

Freedom of Information Act 2000 (Section 50)

Decision Notice

28 February 2008

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

Summary

The complainant made 11 requests for information to the BBC for: details of the personal shareholding of members of staff who select and present coverage on the Working Lunch programme; details of financial relationships that exist between members of staff working on the programme and the financial experts who appear on it; a record of appearances of a financial expert; and a record of the coverage given to a particular company on the programme. The BBC refused to provide all the information requested on the basis that it was not a public authority in relation to the complainant's request because the information was held for the purpose of journalism, art or literature within the meaning set out in Schedule 1 of the Act. As an alternative argument the BBC applied section 40 and 41 to withhold the information.

The complainant made a complaint to the Commissioner regarding the information withheld in points (i), (ii), (iii), (x) and (xi) of this request. The Commissioner has investigated and concluded that the information in parts (x) and (xi) of the request is held for the dominant purpose of journalism, art and literature.

However the Commissioner concluded that the BBC misapplied the Schedule 1 derogation and that the information requested in part (i), (ii) and (iii), falls within the scope of the Act. The Commissioner investigated the BBC's application of the exemptions and found that the information requested is exempt from disclosure 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. On the 20 March 2005 the complainant requested the following information from the BBC:
- (i) *'I would like to know if the BBC has any information concerning personal shareholdings or pecuniary interest in shareholdings of those members of staff, such as Adam Shaw and Tracey Hobbs, of the Working Lunch Programme, who select and present financial 'coverage' for the programme?'*
 - (ii) *'I would like to know if the BBC has any information concerning personal shareholdings or pecuniary interest in shareholdings of those 'Financial Experts', such as Justin Urquhart Stewart, who provide 'coverage' of shares and financial markets on the Working Lunch Programme?'*
 - (iii) *'I would like to know if the BBC has any information concerning financial relationships between those members of staff, such as Adam Shaw and Tracey Hobbs, of the Working Lunch Programme, who select and present financial 'coverage' for the programme, and those 'Financial Experts' and their Companies, such as Justin Urquhart Stewart and Seven Investment Management, who provide 'coverage' of shares and financial markets on the Working Lunch Programme?'*
 - (iv) *'I would like to know if 'Financial Experts' or their Companies, appearing on the Working Lunch Programme of the BBC, are paid in any way, appearance fees, expenses, benefit-in-kind, et cetera?'*
 - (v) *'I would like to know if all 'Financial Experts' and their companies appearing on the Working Lunch Programme of the BBC are treated equally?'*
 - (vi) *'I would like to know if a written Agreement/Contract exists between the 'Financial Experts' and their Companies appearing on Working Lunch, such as Justin Urquhart Stewart/ Seven Investment Management and the BBC?'*
 - (vii) *'I would like to know what BBC Guide-Lines exist to govern the 'exposure/promotion' of Commercial Concerns/Individuals and their Products and Services on the BBC.'*
 - (viii) *'I would like to know what BBC Guide-Lines exist to ensure that all 'Financial Experts' and their Companies, within the same category, such as Justin Urquhart Stewart/Seven Investment Management/'Share Experts' are treated equally by way of 'exposure/promotion' on Working Lunch.'*

- (ix) *I would like to know exactly what records are kept to monitor and ensure equal 'exposure/promotion' of 'Financial Experts' and their Companies on Working Lunch.*
- (x) *I would like to know if the BBC has a record of appearances by Justin Urquhart Stewart on Working Lunch during September and October 2000?*
- (xi) *I would like to know if the BBC has record of 'coverage of Marconi Corporation PLC and Shares in Marconi on Working Lunch, by Justin Urquhart, during September and October 2000?'*
3. The BBC responded on 11 April 2005. It advised that the request '*fell outside the scope of the Act because the BBC, Channel 4 and S4C are covered by the legislation only in respect of information held for purposes other than journalism, art or literature*'. Consequently the complainant was informed that the BBC is not obliged to supply this information as it is held for the purpose of creating its output (i.e. its programmes) or supports and is closely associated with these creative activities.
4. However, in relation to questions (vii) and (viii), the BBC informed the complainant that it may be useful to consult the BBC's Producers' Guidelines at: <http://www.bbc.co.uk/info/policies/producerguides>, which outline all its editorial guidance and the principles which underpin the BBC's journalism. It also advised the complainant that it is satisfied that none of its guidelines on financial reporting have been broken.
5. The BBC further advised the complainant that no internal review procedure was available to him although he was advised of his right to make a complaint to the Commissioner.
6. The complainant contacted the BBC on 26 May 2005 requesting an internal review of its decision to withhold the requested information relating to questions (i) to (iii), (x) and (xi) only.
7. The BBC responded on 03 June 2006 maintaining that it would not offer an internal review in respect of the information requested as it was not covered by the Act and reiterated the complainant's right to make a complaint to the Commissioner.

The Investigation

Scope of the case

- 8 On 8 November 2005 the complainant contacted the Commissioner to complain about the way his request for information in parts (i), (ii), (iii), (x) and (xi) had been handled. The complainant specifically asked the Commissioner to consider the following points:

- In refusing to release the requested information the BBC is acting contrary to the spirit of the partial exemption to the FOIA allowed to the BBC.
 - The release of the requested information is in the Public Interest.
 - In withholding the requested information, the BBC will undermine the confidence of Licence Holders and Viewers in financial coverage on the BBC.
9. This investigation will focus upon the BBC's decision to withhold the information relating to questions (i), (ii), (iii), (x) and (xi) only, as requested by the complainant.

Chronology

10. On 29 August 2006, the Commissioner wrote to the BBC and requested it provide any further arguments for withholding the information on journalistic, artistic and literary grounds.
11. In a second letter dated 19 January 2007, the Commissioner asked the BBC to provide details of any exemptions that it believed supported its decision to withhold the requested information.
12. On 15 February 2007, the BBC responded maintaining that the information requested fell outside the scope of the Act and provided further arguments and references in support of this view. In addition, and without prejudice to its position that the Act does not apply, the BBC provided alternative arguments for withholding the information under the section 40 and section 41 exemptions.
13. In order for the Commissioner to fully consider the arguments submitted, he contacted the BBC again on 22 February 2007 requesting further information to support the exemptions applied.
14. The BBC responded on 02 April 2007. It provided the Commissioner with further information in support of its application of the exemptions under section 40 and section 41. It also provided further arguments in support of its view that the requested information is outside the scope of the Act.

Analysis

15. In the Commissioner's view, for reasons communicated to the parties separately, the information requested in question (x) and (xi) is held for the purposes of journalism, art and literature. As such it falls outside the scope of the Act and will therefore not be considered any further in this notice, as the Commissioner has no jurisdiction to rule on these matters in a Decision Notice
16. In contrast, the Commissioner believes that the information requested in questions (i), (ii) and (iii) is held for purposes other than journalism, art and

literature and is therefore caught by the Act. The remainder of this notice will therefore investigate the BBC's decision to withhold this information only.

The Schedule 1 derogation

17. 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).
18. 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.
19. In this case the requested information that the BBC considers to be covered by the derogation is the financial interest of staff and presenters on the Working lunch programme.

The BBC's view

20. 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 the personal interests information. The BBC consider that the dominant purpose for holding information is the critical factor in making a determination on whether information is held for the purposes of journalism, art and literature, or some other purpose.
21. The BBC maintains that the information regarding the interests of staff and presenters on the Working Lunch programme is held to protect the impartiality of the financial journalism conducted for the Working Lunch programme and is therefore integral to the overall production process.
22. It further states that:

'The dominant purpose for holding the personal interests information is to support BBC content and output; therefore such information was not held for a dominant purpose other than the purposes of journalism, art or literature and as such is outside the scope of the Act.'
23. 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.'

24. In summary, the BBC's position is that the information is not held for purposes other than journalism, art of literature and therefore is outside the scope of the Act

The Commissioner's view

25. The Commissioner has noted the arguments put forward by the BBC.
26. 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.
27. However, the Commissioner's view is that the requested information is held by the BBC for operational purposes in addition to journalistic, literary and artistic purposes.
28. The Commissioner's investigation has revealed that the requested information regarding the personal shareholdings, interests and financial relationships of staff and presenters working on the Working Lunch programme are recorded on a Declaration of Personal Interests Form.
29. When any member of staff commences employment with the BBC they must, as part of their contract of employment, complete a Declaration of Personal Interests form. The same form is completed by non-production staff e.g. administration staff and editorial and production staff e.g. programme makers. As such, this form is also held for the purpose of complying with Human Resources (HR) regulations and the terms of the contract of employment.
30. It should be noted that the same process applies to Freelances as part of their terms of engagement. Freelances are employed by the BBC on one off or short

- term contracts. However, guests are not normally required to declare their personal interests.
31. The Commissioner also believes that the information requested is also held to ensure that all staff meet the requirements of the Agreed Conflict of Interest Statement. The Agreed Statement sets out requirements for staff which are designed to maintain the BBC's reputation for impartiality, integrity in programme-making and impeccable standards in its commercial dealings. It is also designed to protect staff from accusations of partiality in editorial or commercial matters. Full details of this statement can be found at:
[http://www.bbc.co.uk/foi/docs/working_at_the_bbc/staff_policies/Conflict of Interest](http://www.bbc.co.uk/foi/docs/working_at_the_bbc/staff_policies/Conflict_of_Interest)
32. These requirements are based on three principles and relate to activities of all staff:
- Staff will not allow their outside activities to interfere with their BBC work or allow any conflict between their duties and their private interests to affect their ability to carry out those duties effectively;
 - Staff will not make use of or exploit the BBC's name, their connection with the BBC or information obtained in the course of their duties to further their own private interests or those of any outside organisation to the detriment of the BBC;
 - Staff will not act in a manner likely to bring the BBC into disrepute or to affect its reputation for impartiality.
33. In addition, the information regarding the personal interests of staff and presenters on the Working Lunch programme indirectly supports strategic goals identified in the Amended Agreement between the Department for Culture Media and Sport (DCMS) and the BBC dated 4 December 2003, following this referred to as the Amended Agreement. In the Amended Agreement, Clause 5 (titled Programming Standards) details the BBC's objectives for providing a balanced, accurate and impartial service.
34. It should be noted that the 2006 Agreement between the DCMS and BBC replaced the Amended Agreement on 1 January 2007. In the 2006 Agreement the BBC's objectives for accuracy and impartiality are detailed in paragraph 44 of the Agreement.
35. 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.
36. In this case the personal shareholdings and interests information serves the following purposes:
- (i) It supported the delivery of programme content and output.

- (ii) It supports compliance with HR regulations and the terms of the BBC's contract of employment.
 - (iii) It is held to ensure that staff meet the requirements of the Agreed Conflict of Interest Statement.
 - (iv) It indirectly supports the strategic goals identified in the Agreed Amendment for providing balance and impartiality in its services.
37. The final factor which the Commissioner has weighed, in coming to a decision on whether the derogation applies, is whether the information regarding the personal shareholdings and interests constituted a creative decision and/or its relationship with the creative process. A creative decision would relate to the inception, planning and delivery of new content.
38. As such, the Commissioner does not consider that the requested information constitutes a creative decision.
39. 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 management and administrative purposes) and not for journalism, literature or art. As a result, Schedule 1 is not applicable to information and the BBC is a public authority with regard to this information.

Exemptions

40. BBC has provided alternative arguments, without prejudice, 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. These were section 40 and section 41.
41. The remainder of this decision notice will deal with the application of each the relevant exemptions to the information requested.

Section 40 - Personal Information

42. 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").
43. 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.'

44. The Commissioner is satisfied that personal shareholdings, interests and financial relationships fall within the definition of personal data, as this information relates to an identifiable living individual. It is therefore the Commissioner's view that the information relating to the request constitutes third party personal data under the FOIA.
45. The BBC argue that the information is exempt from disclosure because to do so would breach the first, second and sixth data protection principles.
46. 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.
47. In deciding whether disclosure of personal shareholdings, interests and financial relationships information would be fair, the Commissioner has taken the following factors into consideration:
 - Would the third party expect that his or her information might be disclosed? Had the person been led to believe that his or her information would be kept secret?
 - Has the third party expressly refused consent to disclosure of the information?
 - Would the disclosure cause unnecessary or unjustified distress or damage to the third party?
 - The legitimate interests of the general public, in knowing that the BBC provides impartial financial coverage.
48. The BBC has argued that the relevant individuals would not have had any expectation that personal financial information would have been made public by the BBC. To support this view it has confirmed that the Declaration of Personal Interest forms are marked "Confidential".
49. The BBC has confirmed that Mr Shaw has in fact explicitly stated that he does not want the requested information disclosed to the complainant.
50. The Commissioner has made it clear in his guidance on the section 40 exemption that when considering fairness it is helpful to determine whether the information relates to the private or public lives of a third party:

'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally provided on request unless there is some risk to the individual concerned.'

51. The Commissioner considers that the information requested relates to the named individuals' private lives as it constitutes their personal finances and as such should be afforded protection from disclosure.
52. Furthermore, the Commissioner believes that information which might be deemed 'HR information' should remain private e.g. a person's individual tax code, their pension contributions and other information normally held by an organisation's HR department. In the particular circumstances of this case, the Commissioner is aware that a Declaration of Personal Interest form is held on the HR files of all BBC staff and Freelances. As such, he considers that the requested information also falls within this category and should therefore remain private.
53. The Commissioner also recognises the strength of the BBC's argument that there is a strong expectation of privacy attached to the requested information and that disclosure of this information would breach this expectation.
54. Finally, the Commissioner understands that there is legitimate interest in the public having confidence that the BBC presents impartial financial coverage, however, he is aware that the BBC is subject to a variety of rules and regulations to ensure that there is transparency, objectivity and impartiality in the BBC's financial coverage and most importantly that no financial crime occurs. Therefore, in the particular circumstances of this case the Commissioner considers that the rights, freedoms and legitimate interests of the third party outweigh the legitimate interests of the public.
55. In light of the above the Commissioner believes that disclosure of the requested information would breach the fairness element of the first data protection principle and as such the BBC has correctly applied the section 40 exemption.
56. Therefore, the Commissioner accepts that disclosure would be unfair and that therefore disclosure would breach the first data protection principle. Consequently, the information covered by questions (i) (ii) and (iii) is exempt from disclosure by virtue of section 40(2).
57. As the Commissioner has concluded that the information covered by questions (i) (ii) and (iii) is exempt by virtue of section 40 of the Act, he has not considered whether this information is also exempt on the basis of section 41.

Procedural matters

58. Section 17(1) states that a public authority which is relying on a claim that the information is exempt, must, within the time for complying issue a refusal notice which:
 - (a) states the fact that information is exempt,
 - (b) specifies the exemption in question, and
 - (c) states why the exemption applies.
59. As the BBC was relying on the Schedule 1 derogation, its refusal notice of the 11 April 2005 did not explain which exemptions it considered applied to the

requested information. Technically this is in breach of the requirements of section 17 of the Act.

The Decision

60. 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 in parts (i), (ii) and (iii) as the information is not held for the dominant purpose of journalism, art or literature. Therefore the BBC has not dealt with these aspects of 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 of the Act because it failed to provide a refusal notice stating which exemptions it believed applied to the information covered by the request listed in the previous paragraph.

61. 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 to the information requested in parts (i), (ii) and (iii).

Steps Required

62. The Commissioner does not require the BBC to take any further steps as a result of this decision

Right of Appeal

63. 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@dca.gsi.gov.uk

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 28th day of February 2008

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Relevant Statutory Obligations and Provisions under the Act

Section 1(1) provides that –

“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.”

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.”

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 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”