

Freedom of Information Act 2000 (Section 50)

Decision Notice

11 August 2008

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 total cost of overseas trips made by BBC Wales staff during the first 10 months of 2005. In addition he requested a breakdown of these costs. 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 purpose 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 12 of the Act (cost limit) to withhold the information.

The Commissioner has investigated and found that the BBC incorrectly applied the derogation and in the particular circumstances of this case it is a public authority and had therefore failed to deal with the complainant's request in accordance with Part 1 of the Act. He also finds that to provide the information requested would exceed the appropriate limit and that the BBC is therefore not required to comply with the requirements of section 1.

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 the 14 November 2005, the complainant requested the following information from the BBC:

“(i) Could you provide me with the total cost of all overseas business trips made by BBC Wales staff during the first 10 months of 2005.

“(ii) Could you also breakdown the individual cost of each overseas trip, how many staff were sent on each trip, where staff went and the reasons for the trips e.g. rugby international in Italy, documentary on France, film festival in Venice.’

“(iii) Could you also include details of any trips overseas made by BBC Wales Controller Menna Richards together with the costs incurred etc. as above.

“(iv) Could you also confirm what the BBC Wales procedure is for airline flights – do staff fly economy or business or does it vary?”

3. The BBC responded to this request on 9 December 2005. Information in relation to questions (iii) and (iv) was provided in full. The BBC provided some of the information relating to questions (i) and (ii), where the information related to non programme related trips. However, it refused to provide the information related to programme related trips 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 and to make a complaint to the Information Commissioner.
5. On 23 December 2005, the complainant requested the BBC review its decision not to release all the information requested in questions (i) and (ii).
6. The BBC responded on 03 January 2006 stating that it had failed to correctly explain the complainant's appeal rights. The BBC confirmed that it does not offer an internal review where information is considered to be outside the scope of the Act and again informed the complainant of his right to make a complaint to the Information 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 investigation will focus upon the BBC's decision to withhold the information relating to questions (i) and (ii) only as requested 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. At the same time, the Commissioner informed the complainant of his decision to suspend making a final decision on the complaint because of the Information Tribunal's imminent consideration of the Sugar appeal (*Sugar v Information Commissioner*, EA/2005/0032) which would have an impact on his complaint
11. In a second letter dated 19 January 2007, the Commissioner advised the BBC that he was not persuaded by its arguments (provided in the refusal notice and internal review) that the Act did not apply. He asked the BBC to provide details of any exemptions that it believed supported its decision to withhold the requested information.
12. On the 09 March 2007, the BBC responded maintaining that the information requested fall outside the scope of the Act and provided further arguments and references in support of this view.
13. In addition, and without prejudice to its position that the Act does not apply, the BBC provided alternative arguments for withholding the information under sections 12 and 43.
14. On 21 January 2008 the Commissioner wrote to the BBC requesting further details to support its application of section 12. The BBC responded on 11 April 2008 providing the Commissioner with a detailed explanation as to why to provide the information would exceed the appropriate cost limit.

Analysis

The Schedule 1 derogation

15. 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).
16. In this case the requested information relates to the total cost of programme related overseas trips made by BBC Wales staff and a breakdown of these costs.

The BBC's view

17. 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 associated with programme production. 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. The BBC state that:

'Financial information is integral to the production process and held in support of our programmes. ... The information requested is not held for purposes other than journalism, art or literature and is therefore outside the scope of FOIA and exempt from disclosure.'
19. In support of this view the BBC cite three sources:

(a) The Commissioner's view in his 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) Evidence given by Mr Richard Sambrook, Director of News at the BBC, in relation to appeal EA/2005/0032 to the Information Tribunal. 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.'

20. The BBC's view is that when construing their treatment under Schedule 1 of the Act it is necessary to take a purposive approach, considering not simply the nature of the information requested but also the purpose of legislators when including the Schedule 1 derogation.
21. In summary, the BBC's position is that the Schedule 1 derogation should be interpreted widely, to protect the BBC's freedom of expression and their position relative to commercial rivals.
22. In relation to the specific information requested they maintain that the information is not held for purposes other than journalism art and literature.

The Commissioner's view

23. The Commissioner has noted the arguments put forward by the BBC.
24. In the Commissioner's view the purpose of the derogation is to protect journalistic, artistic and literary integrity and to preserve a "creative space" in which programme makers can continue their core activities free from outside interference.
25. The Commissioner accepts that the requested information (the costs of programme related overseas travel made by BBC Wales Staff) 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.
26. The Commissioner's view is that the requested information is held by the BBC for operational purposes in addition to journalistic, literary and artistic purposes.
27. Financial information serves a number of operational purposes, for example, it is used to budget, monitor expenditure, identify opportunities to improve efficiency and comply with legal obligations.
28. 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 operational purposes.
29. The Royal Charter states that the BBC shall be funded by the public through the licence fee revenue; accordingly the BBC is accountable to the public that funds it. This public funding entails Royal Charter obligations which are peculiar to it and not imposed on its commercial rivals who are ultimately responsible to their own shareholders.

30. It should be noted that the Royal Charter in existence on the date of the complainant's request for information (14 November 2005) ran from 1 May 1996 to 31 December 2006 and is known as the 1996 Charter. A new Royal Charter came into force on 1 January 2007 and is known as the 2006 Charter.
31. 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...”*
32. 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.
33. Under the 2006 Charter, the BBC Trust is the guardian of the licence fee revenue and the public interest (paragraph 22 refers). To fulfil this role the Commissioner understands the general functions of the BBC to include the following:
- (i) assessing the performance of the Executive Board in delivering the BBC's services and activities and holding the Executive Board to account for its performance;
 - (ii) representing the interests of licence fee payers and exercising rigorous stewardship of public money; and
 - (iii) to ensure that the Executive Board conducts the BBC's operational financial affairs in a manner best designed to ensure value for money.
34. Therefore the Commissioner believes that, as a result of the Charter, the BBC holds financial information to enable:
- (i) the Governors (and now BBC Trust) to perform their role as 'guardians' under the Royal Charter by assessing the performance of the Executive Board; and
 - (ii) the Executive Board to manage the BBC's financial and operational affairs in a manner best designed to ensure value for money.

35. The costs of programme related overseas travel made by BBC Wales Staff constitutes financial information and therefore serves a number of purposes in addition to that accepted by both the BBC and the Commissioner, i.e. that it supports the creation of programme content.
36. 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.
37. In this case the costs of programme related overseas travel made by BBC Wales Staff serves the following purposes:
 - (i) It supported the delivery of programme content;
 - (ii) It enabled the BBC to monitor its expenditure against its agreed budget for that year;
 - (iii) It enables the BBC to predict with some certainty the future costs of sending staff overseas.
 - (iv) It contributed to meeting the BBC's obligations to publish annual accounts.
 - (v) It contributed to 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.
38. The final factor which the Commissioner has weighed, in coming to a decision on whether the derogation applies, is whether the decision on costs of programme related overseas travel made by BBC Wales Staff constituted a creative decision.
39. A creative decision would relate to the inception, planning and delivery of new content. For example, the decision to use presenter X instead of presenter Y would tend to be a creative decision, based on the reputation and standing of the entertainer in the industry, but the determination of the level of remuneration for presenter X or Y would not be characterised as a creative decision.
40. In the context of this complaint, the decision to cover an event overseas would constitute a creative decision, however, the cost of sending staff there to provide this coverage would not.
41. After carefully balancing these competing purposes, the Commissioner finds that the requested information was, or was more likely than not to have been, held by the BBC for predominantly operational purposes (including financial, management and administrative purposes) and not for journalism, literature or art. As a result, Schedule 1 is not applicable to talent costs information and the BBC is a public authority with regard to this information.

Exemptions

42. The BBC provided additional arguments, without prejudice, 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 sections 12 and 43.

Procedural Matters: Section 12 'Cost Limit'

43. Section 12 of the Act does not oblige a public authority to comply with a request if the authority estimates the cost of complying with the request would exceed the appropriate limit. The BBC state that it is likely to take more than two and a half days (or 18 Hours) to retrieve the information and therefore complying with the request would exceed the appropriate limit as set out in the Appropriate Limit and Fees Regulations 2004. These regulations set a limit of £450 to the cost of complying with a request for all public authorities subject to the Act not listed Schedule 1 part I. In estimating the cost of complying a public authority can take the following into account:

- determining whether it holds the information requested,
- locating the information or documents containing the information,
- retrieving such information or documents, and
- extracting the information from the document containing it.

The Regulations state: *'any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour'*.

44. The BBC submit that to retrieve and extract the information, which is held in a form which suit the BBC's business purposes, but does not allow it to easily extract it would exceed the cost limit at section 12. The BBC explained that the information is held in the online booking system and extraction would be problematic. The BBC would have to retrieve the data in raw form from agency spend reports (the reports which detail BBC expenditure by travel supplier). These reports would then have to be downloaded onto a spreadsheet and then reformatted in order to undertake a manual search, line by line to establish whether each trip was overseas or within the UK. The BBC explained that a computerised search would not be possible as the purpose of the trip is not recorded under set headings but in a free text box.

45. The BBC explained that there would be in excess of 8000 lines of data to search manually and an added complication would be that all the information in relation to the trips such as reason, method of travel etc is not always recorded. Therefore the search may only capture component parts for example, the flight or the hotel but would not show the full cost of each trip as data is not collated with reference to the trip as a whole.

46. In the case of freelance staff and contributors the BBC explained that the original invoices would need to be retrieved and interrogated to check for any travel costs as currently expenses claims are often processed under the generic heading of 'Expenses' with the detail held on the invoice. These invoices are stored with Xansa (the company response for processing the BBC's expenses).

47. The BBC stated that another issue is that is that where travel has been paid for by an individual it is claimed back through the BBC's expense system. The BBC

does not require claimants to state destination when reclaiming expenses for a flight or hotel. Therefore all claims for flights or hotels would have to be requested from archive and manually interrogated, again by individual receipt, to seek to establish the destination. Further, because there is no requirement to include destination information, this resource and time extensive attempt to extract information is likely to be only partially successful. The BBC state that the purchasing manager at BBC Cymru estimates, in its entirety, the process of retrieval and extraction would take longer than one and a half weeks.

48. The Commissioner notes that the BBC were able to provide some information (that related to non-programme related trips) to the complainant within the cost limit. This is because this information related to one individual (Menna Richards) and so was easily retrievable within the limit and in relation to the other disclosed information was costs associated with five specific meetings which did not relate to programme costs.
49. The Commissioner considers that in this case it is clear from the scope of the request when combined with the explanation provided from the BBC regarding the expenses procedure that to comply with the request would exceed the appropriate cost limit. The Commissioner is therefore satisfied that to provide the complainant with all the information sought would exceed the appropriate limit.
50. As the Commissioner has found that to provide the requested information would exceed the appropriate limit and therefore is exempt from disclosure, he has not gone onto consider the application of section 43.

Section 16 'Advice and assistance'

- 51 Section 16 provides:

“(1) 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.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”

52. As the Commissioner has found the BBC should have dealt with the request in accordance with the Part 1 of the Act he also finds that it would have been reasonable to expect the BBC to consider providing an indication of what information could be provided within the cost ceiling, as set out in paragraph 14 of the section 45 code of practice. The BBC was therefore in breach of section 16.

The Decision

53. The Commissioner's decision is that the BBC failed to deal with the following elements of the complainant's request in accordance with the Act:

- (i) The information covered by the request is held by the BBC for a dominant purpose other than that of journalism, art or literature. Therefore the BBC has not dealt with the request in accordance with Part 1 of the Act in that it failed to comply with its obligations under section 1(1)(a) in confirming it held information falling within the scope of the request.
 - (ii) The BBC breached section 17(1) of the Act because it failed to provide a refusal notice stating it was relying on section 12 to withhold the requested information as required by section 17(5).
 - (iii) The BBC failed to provide advice and assistance to the complainant and therefore breached section 16 of the Act.
54. However, the Commissioner has decided that the following aspects of the request were dealt with in accordance with the Act
- (i) The information covered by the request is exempt from disclosure under section 12 of the Act.

Steps Required

55. In line with its duty under section 16 of the Act, The Commissioner requires the BBC to contact the complainant and to advise him of the types, forms and extent of the information it holds relevant to his request. The BBC should advise the complainant of what information it can provide within the cost limit. In the event that a sufficiently narrowed request is agreed the BBC should either provide the relevant information or issue a Refusal Notice in line with section 17.

Right of Appeal

56. 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

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 11th day of August 2008

Signed

Steve Wood
Assistant Commissioner

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

Legal Annex

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 12(3) provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

Legal Annex

Relevant Statutory Obligations and Provisions under the Act

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 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 43 provides that –

- (1) Information is exempt information if it constitutes a trade secret.
- (2) 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).