

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 1 October 2007**

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

### Summary

---

The complainant asked the BBC for details of the estimated value of prizes given out in competitions run by BBC Wales Radio/Television and a breakdown of this figure - to include the total amount handed out in cash and detailed examples of the range of prizes. The complainant also asked if BBC Wales has an annual budget for prizes and, if so, what it was in 2004 and 2005. The BBC refused to provide this information stating that it was not a public authority in relation to the complainant's request because the requested information was held for the purposes of journalism, art or literature within the meaning set out in Schedule 1, Part VI of the Freedom of Information Act ("Schedule 1"). As an alternative argument the BBC has applied the exemption under section 43 (Commercial interests) to withhold the information from the complainant. After careful evaluation of the nature of the request, the submissions of both parties, and the relevant provisions of the Act, the Commissioner's decision is that the information is held for purposes other than journalism art and literature and had therefore failed to deal with the complainants request in accordance with Part 1 of the Act. He also finds that the exemption under section 43 was not engaged. The complaint has been upheld and the Commissioner requires that this information is provided to the complainant.

### 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"). This Notice sets out his decision.

## The Request

---

2. On the 16 November 2005, the complainant requested the following information from the BBC:
  - (i) *What was the BBC Wales workforce in May 1999?*
  - (ii) *What was the workforce as at October 2005?*
  - (iii) *Can you breakdown department by department how the workforce in each area has changed including the total employees in May 1999 and the number now?*
  - (iv) *Can you also provide me with details of the BBC Wales total redundancy costs year by year since 1999 and how many staff if any received redundancy payments totalling more than £50,000 and how many more than £100,000?*
  - (v) *Could you provide me with the estimated value of prizes given out in competitions run by BBC Wales Radio/Television during 2004 and so far in 2005?*
  - (vi) *Please breakdown this figure – to include the total amount in handed out cash and detailed examples of the range of prizes given out to listeners/viewers. What was the biggest prize/cash given out and what was the smallest? Does BBC Wales have an annual budget for prizes? If so what was it in 2004 and what is it in 2005?*
3. The BBC responded to this request on 5 May 2005. Information in relation to questions (i), (ii) and (iii) was provided in full. The BBC provided some of the information relating to question (iv). However, details of the exact number of staff who received over £100,000 was withheld under section 40 of the Act '*as the number of people involved was small, it would be possible to identify the individuals concerned*'. The BBC refused to provide any information in relation to question (v) and (vi) as it '*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*'. The BBC confirmed that it was 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. The BBC further advised the complainant of his right to an internal review in relation to items (i) to (iv). He was informed that no internal review procedure was available in relation to the information which was not covered by the Act. He was also informed of his right to make a complaint to the Commissioner about all aspects of the handling of his request.
5. The complainant contacted the BBC on 23 December 2005 requesting an internal review of its decision to withhold the requested information.

6. The BBC responded stating that it would not offer an internal review in respect of the information which was not covered by the Act and reiterated his right to make a complaint to the Commissioner.

## **The Investigation**

---

### **Scope of the case**

7. On 18 January 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - Whether the information had been correctly withheld – the complainant argued that the information requested fell within the scope of the Act as it did not relate to journalism, art or literature.
  - The complainant further argued that the requests cover factual information about costs incurred by the BBC and the public as licence payers should have knowledge of how their licence fees are spent.
8. This decision will focus upon the BBC's decision to withhold the information relating to questions (v) and (vi), only as specified by the complainant.

### **Chronology**

9. On 22 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.
10. 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.
11. On the 9 March 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.
12. In addition, and without prejudice to its position that the Act did not apply, the BBC provided alternative arguments for withholding the information under the section 43 exemption.
13. It should be noted that the Royal Charter in existence on the date of the complainant's request for information (31 May 2006) ran from 1 May 1996 to 31 December 2006 and is referred to as the 1996 Charter. A new Royal Charter came into force on 1 January 2007 and is referred to as the 2006 Charter.

## Analysis

---

### The Schedule 1 derogation

14. 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).
15. 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.
16. In this case it is clear that the BBC holds information falling within the description in the request.

### The BBC's view

17. The BBC believes that the Schedule 1 derogation applies broadly and that its scope includes information such as programme content but also extends to include multi-purpose information, such as audience research data. 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.
18. In its letter of 9 March 2007, the BBC has stated that broadly speaking the requested information is a part of programme costs information and therefore is integral to the production process, supporting programme making and decisions about programme making. It considers that the requested information was held for the dominant purpose of supporting BBC content and output, and therefore was not covered by the Act. Further to this the BBC contend that this information is not held for any purposes other than journalism art and literature.
19. In its letter of 9 March 2007, the BBC has referenced various sources in support of this argument:
  - (a) It was noted in the Information Commissioner's 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) Support for this can also be found in the evidence given by Mr Sambrook, Director of News at the BBC, at trial in *Sugar*. He noted:

*"Questions about how you make (various) selections and the resources that are available to you 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 the journalism”.*

- (c) When construing the BBC's treatment under Schedule 1 of the Act, regard may be had to its purpose. It is clear that this purpose consisted partly in protecting freedom of expression, but also partly in protecting the position of the BBC relative to its commercial rivals. This much is clear from a letter from the Home Office to the Department for Culture, Media and Sport, on 13 January 2000 and in the wake of much negotiation between the BBC and the Government on the scope of the Act's application to the BBC. The letter cited in *Sugar* at (35) states:

*“the Government has sought to ensure that ....including them (the public service broadcasters) in the Bill does not place them at an unfair 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”.*

### **The complainant's view**

20. The complainant disagrees with the BBC's position. In his letter to the Commissioner dated 18 January 2006, the complainant states that: *“My requests principally cover factual information about costs incurred by the BBC. For example, the public as license-payers should have knowledge of how their license fees are spent annually on prizes for competitions held by the BBC. Perhaps then they would be in a position to judge whether that money is being well spent.”*

### **The Commissioner's view**

21. The Commissioner has noted the arguments put forward by the BBC and the complainant.
22. In the Commissioner's view the purpose of the Schedule 1 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.
23. The Commissioner accepts that the requested information has a bearing on decisions taken by programme makers and therefore a relationship with the creative process at the BBC.
24. The Commissioner's view is that the requested information has a relationship with the BBC's strategic goals. By way of background, the BBC is incorporated by Royal Charter, at the time of the request the 1996 Charter was in effect but at the time this notice is served the 2006 Charter is in effect. In addition to the 1996 Charter the BBC is subject to an agreement with its sponsor department, in this case the relevant department at the time of the request was the Department for Culture Media and Sport, and the BBC was subject to the Amended Agreement of

2003 (2003 Amended Agreement). For further information on the Charter and Agreement please see the Legal Annex.

25. The Commissioner has noted the following provisions of the 1996 Charter:

- Article 7(1)(b) states that it shall be the functions of the Governors to *“satisfy themselves that all the activities of [the BBC] are carried out in accordance...with the highest standards of probity, propriety and value for money in the use of the Licence Revenue and moneys paid...”*
- Article 18(1) states that the BBC’s accounts shall be audited annually. Article 18(2) provides that the BBC *“shall...prepare an Annual Report...and attach thereto an Account or Accounts of the Income and Expenditure of the Corporation and...shall include in such Report such information relating to its finance, administration and its work generally...”*

26. The 2006 Charter has similar provisions to the 1996 Charter albeit with a new structure to reflect changes in corporate governance, via the BBC Trust, and the formalisation of the Executive Board as the executive body of the BBC with responsibility for the functions listed in paragraph 38 of the 2006 Charter; notably these include the operational management of the BBC, and the conduct of the BBC’s operational financial affairs.

27. 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 Trust 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.

28. Therefore the Commissioner believes that in addition to supporting the creation of content, information relating to programme costs is held 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.

29. In the Commissioner’s view, failure by the BBC to monitor and report, internally, on the costs of programmes would have a detrimental effect on the ability of the

Governors (now the BBC Trust) and the Executive Board to perform their respective functions and operational duties under the Royal Charter.

30. The Commissioner also considers that information relating to costs incurred by the BBC is integral to the BBC's operations allowing them to monitor expenditure, plan ahead, and assess value for money in relation to productions and other aspects of expenditure. In the Commissioner's view, if information relating to programme costs were not held, the BBC would have failed to act in accordance with its obligations under the Royal Charter. This practice would also be incompatible with basic business and accounting practices and would adversely affect the administrative, business and financial operations of the BBC.
31. The BBC's 2005/6 Annual Report is helpful in understanding how value for money is monitored. The 2005/6 Annual Report states that 'Value for money' is primarily an empirical financial assessment measured in two ways. One is to divide the total cost of a programme or other output by the number of viewers, listeners etc. to provide a cost per user. The second way is to divide the total number of viewing or listening hours by the total cost to produce a cost per viewer/listener hour.
32. In the Commissioner's view the measurement of success in delivering the BBC's objectives is a managerial activity. The pursuit of these objectives is part of the wider strategic environment within which the BBC operates; together with licence fee income come public responsibilities and purposes which, if the BBC is to achieve, it must measure. Programme costs information, including information on the amount of money spent on prizes, whether in Wales or elsewhere, is key to this monitoring. This demonstrates that there are operational purposes beyond those of journalism, art and literature.
33. Therefore information on programme costs, including information about prizes, serves a number of purposes which are outlined below:
  - It is used by programme makers to inform decisions about programme commissioning and content.
  - It is used by BBC management to monitor the BBC's performance in relation to value for money.
  - It enables the BBC to monitor its expenditure against its agreed budget for that year;
  - It enables the BBC to predict with some certainty the amount of money it will spend on prizes in the future.
34. The Commissioner considers that the ultimate purpose of the derogation is to protect journalistic, artistic and literary integrity by carving out a creative and journalistic space for programme makers to produce programmes free from the interference and scrutiny of the public. In this case the Commissioner is of the view that the information requested is held predominantly for purposes other than journalism, art and literature.

## Exemptions

35. The BBC provided additional arguments, without prejudice to its position in respect of the Schedule 1 derogation, as to the exemption which it would seek to rely on, in the event that the Commissioner found that the derogation did not apply in this case. It has relied on the exemption under section 43 only.

## Section 43 (Commercial interests)

36. Section 43(2) states that where disclosure of the requested information would prejudice the commercial interests of any person it is exempt information. However, section 43 is a qualified exemption and therefore the public interest test under section 2 of the Act must be applied. Therefore the Commissioner must first consider whether disclosure would prejudice the commercial interests of any person and then, if prejudice would exist, consider where the balance of the public interest lies.

37. For clarity the relevant elements of the request are repeated below:

*(v) Could you provide me with the estimated value of prizes given out in competitions run by BBC Wales Radio/Television during 2004 and so far in 2005?*

*(vi) Please breakdown this figure – to include the total amount in handed out cash and detailed examples of the range of prizes given out to listeners/viewers. What was the biggest prize/cash given out and what was the smallest? Does BBC Wales have an annual budget for prizes? If so what was it in 2004 and what is it in 2005?*

### **Would disclosure of the requested information prejudice the commercial interests of any person?**

38. The requested information in this case is relates to prizes paid out by BBC Wales either on radio or television. The BBC describes the information in its letter of 9 March 2007 as “in-house programme headline costs”.
39. In their letter of 9 March 2007 the BBC state that “*Disclosure of this information may result in a ratchet effect among bids from indies [independent production companies] for licence deals in respect of similar programmes, and in relation to similar line items for different types of programmes (e.g. budget available for competition prizes). Indeed, disclosure of any of these elements of a programme budget could be the basis for incurring this prejudice. If further requests were made for other elements of programme costs it is directly foreseeable that entire budgets would then be disclosed. This could lead to the position that indies will know that a minimum level of funds are available for a particular type of programme or similar programme, and they will have an incentive to bid beyond that level. This will prejudice the commercial interests of the BBC, in that it will be forced to increase what it pays indies for those licence deals, or face losing the deals.*”



40. This argument is based on the premise that, at present, a limited flow of information to the market place about the costs of in-house productions means that a level playing field is in place. Although independent production companies will have knowledge of deals to which they are party, routine disclosure of the requested information would enable them to have an overall view of the market not currently available. This would enable independent production companies to ascertain with certainty the amount the BBC is willing to pay for programme types.
41. The BBC acknowledges that occasional and sporadic disclosures of the fees do occur in breach of confidentiality provisions within the relevant contracts. However, the BBC goes on to argue that if disclosures of this sort were to be institutionalised via the Act (i.e. become the norm) this would reduce the uncertainty that currently exists about the fees paid in previous auctions won by the BBC. It states that this would, therefore, reduce the uncertainty of competitors engaging in future bidding wars.
42. Finally, the BBC claim that the effect of the contentions within paragraphs 39, 40, and 41 is that, were disclosure to occur, an informational asymmetry would be created. The term informational asymmetry is used in economics to describe a situation where one party to a transaction has more or better information than the other party involved in that transaction. Due to this informational asymmetry it would be possible for competitors in the market for independent production company services to gain an advantage when bidding for these services by reference to the previous bidding patterns of the BBC in relation to services of a similar nature. The BBC cites Paul Klemperer's paper on Bidding Markets as supporting this view, this paper is available at [http://www.competition-commission.org.uk/our\\_role/analysis/bidding\\_markets.pdf](http://www.competition-commission.org.uk/our_role/analysis/bidding_markets.pdf)
43. It is clear that the BBC's commercial interests are those at stake in this case and the Commissioner's consideration of this complaint will focus on their interests.
44. In relation to part (v) of the complainant's request, the Commissioner is not convinced that prejudice would be caused to the BBC's commercial interests if this information were to be disclosed.
45. The release of an aggregate figure of the amount of money paid out in prizes, whether an estimate or an exact figure, would not necessarily prejudice negotiations in relation to any future commissions through the ratchet affect (see paragraph 39). It would not be apparent from an aggregate figure that x amount of money had been spent by a specific production on prizes. The prejudice that the BBC suggests would exist is dependent on the information being directly linked to a programme, without this link the argument cannot be sustained and therefore in this respect the Commissioner is not satisfied that prejudice would be caused to the BBC's commercial interests.
46. Furthermore, the BBC publishes on its website indicative tariffs which would be paid to independent production companies for programmes of this type. Admittedly the range of prices is relatively broad but the fact that indicative tariffs are published means that the bidding companies would have a relative degree of

certainty over the price that they would be able to obtain for the BBC for programming of this type.

47. Moving to part (vi) of the complainant's request, there are three elements to this part of the request:
1. *Please breakdown this figure – to include the total amount in handed out cash and detailed examples of the range of prizes given out to listeners/viewers.*
  2. *What was the biggest prize/cash given out and what was the smallest?*
  3. *Does BBC Wales have an annual budget for prizes? If so what was it in 2004 and what is it in 2005?*
48. With regard to the first two elements of part (vi) of the complainant's request; in the Commissioner's view these are very closely related in that the disclosure of a breakdown of prizes awarded would include both the smallest and largest prizes, whether cash or goods.
49. The third element, the annual budget for prizes in 2004/5, is closely related to part (v) of the request and the same considerations have been taken into account by the Commissioner. Again the Commissioner is of the view that prejudice has not been demonstrated in this respect.
50. In the Commissioner's opinion, disclosure would not necessarily prejudice negotiations in relation to any future commissions through the ratchet affect. It would not be apparent from the disclosure of the requested information, the breakdown, that x amount of money had been spent by a specific production on prizes. The prejudice that the BBC suggests would exist is dependent on the information being directly linked to a programme, without this link the argument cannot be sustained and therefore in this respect the Commissioner is not satisfied that prejudice would be caused to the BBC's commercial interests.
51. Having examined all the arguments, the Commissioner considers that the BBC has failed to demonstrate the prejudice that would result from disclosure. As the exemption at section 43 is not engaged there is no requirement to explore the public interest.

## The Decision

---

52. The Commissioner's decision is that:
- (i) The dominant purpose for information concerning the value of prizes given out by BBC Wales is other than those of journalism, art or literature.
  - (ii) The BBC has not dealt with the complainant's request in accordance with Part 1 of the Act in that it failed to comply with its obligations under section 1(1).

- (iii) There is not sufficient evidence of prejudice to the BBC's commercial interest as a result of disclosure and therefore the exemption under section 43 is not engaged.

### **Steps Required**

---

- 53. The Commissioner requires the BBC shall provide the complainant with the information requested within 35 calendar days of the date of this notice.

### **Failure to comply**

---

- 54. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## 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@dca.gsi.gov.uk](mailto: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 1<sup>st</sup> day of October 2007**

**Signed .....**

**Jane Durkin  
Assistant Commissioner**

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

## Legal Annexe

### Relevant Statutory Obligations and Provisions under the Act

**Section 43(2)** provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

**Section 2(2)** provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

**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.”

### BBC resources

2006 Royal Charter

[http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory\\_framework/charter\\_agreement/royalchartersealed\\_sept06.pdf](http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/royalchartersealed_sept06.pdf)

2006 Agreement with Department for Culture Media and Sport

[http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory\\_framework/charter\\_agreement/bcagreement\\_july06.pdf](http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/bcagreement_july06.pdf)

1996 Royal Charter

[http://www.bbc.co.uk/foi/docs/bbc\\_constitution/bbc\\_royal\\_charter\\_and\\_agreement/BBCs\\_royal\\_charter.pdf](http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/BBCs_royal_charter.pdf)

1996 Agreement with the Department of National Heritage

[http://www.bbc.co.uk/foi/docs/bbc\\_constitution/bbc\\_royal\\_charter\\_and\\_agreement/Agreement.pdf](http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/Agreement.pdf)

2003 Amended agreement with Department for Media Culture and Sport

[http://www.bbc.co.uk/foi/docs/bbc\\_constitution/bbc\\_royal\\_charter\\_and\\_agreement/Amendment to the Agreement.pdf](http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/Amendment_to_the_Agreement.pdf)