

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 April 2015

Public Authority: The British Broadcasting Corporation (BBC)

Address: Room BC2 B6, Broadcast Centre

White City

Wood Lane

London

W12 7TP

Decision (including any steps ordered)

1. The complainant has requested any correspondence between senior BBC staff members and members of the Dame Janet Smith Review team (or Counsel/Secretariat to the Review) that relates to the scheduled publication date of the review findings . The BBC refused to provide the requested information under section 36(2)(b)(i) and (ii), section 36(2)(c) and section 40(2) FOIA.
2. The Commissioner's decision is that the BBC has correctly applied section 36(2)(b)(ii) and section 40(2) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 13 August 2014 the complainant requested information of the following description:

"Please provide all information contained in any correspondence between senior BBC staff members and members of the Dame Janet Smith Review team (or Counsel/Secretariat to the Review) that relates to the scheduled publication date of the review findings.

I am only seeking relevant information produced since 1st January

2013. By senior BBC staff member, I mean any member of staff named on the following BBC web page:

<http://www.bbc.co.uk/aboutthebbc/insidet...>"

5. The BBC responded on 5 November 2014. It provided the complainant with some of the information he had requested. It withheld some information under section 36 and 40(2) FOIA but said it required further time to consider the public interest in relation to section 36 FOIA.
6. On 19 December 2014 the BBC confirmed that it considered the balance of the public interest favoured maintaining the exemption.

Scope of the case

7. The complainant contacted the Commissioner on 15 December 2014 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the BBC correctly applied section 36(2)(b)(i) and (ii), section 36(2)(c) or section 40(2) FOIA to the withheld information.

Reasons for decision

9. Section 36 FOIA provides that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(b) would, or would be likely to, inhibit-

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation, or

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

10. The BBC has applied section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA to the withheld information.
11. In determining whether the exemptions were correctly engaged by the BBC, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
12. The BBC explained that the qualified person is the Chairman, Rona Fairhead. It explained that the qualified opinion was provided on 18 December 2014. The qualified person's opinion was that section 36(2)(b)(ii) and section 36(2)(c) FOIA were applicable in this case. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions to the qualified person and the qualified opinion was provided to the Commissioner.
13. The Commissioner has first considered the application of section 36(2)(b)(ii).
14. The submissions to the qualified person set out that it is important that the Review is as robust and comprehensive as possible and explained that disclosure would be likely to damage the ability of the BBC and the Review team to discuss all relevant factors as freely and as frankly as the circumstances require and thoroughly explore options for dealing with them if the information withheld under section 36 were disclosed at this time.
15. The qualified person's opinion is that disclosure would be likely to inhibit the free and frank exchange of views under s36(2)(b)(ii) between the BBC and the Review team. She considers that if the information were to be disclosed at this stage, BBC staff and members of the Review team would be likely to feel inhibited in future in discussing the sensitive issues that arise in the context of the Review and exploring options for resolving them in a full and open way.

16. Upon viewing the withheld information, the submissions to the qualified person and the qualified person's opinion, the Commissioner considers that the opinion of the qualified person is a reasonable one.
17. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)*¹.
18. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

19. The BBC considers that there is a public interest in members of the public being able to understand the relationship between the BBC and Dame Janet Smith's Review. In particular, to be in a position to judge whether it is sufficiently independent from the BBC and able to work without interference from the BBC, and whether the BBC is really committed to there being a full investigation of the culture and practices of the BBC in the years when Savile worked there.

Public interest arguments in favour of maintaining the exemption

20. The BBC has explained that it believes the following public interest arguments favour maintaining the exemption:
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¹ EA/2006/0011; EA/2006/0013

Safe Space

Disclosure would have a negative impact on the ability of both the BBC and the Review team to debate live issues and reach decisions which would in turn undermine the "safe space" the Review requires to complete its work free from external interference and distraction.

The Chilling Effect

There is a strong public interest in ensuring that the Review is as robust and comprehensive as possible. Disclosure would be likely to damage the ability of the BBC and the Review team to discuss all relevant factors as freely and as frankly as the circumstances require and thoroughly explore options for dealing with them.

The Timing of the Request

The BBC explained that much of the requested information had already been disclosed to the complainant and, in addition to this, updates have been posted at regular intervals on the Review's website. The BBC said that the information provided demonstrates, contrary to the requestor's concerns, that it was the Review, not the BBC, suggesting that the Report should be delayed. It explained that there were two reasons for this: the need to interview more witnesses and to avoid the possibility of adversely affecting the fairness of forthcoming criminal trials.

The BBC explained that whilst the Review is nearing the end of its work it continues to be approached by witnesses and to receive evidence. According to the latest update on the Review's website, 17 March 2015, the Report is currently expected to be published in the second half of May 2015.

Balance of the public interest arguments

21. The Commissioner considers there is a strong public interest in openness and transparency, particularly in relation to a sensitive issue such as in this case. This is because it would provide the public with a greater understanding of the relationship between the BBC and Dame Janet Smith's Review, and in particular to be in a position to judge whether it is sufficiently independent from the BBC and able to work without interference from the BBC, and whether the BBC is really committed to there being a full investigation of the culture and practices of the BBC in the years when Savile worked there.

22. The Commissioner does however consider that the Review does require a 'safe space' for it to be able to obtain, share, digest and discuss information with the BBC. There is also a requirement for free and frank discussion and the sharing of views. Disclosure of information which would prevent this 'safe space' for consideration and which would be likely to inhibit the frankness and candour of such discussions would not be in the public interest. Particularly as at the time the request was made the Review had not been completed.
23. The Commissioner considers that there is a strong public interest in disclosure of information relating to this sensitive issue as it would provide the public with greater understanding of the relationship between the BBC and the Review team. However the Commissioner considers that there is a strong public interest in allowing the relevant parties safe space for discussion and to enable views to be shared freely and frankly relating to this issue. As the Review was ongoing at the time the request was made, this adds greater weight to the chilling effect arguments.
24. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) was correctly applied in this case.

Section 40(2)

25. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
26. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

“data which relate to a living individual who can be identified –

 - (i) from those data, or
 - (ii) 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.”
27. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform

decisions affecting them, has them as its main focus or impacts on them in any way.

28. The BBC has withheld the names, contact details and signatures of some of the parties to the requested correspondence. It has also applied section 40(2) to one paragraph within the body of the correspondence. The Commissioner considers the information withheld under section 40(2) is information from which the data subjects would be identifiable.
29. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.

Likely expectation of the data subject

30. The BBC argued that no one would reasonably expect their signature to be released, regardless of seniority. This is because a signature is inherently personal to the data subject and does not have any relevance in terms of the performance of that individual's public duties.
31. The member of staff working at Reed Smith who sent an email is in a relatively junior role and is not named in connection with the Review on its website. The BBC therefore considers that this individual would not expect their name to be released in this context.
32. The BBC argued that the BBC lawyers who are named in the correspondence would not reasonably expect their names to be released, given that they are not sufficiently senior to be included in the BBC's publication scheme and disclosure would not shed any light on the publication date of the Review's report. It said of relevance here is the recent decision in *Timothy Couzens v IC* EA/2014/0146 in which the First-Tier Tribunal upheld the Care Quality Commission's refusal to supply the names of individuals who provided it with legal advice on the de-registration of a care agency.
33. In relation to one of the paragraphs redacted under section 40(2), the BBC argued that this related to the personal plans of the individual concerned and the individual would not reasonably expect this

information to be disclosed. Similarly, in relation to the other redacted paragraph, this related to the personal plans of the individual concerned and the individual would not expect the information to be released in response to a request under FOIA. Clearly this information relates to these individuals' personal lives and has nothing to do with the performance of their public duties or the expenditure of public money.

34. Tony Hall is the Chief Executive Officer of the BBC and therefore can reasonably expect information relating to the performance of his public duties to be subject to a greater level of scrutiny than more junior members of staff. The email address is not confidential and it would not be difficult for a member of the public to work out the address given the BBC's standard email format. However, Tony Hall would not expect his email address to be disclosed because the BBC does not make this address public for the reason that there are more efficient channels for dealing with the very high level of correspondence that the BBC receives (see <http://www.bbc.co.uk/contact> for a list of ways that members of the public can contact the BBC). The BBC aims to ensure all correspondence that requires a response receives it from the most appropriate area of the BBC. This response could come from the Director- General or his office, but it could also from another appropriate division (for example, BBC Audience Services, TV Licensing, or the Freedom of Information Team).

Damage and distress

35. The BBC argued that disclosure of the data subjects' signatures is unlikely to have a detrimental effect, but it is possible that this information could be used for fraudulent purposes.
36. It said that it is possible that as a consequence of disclosing the name of the member of staff at Reed Smith and the names of the lawyers at the BBC, these individuals could be contacted directly by members of the public about matters relating to the review. Although it acknowledges this is a low level of harm, it could distract these individuals from their work.
37. It argued if the BBC disclosed the personal information relating to the personal lives of two individuals it is possible that this could negatively impact on the BBC's relationship with these individuals. This is because the data subjects would not expect the BBC, as a responsible data controller, to release this type of information into the public domain.

38. Finally the BBC argued that publishing the email address of Tony Hall on the WhatDoTheyKnow website is likely to result in a large number of emails being sent to this address, a number of which could be dealt with more effectively if the sender had consulted the BBC's 'contact us' page on its website and directed their enquiry to the relevant area of the BBC. Disclosure would also be likely to make the account more vulnerable to spamming and phishing emails.

The legitimate public interest

39. The BBC said that as set out in the ICO's guidance, despite the reasonable expectations of the individuals and the fact that damage and distress may result from disclosure, it may still be fair to provide the information if these factors are outweighed by the legitimate interest in disclosure to the public. In this sense, assessing fairness involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public.
40. It argued that the legitimate public interest in knowing whether the BBC has exerted any pressure on members of the Review team to delay publication of the Review's report is adequately served by the regular updates that are published on the Review's website which clearly explain the reasons for any delays and the correspondence which has already been released to the applicant. Disclosure of the personal information the BBC has withheld under section 40(2) would not add any discernible benefit to the public interest and therefore disclosure would not be fair.
41. The Commissioner considers that whilst there is a legitimate public interest in the disclosure of information which would demonstrate the independence of the Review, he does not consider that the information withheld under section 40(2) would go any significant way to meeting that legitimate public interest.
42. The Commissioner therefore considers section 40(2) FOIA was correctly applied to the withheld information in this case.

Right of appeal

43. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Gerrard Tracey
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