

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 October 2007

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

Summary

The complainant requested from the BBC 'the 10 largest annual claims for expenses by BBC broadcasters in the latest year for which figures are available'. The BBC refused to provide the information on the basis it was held for the purposes of journalism, art and literature. The BBC also explained that even if this request fell within the scope of the Act, it would need to clarify with the complainant what he meant by the term broadcaster. Having considered the purposes for which the information is held the Commissioner is satisfied that it falls within the scope of the Act. Consequently, the Commissioner has decided that the BBC should contact the complainant in order to clarify his request in line with its duty under section 16 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 15 January 2007 the complainant requested the following information from the BBC:

'The 10 largest annual claims for expenses by BBC broadcasters in the latest year for which figures are available'.

3. As part of his request the complainant noted that disclosure of this information was in the public interest for a number of reasons, namely: in order to uphold public confidence that the BBC controls expenses, to provide assurance that the BBC monitors how much individual broadcasters' expense claims cost the organisation and to ensure that public funds are spent correctly reimbursing broadcasters for expenses in the course of their work.
4. The BBC contacted the complainant on 16 January 2007 and explained that it believed the information requested was not covered by the Act. The BBC explained that this was because 'the BBC and the 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". We are not therefore obliged to supply information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities.'
5. The BBC noted that although it did not offer an internal review when its position was that the requested information was not covered by the Act the complainant did have the right to complain to the Commissioner.

The Investigation

Scope of the case

6. On 16 January 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant argued that the requested information was held for financial and budgetary reasons and not in order to further the cause of journalism, art or literature and therefore the information was covered by the scope of the Act.

Chronology

7. The Commissioner wrote to the BBC on 21 February 2007 and asked it to provide further arguments to support its position that the information was not held for purposes other than for journalism, art or literature. The Commissioner also asked the BBC to provide, without prejudice to its position on the application of the Schedule 1 derogation, an explanation of how it would process this request if it fell within the scope of the Act.
8. The BBC responded on 13 April 2007 and provided the Commissioner with a detailed explanation of why it believed the requested information was covered by the derogation. The BBC also provided the Commissioner with the following explanation of how it would process this request under the Act.

9. If it were to deal with this request under the Act, the BBC explained that it would need to seek clarification from, and agreement with, the complainant as to what he meant by the term 'broadcaster'. The BBC suggested that individuals it considered to be broadcasters may be different from the types of individuals the complainant considered to be broadcasters. The BBC noted that some, or possibly, all of the people to whom the complainant was interested in could be defined as talent (i.e. on-air performers, either radio or audio-visual). Furthermore, it was likely that some of the individuals who would fall within the scope of the request would be BBC staff and some would be freelance.
10. Having agreed a definition of the term broadcaster with the complainant, the BBC suggested that the cost of complying with this request was likely to exceed the appropriate cost limit and therefore the BBC could refuse this request on the basis of section 12 of the Act.
11. The BBC then explained to the Commissioner how it believed that the cost limit would be exceeded by fulfilling this request. The BBC noted however, that given the various different definitions of the term broadcaster that may be agreed with the complainant, there were various scenarios of how it would have to compile the information needed to answer the request and therefore different methods by which the cost limit may be reached. The BBC therefore noted that its explanation as to how section 12 may apply to this request were set out within these parameters.
12. The BBC suggested the complainant's interpretation of the term broadcaster may encompass a number of different roles which do not correlate to the BBC's own role definitions. If this was the case, the BBC explained that to accurately identify the individuals concerned it would be necessary to go through a list of all individuals in programme making roles and consider whether they met the criteria laid down by the requester. The BBC suggested that given the number of individuals in programme-making roles, it estimated that this would take more than 18 hours.
13. Alternatively, the BBC explained that if it were possible to agree a definition of the term broadcaster which correlated with the BBC's own job categories, it would then be possible to more easily identify those individuals concerned. The BBC would then be able to run a report from its electronic expense system ('e-expenses') for these people for the last financial year. This would then identify the ten people with the highest total e-expense claims.
14. However, the BBC explained that some expense claims are submitted manually, and in the case of freelancers, expenses are claimed by submitting individual invoices. Details of these expenses would not be included on the BBC's e-expenses system, but in order to ensure that the manual expense claims are considered when compiling the top ten list needed to answer the request, the BBC argued that details of these claims would have to be considered. This would involve individually checking each of the thousands of manual expense claims submitted in the previous financial year, a process which the BBC estimated would take more than 18 hours.

15. Finally, the BBC noted that some of the individuals falling within the scope of the complainant's clarified definition of the term broadcaster may feature in programmes produced by independent production companies ('IPCs'). The BBC would not hold details of the expense claims submitted to the relevant IPCs. However, the BBC suggested that it would need to search for and determine the nature of each contract in order to determine whether relevant programmes were produced by IPCs or whether they were in-house BBC productions (and thus details of the expenses would be held). Again, the BBC estimated that conducting these searches would take more than 18 hours.
16. The BBC also explained that even if it established a definition of the term broadcaster with the complainant and the information related to these broadcasters' expenses could be collated for a cost which did not exceed the appropriate limit, it argued that information relating to expenses incurred by broadcasters would be exempt by virtue of section 43(2) of the Act.
17. Information about expense claims made by programme-makers is identified by the BBC as pertaining to 'in-house programme' costs. In the BBC's opinion, although disclosure of this information would reveal only part of a programme budget and not the total cost, it follows that all other information relating to the same programme may be subject to potential disclosure, and it would therefore be possible to calculate the total cost of the programme.
18. The BBC argued that disclosure of information relating to either the budget or final cost of an in-house production would, or would be likely to, prejudice the commercial interests of the BBC in the following way. Disclosure may result in a ratchet effect among bids from IPCs for licence deals in respect of similar programmes. Since IPCs will then know the minimum level of funds that are available for a particular type of programme, they will have an incentive to bid beyond that level. This would prejudice the commercial interests of the BBC in that it will be forced to increase what it pays for those licence deals, or face losing those deals.

Analysis

The Schedule 1 Derogation

19. 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.
20. 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.

21. The BBC explained that it considered the information it held about expense claims could be separated into two different classes, one of which fell within the scope of the Act and one of which did not.
22. With regard to the latter type of expenses, the BBC explained that expenses which are claimed by programme makers in the course of their duties are considered to be programme expenses and therefore form part of the production budget. For reasons discussed below, the BBC believes that information related to production budgets is not covered by the Act. (See paragraphs 25 to 28).
23. However, the BBC explained that it considered expenses of staff not involved in programme production *are* covered by the Act because their expenses do not form part of programme budgets. (For example, the BBC has previously disclosed details of the Director General, Mark Thompson's expense claims under the Act. Source: <http://www.bbc.co.uk/foi/docs/responses.shtml>)
24. Consequently, with regard to making a decision on the Schedule 1 derogation the Commissioner has only had to consider expenses claimed by programme makers in the course of programme making.

The BBC's view

25. 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 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.
26. With regard to the specific financial information requested in this case, namely expense claims made by broadcaster, the BBC have outlined how it considers these expenses to have a direct relationship to the creation of programme content. These expenses, the BBC have explained, are for items purchased by BBC staff which they are required to purchase in order that they may carry out their programme making roles. If they were not making programmes, they would not have to purchase these items and thus incur expense claims. The BBC noted that examples of such expenses include travel and accommodation expense claims from journalists covering stories, books for research and even items bought by production staff to use as props. In the BBC's opinion as the details of these expenses form part of the production budget they are therefore held for the purpose of content creation and consequently do not fall within the scope of the Act.
27. In correspondence with the Commissioner on this case, the BBC cited three sources to support it's view that financial information such as that requested in this case falls within the scope of the derogation:

(a) 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'.

(b) 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.'

(c) A letter from the Home Office to the Department for Culture Media and Sport of 13 January 2000 which states:

'the Government has sought to ensure that...including them [the public service broadcasters] in the Bill does not place them at a commercial disadvantage to their commercial rivals. The Bill therefore provides that the inclusion of the public service broadcasters does not relate to information held for journalistic, artistic or literary purposes.'

28. In summary, the BBC's position is that information related to the expenses claimed by broadcasters which form part of the programme budgets is not held for purposes other than journalism, art of literature and therefore is outside the scope of the Act.

The Commissioner's view

29. The Commissioner has noted the arguments advanced by the BBC.

30. 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.

31. The Commissioner accepts that information about expenses claimed by broadcasters supports 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.

32. 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.

33. 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. At the time the request was submitted (15 January 2007) the 2006 Charter was in force.
34. The 2006 Charter introduced a new structure of management to the BBC to reflect changes in corporate governance; within the BBC two separate bodies were established, the BBC Trust and an Executive Board. In summary the main role of the Trust is to set the overall strategic direction of the BBC and to exercise a general oversight of the work of the Executive Board. The Executive Board has responsibility for delivering the BBC's services in accordance with the priorities set by the Trust.
35. Notably, the Commissioner understands that the functions of the Executive Board (which are listed at paragraph 38 of the 2006 Charter) include the operational management of the BBC and the conduct of the BBC's operational financial affairs. Furthermore, the Commissioner also understands that under the 2006 Charter the role of the BBC Trust includes:
 - (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) ensuring that the Executive Board conducts the BBC's operational financial affairs in a manner best designed to ensure value for money.
36. Therefore the Commissioner believes that as a result the 2006 Charter, the BBC holds financial information to enable:
 - (i) the BBC Trust to perform their role as 'guardians' under the 2006 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.
37. In the Commissioner's view failure by the BBC to hold information about expense claims would have a prejudicial effect on the ability of the Trust and Executive Board to perform their respective functions and operational duties under the 2006 Charter.
38. 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.
39. 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.

40. 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. While he acknowledges the BBC's view that the information required for the purposes of Schedule 1 does not 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.
41. The Commissioner does not believe that information about expense claims made in the course of programme production possesses enough journalistic application to enable it to be held for a dominant journalistic purpose. Rather, the Commissioner considers this financial 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 operations, rather than one of the purposes of Schedule 1.
42. Therefore, the Commissioner considers the BBC to be a public authority with regard to information about expense claims which form part of programme costs.

Procedural matters

Section 16

43. As noted in paragraphs 9 to 18, the BBC provided, without prejudice to its position on the derogation, an explanation of how it would deal with this request if it fell within the scope of the Act.
44. The BBC has argued that there are a number of ways in which the term broadcaster could be interpreted. Consequently, the BBC explained that it would need to seek clarification from the complainant as to what types of individuals he considered to be broadcasters and compare this definition with types of individuals the BBC considered to be broadcasters. Having established agreed criteria for who a broadcaster is, the BBC would then be in a position to begin compiling a list of relevant individuals who may fall within the definition of broadcaster. The BBC has argued that depending how broad or narrow this agreed definition of broadcaster was, it would process the request in different ways.
45. Having considered the BBC's arguments, the Commissioner accepts that there is a degree of ambiguity to this request, primarily because depending on the BBC's interpretation of the term broadcaster some information may be exempt because the cost of collating this information would exceed the cost limit. However, the Commissioner also notes that the BBC has suggested that it may not exceed the cost limit to provide information contained on the BBC's e-expenses system. The

Commissioner does not consider it appropriate for public authorities to essentially second guess the nature of the information being sought where the precise definition of the request is unclear or ambiguous. Therefore, the Commissioner accepts that in order to answer this request under the Act the BBC would need to seek clarification from the complainant as to what he meant by the term broadcaster and how the types of information held by the BBC could fall within the scope of this request.

46. The Commissioner notes that section 16 of the Act places a duty on public authorities to provide advice and assistance to applicants who propose to make, or have made, information requests. In line with this duty public authorities are entitled to seek more details, if needed, in order to enable them to identify and locate the requested information. 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 16 has occurred because the BBC failed to clarify with the complainant the nature of his request.

The Decision

47. The Commissioner's decision is that the requested information is held by the BBC for purposes other than those of journalism, art and literature. Consequently, the Commissioner has decided that the BBC breached section 16 of the Act by failing to clarify with the complainant the scope of his request.

Steps Required

48. The Commissioner requires the following steps to be taken:
49. In line with its duty contained at section 16 of the Act, the BBC should contact the complainant and seek clarification as to what information he was requesting when he submitted his original request. In assisting the complainant in clarifying his request the Commissioner considers that the BBC should also consider advising the complainant what information can be provided within the cost limit. Having established a clarified request the BBC should either provide the complainant with the information he requests in line with its duty under section 1 of the Act or provide the complainant with a refusal notice compliant with section 17 of the Act.

Failure to comply

50. 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

51. 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.

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 8th day of October 2007

Signed

**Jane Durkin
Assistant Commissioner**

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

Legal Annex

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 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

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(5) provides that -

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact”

BBC resources

2006 Royal Charter

http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/royalchartersealed_sept06.pdf