further information as to how payments made to presenters and the costs of programmes combine to form the programme budget. The BBC

- referred the Commissioner to case reference FS50067416 and stated that the arguments on the application of the derogation to presenter's salaries have been set out in this case as well as its analysis of the relevant exemptions that it would apply should the Act be found to apply to the information.
9. On 13 February 2007 the Commissioner wrote again. In line with the arguments presented by the BBC in case FS50067416 the Commissioner asked the BBC to provide more detailed arguments and explanation regarding the application of sections 40 and 43.
 10. Having received no response the Commissioner wrote again to the BBC on 13 March 2007 requesting that a response be sent to his letter of 13 February 2007 no later than 2 April 2007.
 11. On 6 February 2008, having still received no response from the BBC the Commissioner wrote again. In his letter the Commissioner informed the BBC that it could now proceed with the arguments supplied in case FS50067416 but did not believe that these arguments justified withholding the information in this case. The Commissioner specifically asked the BBC to explain how section 40 applied to the names of the presenters alone and how this information relates to in-house production costs. The Commissioner asked the BBC to respond by 20 February 2008 or he would proceed with the arguments already supplied.
 12. On 20 February 2008 the BBC responded providing further explanation regarding the application of section 40, 41 and 43 to the salaries of the presenters.

Analysis

The Schedule 1 derogation

13. Part VI of Schedule 1 of the Act states that the BBC is a public authority 'in respect of information held for purposes other than journalism, art and literature'. This is commonly referred to as the Schedule 1 derogation. Similar provision exists in relation to Channel 4 and S4C – as a group these organisations are called public service broadcasters (PSBs).
14. In order to determine the purpose for which information is held the Commissioner will apply a dominant purpose test. This means that where information is held for a number of purposes he will weigh these purposes against each other to determine the dominant purpose for which that information is held.
15. In this case the requested information that the BBC considers to be covered by the derogation is information pertaining to production costs, talent costs and salaries.

The BBC's view

15. The BBC believes that the Schedule 1 derogation applies broadly and therefore its scope includes information such as programme content but also extends to include multi-purpose information, such as financial information related to the cost of programme making. The BBC argue that although this financial information (including details of talent costs and the total cost of in-house productions) is not in itself journalism, art or literature, this financial information is part of the production process and therefore has an obvious impact on creativity.
16. In support of this view the BBC cite three sources:
- (a) The Commissioner's view in his Provisional Decision in the case of *Sugar v Information Commissioner*, EA/2005/0032 that this sort of budgetary information deals with the 'sustenance...of the creative journalistic purpose that the designation is meant to protect'.
 - (b) Evidence given by Mr Richard Sambrook, Director of News at the BBC, in relation to appeal EA/2005/0032 to the Information Tribunal. He stated that:

'Questions about how you make (various) selections or the resources that are available to make selections, might be characterised on the one hand as management, but they are absolutely core to journalism and determine both the quality, nature and character of journalism.'
 - (c) A letter from the Home Office to the Department for Culture Media and Sport of 13 January 2000 which states:

'the Government has sought to ensure that...including them [the public service broadcasters] in the Bill does not place them at a commercial disadvantage to their commercial rivals. The Bill therefore provides that the inclusion of the public service broadcasters does not relate to information held for journalistic, artistic or literary purposes.'
17. In summary, the BBC's position is that the talent cost and in-house production cost information is not held for purposes other than journalism, art or literature and therefore is outside the scope of the Act.

The Commissioner's view

18. In the Commissioner's view the purpose of the derogation is to protect journalistic, artistic and literary integrity and to preserve a "creative space" in which programme makers can continue their core activities free from outside interference.
19. The Commissioner accepts that the requested information (talent costs) supports the creation of programme content. It is self evident that in the majority of cases

some form of financial support is necessary to produce programme content. The BBC and the Commissioner agree on this point and as such he has not considered it further.

20. However, the Commissioner's view is that the requested information is also held by the BBC for operational purposes in **addition** to being held for journalistic, literary and artistic purposes. The Commissioner believes that financial information serves a number of direct purposes; for example, it is used to budget, monitor expenditure, identify opportunities to improve efficiency, and to comply with legal obligations.
21. In the particular circumstances of this case, the Commissioner has found it useful to understand the Royal Charter which constitutes the BBC when considering these purposes. It should be noted that the Royal Charter in existence on the date of the complainant's request for information (24 January 2005) ran from 1 May 1996 to 31 December 2006 and is known as the 1996 Charter. A new Royal Charter came into force on 1 January 2007 and is known as the 2006 Charter.
22. The Commissioner has noted the following provisions of the 1996 Charter:
 - Article 7(1)(b) states that it shall be the functions of the Governors to *"satisfy themselves that all the activities of [the BBC] are carried out in accordance...with the highest standards of probity, propriety and value for money in the use of the Licence Revenue and moneys paid..."*
 - Article 18(1) states that the BBC's accounts shall be audited annually. Article 18(2) provides that the BBC *"shall...prepare an Annual Report...and attach thereto an Account or Accounts of the Income and Expenditure of the Corporation and...shall include in such Report such information relating to its finance, administration and its work generally..."*
23. The 2006 Charter has similar provisions to the 1996 charter albeit with a new structure to reflect changes in corporate governance, via the BBC Trust, and the formalisation of the Executive Board as the executive body of the BBC with responsibility for the functions listed in paragraph 38 of the 2006 Charter; notably these include the operational management of the BBC, and the conduct of the BBC's operational financial affairs.
24. Under the 2006 Charter, the BBC Trust is the guardian of the licence fee revenue and the public interest. To fulfil this role the Commissioner understands the general functions of the BBC to include the following:
 - (i) assessing the performance of the Executive Board in delivering the BBC's services and activities and holding the Executive Board to account for its performance;
 - (ii) representing the interests of licence fee payers and exercising rigorous stewardship of public money; and

- (iii) to ensure that the Executive Board conducts the BBC's operational financial affairs in a manner best designed to ensure value for money.
- 25. Therefore the Commissioner believes that, as a result of the Charters, the BBC holds financial information to enable:
 - (i) the Governors (and now BBC Trust) to perform their role as 'guardians' under the Royal Charter by assessing the performance of the Executive Board; and
 - (ii) the Executive Board to manage the BBC's financial and operational affairs in a manner best designed to ensure value for money.
- 26. People costs constitute financial information and therefore serve a number of purposes in addition to that accepted by both the BBC and the Commissioner, i.e. that they support the creation of programme content.
- 27. Where information is held for a number of purposes the Commissioner's approach is to consider whether the dominant purpose for holding that information is a purpose specified in the Schedule 1 derogation.
- 28. In this case, in-house programme and talent costs information serves the following purposes:
 - (i) It supports the delivery of programme content.
 - (ii) It enables the BBC to monitor its expenditure against its agreed budget for that year.
 - (iii) It enables the BBC to predict with some certainty the future costs of engaging talent.
 - (iv) It enables the BBC to predict with some certainty the future costs of producing programmes in-house.
 - (v) It contributes to meeting the BBC's obligations to publish annual accounts.
 - (vi) It contributes to the ability of the Governors (now the BBC Trust) and the Executive Board to perform their respective functions and operational duties under the Royal Charter
- 29. The final factor which the Commissioner has weighed, in coming to a decision on whether the derogation applies, is whether the decision on the cost of engaging talent constitutes a creative decision.
- 30. A creative decision would relate to the inception, planning and delivery of new content. For example, the decision to use presenter X instead of presenter Y would tend to be a creative decision, based on the reputation and standing of the entertainer in the industry, but the determination of the level of remuneration for presenter X or Y would not be characterised as a creative decision.
- 31. As such, the Commissioner does not consider that the requested information constitutes a creative decision.

32. After carefully balancing these competing purposes, the Commissioner finds that the requested information was, or was more likely to have been, held by the BBC for predominantly operational purposes (including financial, management and administrative purposes) and not for journalism, literature or art. As a result, Schedule 1 is not applicable to talent costs information and the BBC is a public authority with regard to this information.

Exemptions

33. The BBC provided additional arguments, without prejudice to its view that the derogation was engaged, as to the exemptions which it would seek to rely on, in the event that the Commissioner found that the derogation did not apply in this case.
34. The BBC explained that the information requested constitutes 'talent costs' and that this is exempt under sections 40, 41 and 43 of the Act.

Section 40 'Personal Data'

Talent Costs

35. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the Data Protection Act 1998 ('DPA').
36. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal information as:

'...data which relates to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

37. The Commissioner accepts that the salaries paid to the presenters and the names of the presenters falling in the 'top 25' category clearly falls within the description of personal data as defined by the DPA because it is information which directly relates to a living individual.
38. The BBC argued that presenters' salary details and names are exempt from disclosure because to do so would breach the first, second and sixth data protection principles.
39. The first data protection principle has two components:
1. Personal data shall be processed fairly and lawfully and

2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
40. In considering whether disclosure would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
 - The presenters' reasonable expectations of what would happen to their personal data; and
 - Whether disclosure would cause any unnecessary or unjustified damage to the presenters
 41. In the BBC's view payments made to talent such as presenters are not analogous to the salaries paid to senior employees in public sector organisations. This is because the sums paid by the BBC to talent do not relate to the performance of a public function, but rather to individuals who are contracted to provide services to the BBC in an entirely private capacity. In the BBC's view disclosure of the requested information would therefore impinge on the private lives of the relevant individuals, particularly given that in the case of talent, their work forms part and parcel of their lives to such a degree that the professional and private aspects of their lives are often intertwined.
 42. Furthermore, with regard to the expectations of the talent, the BBC has explained that the contracts it enters into with talent contain express confidentiality provisions which state that: 'the Broadcaster shall not at any time during the Term or afterwards disclose to anyone in circumstances whatsoever confidential information relating to the business or affairs (including programmes) of the BBC its subsidiaries and associates'.
 43. The BBC has acknowledged that, strictly speaking, individuals with knowledge of talent deals are free to disclose that information. However, the Commissioner understands that in this case none of the talent covered by the scope of the request have made any public comment to such an effect. Furthermore, the BBC has explained that in fact there is very little sharing of information of this kind and that this is demonstrated by the newsworthiness of leaks to the press regarding individual talent deals. The BBC argues that if such information were commonplace it would not merit the headlines that it normally does. The BBC has also noted, on occasions where details of deals have been leaked to the press the BBC has received complaints from several agents and from talent themselves about breaches of confidentiality. Therefore, set against this context of talent costs very rarely being proactively disclosed, and the particular circumstances in which the agreements with these individuals were negotiated, the BBC believes that the individuals covered by these requests would have a clear expectation that details of their agreements would not be disclosed.
 44. The BBC has drawn the Commissioner's attention to a number of articles in the press which contained negative comments about the salaries paid to leading presenters. The BBC have argued that this demonstrates that the presenters could be subject to unwarranted and unwelcome press coverage including potentially personal and attacking material which would cause distress.

45. On the basis of the above, the Commissioner accepts that the talent involved in this case would have an expectation that details of their financial arrangements with the BBC would not be disclosed. Furthermore, the Commissioner is also persuaded that this expectation is a reasonable one. In reaching this conclusion the Commissioner has placed considerable weight on the fact that the relationship which talent enters into with the BBC is distinct from the relationship that salaried employees enter into with the BBC. This key distinction is based on the fact that the talent's work for the BBC is inextricably linked to their private lives and because it is not possible to separate the private and professional aspects of their lives it would be unfair to disclose how much these individuals were paid by the BBC.
46. The Commissioner has also considered if disclosure of the names alone of the top 25 presenters would contravene the first data protection principle. The Commissioner accepts that disclosure of the names, without the financial details, still reveals information about the relative financial situation of the individuals. Disclosing that the individual falls within this category reveals to others something about them. For example if there were colleagues presenting similar shows and one appeared on the list and the other did not, it would reveal to the individual not on the list that his colleague was earning more money than him, something he would not already have known. The Commissioner considers that the individual presenters would not expect their names to be disclosed as being on the 'top 25' list and that this expectation would be a reasonable one.
47. Therefore, the Commissioner accepts that disclosure of the names and accompanying salary details of the top 25 presenters would be unfair and consequently that disclosure would breach the first data protection principle. As he is satisfied that section 40(2) applies to the requested information he has not gone on to consider the application of section 41 or 43.

Procedural matters

48. The complainant submitted his request on 24 January 2005 and the BBC refused to disclose the information it considered to be covered by the derogation on 21 February 2005. As the BBC relied on the derogation to withhold this information, it did not specify the exemptions under which it considered the information to be exempt from disclosure under the Act. As the Commissioner has concluded that this information is not covered by the Schedule 1 derogation and therefore falls within the scope of the Act, he must conclude that technically a breach of section 17 has occurred.
49. Section 17(1) requires that when a public authority refuses access to information it must specify in a notice to the applicant the exemptions upon which it is relying to refuse to answer the request and why, if not clear, those exemptions apply. Therefore a breach of section 17 occurred because the BBC failed to provide the complainant with a refusal notice citing sections 40 and 43.

The Decision

50. The Commissioner's decision is that the BBC has failed to deal with the following elements of the complainant's request in accordance with the Act:
- (i) The BBC has incorrectly applied Part VI of Schedule 1 of the Act to the information requested as it is not held for the dominant purpose of journalism, art or literature. Therefore the BBC has not dealt with the complainant's request in accordance with Part I of the Act in that it failed to comply with its obligations under section 1(1).
 - (ii) The BBC breached section 17(1) of the Act because it failed to provide a refusal notice stating which exemptions it believed applied to the information covered by the request.
51. However, the Commissioner has decided that the following aspects of the request were dealt with in accordance with the Act:
- (i) The application of section 40(2) to the information requested.

Steps Required

52. The Commissioner requires no steps to be taken.

Right of Appeal

45. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 25th day of March 2008

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).”

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.