

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 details of payments made by the BBC to a range of personalities, actors, journalists and broadcasters. The BBC refused to provide the information on the basis that the information was held for the purposes of journalism, art and literature. Having considered the purposes for which this information is held, the Commissioner has concluded that the requested information was not held for the dominant purposes of journalism, art and literature and therefore the request falls within the scope of the Act. Therefore the Commissioner has decided that in responding to the request the BBC failed to comply with its obligations under section 1(1). Also, in failing to provide the complainant with a refusal notice the Commissioner has decided that the BBC breached section 17(1) of the Act. However, the Commissioner has also concluded that the requested information is exempt from disclosure by virtue of section 40(2) 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 30 January 2007, the complainant made a request to the BBC for the following information:

“..what payments the BBC has made to the following personalities, actors, journalists, broadcasters and employees listed below:

June Brown, Star of Eastenders
Fiona Bruce, broadcaster and journalist
Adrian Chiles, presenter
Jeremy Clarkson, presenter of Top Gear
David Dimbleby, presenter Question Time
Huw Edwards, journalist and broadcaster
Chris Evans, radio presenter
Bruce Forsyth, presenter and entertainer
Dawn French, actress and comedian
Ricky Gervais, comedian and writer/director of The Office and Extras
Richard Hammond, presenter on the BBC's Top Gear programme
John Humphrys, radio and TV broadcaster
Natasha Kaplinsky, journalist and presenter
Gary Lineker, BBC presenter
Joanna Lumley, actress and comedian
Emily Maitless, journalist and presenter
Andrew Marr, journalist and presenter
Simon Mayo, broadcaster
Stephen Merchant, comedian and writer/director of The Office and Extras
James Naughtie, presenter on the Today programme
Graham Norton, broadcaster
Jeremy Paxman, presenter of Question Time and University Challenge
Carolyn Quinn, presenter on the Today programme
Anne Robinson, broadcaster and presenter of The Weakest Link
Jonathan Ross, broadcaster and presenter
Jennifer Saunders, actress and comedian
Edward Stourton, presenter on the Today programme
Barbara Windsor, star of Eastenders
Terry Wogan, television and radio broadcaster
Gabby Yorath, broadcaster
Kirsty Young, presenter of Desert Island Discs.”

3. The BBC responded on 2 February 2007. It advised the complainant that it considered the request ‘falls outside the scope of the Act because the BBC and other public service broadcasters are covered by the Act only in respect of information held for purposes “other than those of journalism, art or literature”’. 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.

4. The BBC also informed 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.

The Investigation

Scope of the case

5. On 13 February 2007 the complainant contacted the Commissioner to complain about the way his/her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - “I am unhappy with the BBC’s failure both to provide any information on this matter and with its decision to refuse me an internal appeal.”
 - “...the original request sought information about payments made by the BBC to some of its more established personalities. I submitted the request after you issued a decision notice in my favour on 11 December 2006. That decision notice, which concerned another FOI request about payments to BBC staff, was strongly supportive of the idea of greater transparency on these issues.”

Chronology

6. On 28 August 2007 the Commissioner contacted the BBC and requested further arguments supporting the BBC’s claim that the requested information was not held for purposes other than journalism, art and literature. The Commissioner explained that his preliminary view was that the requested information would predominantly be held for purposes other than journalism, art and literature. With this in mind, the Commissioner also asked the BBC to provide, without prejudice to its position on the application of the Schedule 1 derogation, details of any exemptions it would seek to rely upon in the event that the derogation did not apply in this case.
7. The BBC responded on 21 February 2008 and confirmed that they still considered that the requested information was not held for purposes other than journalism art or literature and that it, therefore, fell outside the scope of the Act. The BBC also explained that it considered the requested information to be exempt from disclosure by virtue of the exemptions contained at section 40 (personal data), section 41 (information provided in confidence) and section 43 (commercial interests).

Analysis

8. 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.

9. 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.
10. In this case the complainant's request was for information which the BBC refers to as 'talent costs', i.e. the payments made by the BBC to those named in the request. The BBC has explained that programme budgets are made up of a range of different financial costs including these talent costs.

The BBC's view

11. 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) 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.
12. By way of an example the BBC suggests that the Vicar of Dibley would not have been the same without Dawn French or the distinctive location used of the fictional village of Dibley. Similarly, Friday Night with Jonathan Ross would be a completely different show if the BBC were not able to engage the services of Jonathan Ross. The BBC argues that decisions relating to the cost of engaging presenter A versus presenter B clearly pertain to the inception, planning and delivery of content which constitutes a creative decision. The information, therefore, falls outside the scope of the Act.
13. In support of this view the BBC cite the following sources:
 - (a) Part VI of Schedule 1 of the Act specifies that the BBC is only subject to the disclosure obligations of the Act in respect of "information held for purposes other than those of journalism, art or literature." This does not mean that the information itself needs to be journalism, art or literature to be exempt for disclosure; merely that it be held for these purposes. Details of programme expenses (including talent costs) are part of the production process and have an obvious impact on creativity.
 - (b) The Commissioner's view in his Provisional Decision in the case of *Sugar v Information Commissioner*, FS50133791 that this sort of budgetary information deals with the 'sustenance...of the creative journalistic purpose that the designation is meant to protect'.

(c) Evidence given by Mr Richard Sambrook, Director of News at the BBC, in relation to appeal of the Sugar decision notice to the Information Tribunal (EA/2005/0032). 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.'

(d) 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.'

14. In summary, the BBC's position is that the requested information is held for the purposes of journalism, art or literature and is therefore not subject to the Act. Consequently, the BBC considers that it is not obliged to disclose the information.

The Commissioner's View

15. The Commissioner has noted and considered the arguments advanced by the BBC.
16. The Commissioner accepts that payments made to the talent identified in the request are supportive of 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.
17. 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.
18. 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.
19. 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.

20. As a result of the Charter, the Commissioner believes that 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.

21. In the Commissioner's view, failure by the BBC to hold talent costs information would have a prejudicial effect on the ability of the Governors and Executive Board to perform their respective functions and operational duties under the Charters.

22. The Commissioner also considers that if the BBC failed to hold information related to business costs this practice would also be incompatible with the most basic business and accounting practices and would adversely affect the administrative, business and financial operations of the BBC.

23. The Commissioner is, therefore, satisfied that the requested information is held by the BBC for multiple purposes. 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.

24. 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. While he acknowledges the BBC's view that the information required for the purposes of Schedule 1 does not necessarily need to be journalistic, artistic or literary in nature, it is his view that such information should have the necessary journalistic, artistic or literary application to justify its status as being held for the dominant purpose of Schedule 1.

25. The Commissioner does not believe that talent costs information possesses enough journalistic application to enable it to be held for a dominant journalistic purpose. Although he acknowledges that the requested information was generated by the need to hire presenters for BBC shows and that this is a creative purpose, the Commissioner considers that the reasons the information

continues to be held by the BBC are essentially ones of financial management. The Commissioner considers talent costs information to be central to the operational heart of the BBC's policies, strategies and allocation of resources and the prejudicial consequences of not holding this information support the view that the requested information is held for the dominant purpose of the BBC's operations, rather than one of the purposes of Schedule 1.

26. Therefore, the Commissioner considers the BBC to be a public authority with regard to this information.

Exemption Arguments

27. As noted in paragraph 5, 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 the Commissioner found that the derogation did not apply in this case. These were:

- Section 40 – Personal data.
- Section 41 – Information provided in confidence.
- Section 43 – Commercial interests.

Section 40

28. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA). (The relevant sections of section 40 are included in the legal annex attached to this notice).
29. 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 relate 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 intentions of the data controller or any persons in respect of the individual”

30. The Commissioner is satisfied that the requested information consists of personal data as defined by the DPA. This is because the financial agreements that the talent identified in the request entered into with the BBC represent data which relates directly to them and includes indications of the BBC's intentions in respect of them, e.g. payment of x pounds for presenting particular programmes.

The first data protection principle

31. The first data protection principle requires that the processing of personal data should be fair and lawful and that personal data should not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.
32. In correspondence with the Commissioner, the BBC has argued that disclosure of the information would breach the first data protection principle because disclosure would be both unfair and unlawful and further more, none of the conditions in Schedule 2 of the DPA can be met.

Unlawful Processing

33. The BBC argues that disclosure of the information would amount to unlawful processing because it would be processing in breach of the law of confidence. They explained that, as information pertaining to talent costs has the quality of confidence about it and is communicated in circumstances importing an obligation of confidence, disclosure of that information would be a breach of that obligation, to which there would be no valid public interest defence.
34. In support of their view that information pertaining to talent costs has confidential quality, the BBC explained that:

(i) A significant number of the BBC's key talent have express provisions in their individual contracts whereby the BBC warrants and undertakes that it will not divulge any information relating to the terms of the contract. In some instances these clauses are full warranties and breach of the clause allows for immediate termination of the contract without reparation.

(ii) Cheques and remittances are sent out to talent in envelopes marked 'private and confidential'.

(iii) Talent details (contract, fee, programme, rights detail, cost centre to which the fees should be charged) are contained in an integrated pan-BBC system known as 'ACON'. A number of security features of this system are specifically designed to ensure that payments to talent remain confidential:

- ACON access is restricted to BBC staff in the Rights community and is restricted again according to the specific teams in which rights staff negotiate talent agreements, for example, Sport or News. Additionally, BBC Sport and News rights staff use confidential contract types for their high profile talent and this means that only a very small number of BBC staff are able to see the contractual agreements and fees.
- A confidentiality warning appears each time an ACON user logs on to the system. This warning states that 'information about BBC contributors which can be accessed through ACON is confidential to the BBC and must not be disclosed to any third party unless you are expressly authorised to do so.'

- ACON security is built into roles and there are 4 different levels of security access. There is extra security for high profile talent, such as those individuals which are the subject of this request, marked as “confidential contributors”, engaged by areas other than Sport and News where these contributors are paid fees in excess of £10,000. Contracts for these “confidential contributors” can only be accessed by a limited number of staff with access levels 3 or 4.
- On occasions when talent costs have been leaked to the media several agents and talent themselves have complained about breaches of confidentiality.

35. On the basis of the above, the Commissioner accepts that the talent identified in the request would have had an expectation that information pertaining to their financial agreements with the BBC would not be placed in the public domain. In reaching this conclusion the Commissioner has placed particular weight on the nature of talent contracts and the manner in which contractual information is held by the BBC. At the very least it is clear that the BBC owes the talent in question an implicit duty of confidence and in some cases, this is explicitly set out in contractual clauses.
36. Whether an individual has an expectation that information held about them by a public authority will not be disclosed is only one factor in deciding whether the disclosure would be a breach of confidence thereby rendering the processing unlawful. However, the same point is relevant in deciding whether disclosure would be unfair.

Unfair Processing

37. The Commissioner’s guidance on section 40 notes that the concept of fairness is not easy to define. However, the guidance suggests that the sort of issues which should be considered when establishing whether it would be unfair to pass on information without the consent of the data subject would include:
- Would the disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
 - Would the third party expect that his or her information might be disclosed to others?
 - Has the person been led to believe that his or her information would be kept secret?
38. In thinking about fairness, the Commissioner’s guidance suggests that it is helpful to ask whether the information relates to the private or public life of the third party. Information which is about the home or family life of an individual, e.g., their personal finances, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual involved. While it is right to take into account any damage or distress that may be caused to a third party by the disclosure of personal information, the focus should be on damage or distress to an individual acting in a personal or private capacity. The exemption

should not be used, for instance, as a means of sparing officials embarrassment over poor administrative decisions.

39. So, applying the criteria above, where information consists of job functions, grades or decisions which have been made in a third party's official capacity, then disclosure would normally be made. On the other hand, information such as home addresses or internal disciplinary matters would not normally be disclosed.
40. On the basis of this guidance the Commissioner considers that senior public sector employees should expect information about their roles and the decisions they take to be disclosed under the Act. The Commissioner also considers that senior officials in public authorities should expect details of their salary bands to be disclosed because senior officials are paid out of public funds commensurate with their level of responsibility.
41. This approach is supported by a recent Information Tribunal decision (House of Commons v Information Commissioner and Norman Baker MP EA2006/0015 and 0016). This decision involved a request for information about the details of the travel allowances claimed by MPs. In its decision the Tribunal noted that:

'where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives'. (Tribunal at paragraph 78).
42. The BBC has explained that the payments made to talent are not analogous to salaries paid to senior employees in other organisations. The sums paid 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. Disclosure of that information is therefore likely to 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.
43. The BBC has also submitted that as the individuals in this case are talent and are not responsible for policy or expenditure decisions, they also have a reasonable expectation that details of their payments will not be disclosed. As a result, to do so would be unfair to the individuals concerned.
44. In this case the Commissioner accepts that the talent identified in the request are not in a position to make influential policy decisions or take decisions related to the expenditure of public funds. Therefore, the Commissioner accepts that they will have different expectations as to what information will be disclosed about their financial agreements with the BBC than senior salaried employees at the BBC. Consequently, the Commissioner accepts that it was reasonable for the talent named to expect that details of their financial arrangement with the BBC would not be disclosed despite the different expectations that the Commissioner believes senior salaried employees of the BBC should have with regard to disclosure of their financial arrangements with their employer.

45. In his submissions, the complainant made reference to a previous decision notice issued by the Commissioner and argued that the decision in that instance was transferable to the current complaint¹. The relevant section of the decision notice in question relates to a request for details of payments made to presenters of the BBC's 2005 edition of their 'Children in Need' programme.
46. The Commissioner's decision in that case was that, given the unique, charitable nature of the broadcast and the associated public perception that talent were not remunerated for their involvement in this, the BBC's use of section 40 to withhold the information was not appropriate and that the information should be disclosed. Crucially, the decision notice made it explicit (at paragraph 38) that the content of the decision addressed the specific context of the Children in Need programme and was not necessarily transposable to other requests for talent payment information. The complainant's argument that the same decision should apply in this instance has not, therefore, been considered further.
47. In conclusion, the Commissioner is satisfied that the talent specified in the request had a reasonable expectation that the BBC would not disclose details of their financial agreement with the BBC and consequently to disclose details of this agreement would be unfair. Therefore, to disclose the requested information would breach the fairness element of the first data protection principle and therefore the exemption provided by section 40(2) of the Act is engaged.
48. Although the BBC applied more than one exemption to the requested information, as the Commissioner has found that the section 40 exemption has been correctly applied he did not consider the application of section 41 or section 43.

Procedural Matters

49. The complainant made the request on 30 January 2007 and the BBC refused the information on 2 February 2007. In their refusal the BBC relied on the Schedule 1 derogation and therefore did not specify the exemptions under which it also considered the information to be exempt from disclosure. As the Commissioner has found that the requested 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.
50. Section 17(1) requires that when a public authority refuses access to information it must specify in a notice to the applicant the exemptions on which it is refusing the application 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 which cited sections 40, 41 and 43.
51. However, the Commissioner acknowledges that the BBC did not, at this juncture, intend to rely on any exemptions under the Act as they had concluded that the requested information did not fall within the scope of the Act.

¹ ICO case reference FS50102474 viewable on the Commissioner's website here: <http://www.ico.gov.uk/upload/documents/decisionnotices/2006/fs50102474.pdf>

52. With regard to the complainant's concern that the BBC did not offer to conduct an internal review of their decision, section 17(7) of the Act states that a refusal notice issued under section 17(1) should contain "...particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure." In this case, whilst the grounds for the BBC's refusal was that the information was not held for the purposes of the Act they did, in confirming that, in such instances, they did not offer internal reviews, comply with section 17(7).

Decision

53. The Commissioner's decision is:
- The requested information is held by the BBC for purposes other than those of journalism, art and 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).
 - The BBC breached section 17 of the Act because it failed to provide a refusal notice explaining why it considered the requested information exempt on the basis of the exemptions contained within Part II of the Act.
 - However the Commissioner is satisfied the requested information is exempt from disclosure on the basis of section 40 of the Act.

Steps Required

54. The Commissioner does not require any steps to be taken.

Right of Appeal

55. 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

**David Smith
Deputy 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 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

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).”