

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 June 2019

**Public Authority:** British Broadcasting Corporation (BBC)  
**Address:** Room BC2 A4  
Broadcast Centre  
White City  
Wood Lane  
London  
W12 7TP

### Decision (including any steps ordered)

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1. The complainant has requested documents and correspondence regarding a BBC investigation into comments made in a WhatsApp group involving BBC staff as well as the transcripts of the messages.
2. The BBC disclosed some of the information but withheld some information on the basis of section 40(2) and 42 of the FOIA. The complainant asked the Commissioner to consider if information had been redacted from the transcripts and disciplinary documents correctly under section 40(2).
3. The Commissioner's decision is that the BBC has correctly applied the provisions of section 40(2) to withhold the information.

### Request and response

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4. On 3 March 2018 the complainant made a request to the BBC in the following terms:

*"I would like documents and correspondence concerning the investigation of a Whatsapp group of which several BBC Asian Network staffers were involved with in 2017. They are reported to have made*

*homophobic, sexist and racist comments about Muslims, specifically Pakistani's.*

*I am happy for personal details such as names and other identifiers to be removed from the documents and Whatsapp transcripts but I'd like the content of the Whatsapp group to be released as there is a public interest in knowing the basis for the internal BBC investigation."*

5. The BBC responded on 26 July 2018 confirming that information within the scope of the request was held and disclosing much of this information. The BBC withheld some information on the basis of section 40 of the FOIA as it was considered personal data and on the basis of section 42 where the information was legal advice.
6. The complainant asked for an internal review on 6 August 2018. The complainant specifically asked the BBC to consider the redactions made under section 40 of the FOIA as it was considered these were excessive.
7. The BBC conducted an internal review and responded to the complainant on 19 November 2018. The internal review concluded that section 40 had been correctly applied to redact information from the WhatsApp transcripts and interviews and in fact considered that much of the information that had already been disclosed could have in fact been withheld under this exemption.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 26 November 2018 to complain about the way his request for information had been handled.
9. The focus of the internal review request and internal review conducted by the BBC was on the redactions made under section 40 of the FOIA. The Commissioner clarified the scope of her investigation would be therefore on the use of this exemption. The Commissioner considers the scope of her investigation to be to determine if the BBC has correctly withheld information within the scope of the request on the basis of section 40.

## **Reasons for decision**

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### **Section 40 – personal data**

10. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the

requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

11. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

***Is the information personal data?***

14. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual"*.

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. The request specifically asked for the transcripts of the private WhatsApp group conversations between four BBC personnel in the BBC's Asian Network radio team. The request also captured documents and correspondence relating to the process followed by the BBC once it had received a complaint about the messages. The BBC acknowledges that

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

by the time the request was made the identities of the individuals had been made public in press reports about the incident. However, the comments and opinions in the messages have not been attributed publicly to any specific individual. The personal data includes the staff names, contact details, employment details, information about their personal conduct and expressions of opinion linked to the individuals. The BBC also states the personal data capture information such as the racial and ethnic backgrounds of the individuals even where this is not explicitly set out in the messages.

19. As well as this the withheld information also captures personal data of other BBC personnel including the individual who raised the complaint and individuals involved in the subsequent disciplinary and advice processes. This information includes names, contact details, details of employment and status as trade union representatives in some cases. The information also includes details of the complaint and the circumstances surrounding the raising of the complaint – information which reveals personal data of the individual concerned.
20. The information that has been redacted has been done to anonymise the comments and expressions of opinions in the messages so that they are not attributable to specifically identifiable individuals, either as the individuals participating in the WhatsApp messages or as the individuals that are the subject of the comments and opinions. The BBC maintains the comments and attributions are not public even though the names of the contributors to the WhatsApp messages and the names of two female employees have been identified publicly in press reports. Further discussion of this is in a confidential annex provided only to the public authority.
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to several data subjects involved in the WhatsApp messages, referred to in the messages and involved in the subsequent disciplinary process. She is satisfied that this information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

24. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

25. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

27. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

*Is the information special category data?*

28. Information relating to special category data is given special status in the GDPR.

29. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

30. Having viewed the withheld information, the Commissioner finds that the requested information does include special category data. Whilst not all of the withheld information is special category data there are clear references to the racial and ethnic backgrounds of individuals and the trade union membership of some individuals. Further identification of special category data has been discussed in the confidential annex provided to the public authority.

31. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.

32. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

33. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
34. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
35. The Commissioner has gone on to consider if there is an Article 6 condition to allow for the lawful processing of the remaining personal data that is not special category data.

### **Lawful processing: Article 6(1)(f) of the GDPR**

36. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
37. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>2</sup>.*

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

38. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
39. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

40. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
41. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
42. The Commissioner understands that the complainant considers the redactions made to the requested information to be excessive and prohibitive in understanding the language and comments that triggered the complaint. The complainant is of the view that further detail can be disclosed without compromising individual privacy.
43. The BBC also recognises there are legitimate interests in transparency and accountability. Specifically, in this case, there is a specific legitimate interest in knowing whether individuals responsible for BBC output hold or express unacceptable views or opinions. The BBC acknowledges the importance of this as it is a public service broadcaster and its Charter mandates that the BBC must be independent in all matters concerning the fulfilment of its mission and its public purposes. Additionally it is recognised there is a legitimate interest in disclosing information that enables the public to satisfy themselves that appropriate procedures are

in place and followed in dealing with complaints of bullying and discriminations.

*Is disclosure necessary?*

44. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
45. The BBC has stated that it does not consider disclosure of the withheld information is necessary to meet the complainant's legitimate interests. The BBC considers that the majority of the information falling within the request has been disclosed and there is also information already in the public domain such as the names of the individuals who were the subject of the complaint as well as some of the details of the nature of the allegations.
46. The BBC points out that the complainant is particularly interested in understanding the basis of the internal BBC investigation and the BBC considers this is met by the disclosure of the letters requiring the individuals involved in the WhatsApp messaging to attend disciplinary meetings. These letters have been disclosed with only minor redactions. The outcome letters from these investigations have also been disclosed largely in full as well as the disciplinary meeting notes with minor redactions.
47. The BBC states that it has appropriate procedures in place to address employment related issues and publishes a significant amount of information including general HR policies, disciplinary procedures and outcomes of BBC investigations. This serves to reassure the public that appropriate procedures are in place and followed when employment related issues arise. Taking all this into account, the BBC argues that disclosing the withheld information would be disproportionately intrusive and unnecessary to meet the legitimate interests identified.
48. Whilst the Commissioner accepts the BBC has disclosed the majority of the requested information it is noted the complainant does not consider this meets his request or the legitimate interests he is trying to pursue. The complainant requires to know the specific nature of the complaint, the language and wording used in the messages. The disclosed information goes some way to meeting that but it does not give the specific details the complainant is seeking. Disclosure of the withheld information is therefore 'necessary' to meet the legitimate interests already identified.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

49. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
50. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
51. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
52. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
53. The remaining withheld information falls into two categories – the WhatsApp messages themselves and the correspondence and documents relating to processes that the BBC followed once a complaint had been made about those messages. The correspondence and documents includes information about the circumstances surrounding the complaint and the disciplinary procedures undertaken including the nature of the complaint, the questions asked during the disciplinary meetings and the responses provided.
54. The BBC states that the disciplinary action arose from private WhatsApp messages sent between colleagues and related to their personal conduct. The messages came into the BBC's possession and formed the basis of the BBC's investigation but such private messages would not normally be available to the BBC or the public. As has already been stated although the identities of the individuals subject to the disciplinary process have been made public the comments and opinions in the messages have not been attributed publicly to specific individuals.

55. The BBC considers that the individuals concerned would have a reasonable expectation that the personal data captured as part of these private messages would not be made public. The BBC employees and other staff concerned would also have a reasonable expectation that details of employment related complaints and disciplinary procedures that are followed would be kept confidential even if the outcome is made public.
56. The Commissioner recognises the general expectation of privacy that is provided with regard to internal investigations or disciplinary hearings. This has been confirmed by the Information Tribunal in several instances and in case EA/2008/0038 it was noted that *"there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters."*
57. The correspondence and documents relating to the disciplinary meetings also capture personal data of the person who raised the complaint and the nature of the complaint as well as the data of other BBC personnel. Disclosure against the reasonable expectations of these individuals is likely to cause distress particularly when having regard for the nature of the information and the allegations that were investigated. The Commissioner recognises that disclosure is likely to cause further distress to the individual who raised the complaint and those involved in the disciplinary process.
58. In relation to the individuals involved in the WhatsApp messaging, the BBC argues that disclosure would be intrusive and could adversely affect their future careers and employability, particularly if they are publicly associated with the specific comments and expressions of opinions made by themselves in the WhatsApp messages. The BBC considers that it reached outcomes that were considered to be fair and appropriate following its disciplinary proceedings and the potential for disclosure to have further adverse effects is unwarranted and unfair. In addition to this two of the individuals continue to work for the BBC and disclosure could adversely impact their working relations with colleagues and other individuals they deal with in a professional capacity.
59. The Commissioner agrees that it is the general expectation of the data subjects concerned that their personal data will remain private and confidential and will not be disclosed to the world at large. Disclosure under the FOIA would confirm to the world at large the specific nature of the complaint, directly attributing comments and opinions to named individuals as well as revealing details about the person making the complaint and those involved in the disciplinary proceedings.

60. Taking into account what information has already been disclosed by the BBC and the information already in the public domain via press reports, the Commissioner considers this would be an unwarranted intrusion into the lives of the data subjects. Individuals involved in the disciplinary process would not have any expectation that the information could be disclosed into the public domain and disclosing this information is likely to cause some distress and upset. Similarly, for the information withheld from the WhatsApp messages the consequence of disclosure should not be understated; disclosure is likely to cause damage and distress to the individuals involved in the messaging and distress to the person who made the complaint by having the nature of the comments and opinions placed in the public domain.
61. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
62. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

## Right of appeal

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63. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

64. 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.
65. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**