

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 May 2008

Public Authority: British Broadcasting Corporation ('BBC')
Address: Room 2252
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London
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Summary

The complainant submitted to two requests to the BBC, the first seeking the total budgets of three BBC shows (Top Gear, Eastenders and Newsnight) and the second seeking the costs of BBC advertisements. The BBC refused to provide the information covered by both requests on the basis that it was held for the purposes of journalism, art or literature. Having considered the circumstances of this case the Commissioner has concluded that the BBC has misapplied the Schedule 1 derogation and that all of the information covered the complainant's requests falls within the scope of the Act. During the Commissioner's investigation the BBC argued, without prejudice to its position on the derogation, that the information covered by the first request was exempt on the basis of section 43(2). The Commissioner has considered the BBC's arguments and concluded that the information is not exempt on the basis of section 43(2). The Commissioner has ordered the BBC to disclose this information. The BBC also argued that some of the information covered the second request was not held and the remainder of the information was also exempt under section 43(2). With regard to the second request the Commissioner agrees that the some of the requested information is not in fact held by the BBC and that the remainder of the information is exempt from disclosure on the basis of section 43(2).

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. The complainant submitted two requests for information to the BBC.
3. The first request was dated 31 May 2006 and asked for:
 - ‘1. What is the budget for the current series of Top Gear on BBC2? (Please specify whether this figure includes presenters’ fees).
 2. What is the annual budget for EastEnders on BBC1? (Please specify whether this figures includes actors’ fees).
 3. What is the annual budget of Newsnight on BBC2? (Please specify whether this figure includes presenters’ and journalists’ salaries).
 4. How much does the BBC pay annually for the right to broadcast the Australian soap opera Neighbours?’
4. The second request was dated 1 August 2006 and asked for:
 - ‘1. How much the BBC spent on advertising BBC3 and BBC4 in 2005?
 2. How much was spent on advertising BBC1 and BBC2 programmes on BBC3 and BBC4?’
5. The BBC responded to the first request on 1 June 2006 and explained that it considered the requested information to fall outside the scope of the Act because ‘the BBC and other public sector broadcasters are covered by the Act only in respect of information held for the purposes “other than those of journalism, art or literature” (see Schedule I, Part VI of the Act). 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.’
6. The BBC responded to the second request on 15 August 2006 and explained that it also considered information about the cost of advertising individual channels is outside the scope of the Act.

The Investigation

Scope of the case

7. On 3 November 2006 the complainant contacted the Commissioner in order to complain about the BBC’s decision to refuse to disclose the information he had requested under both requests.

Chronology

8. The Commissioner wrote to the BBC on 21 February 2007. The Commissioner asked the BBC to provide him with any further arguments it wished to rely on to support its position that the requested information was covered by the derogation. The Commissioner also asked the BBC to provide, without prejudice to its position on the derogation, details of any exemptions it would rely to withhold this information should the Commissioner conclude that the derogation did not apply and therefore the information fell within the scope of the Act.
9. Having received no response to his initial letter the Commissioner wrote to the BBC again on 23 March 2007 and asked for a response to his letter of 21 February 2007.
10. Again having received no response to this letter the Commissioner wrote again to the BBC on 10 May 2007 asking for a response to his letter of 21 February 2007.
11. On 26 June 2007 a case worker at the Commissioner's office called the BBC and was informed that a response to his letter would be sent within a week.
12. Over the following months, the Commissioner contacted the BBC on a number of further occasions in order get a response to his letter of 21 February 2007, but no substantive response from the BBC was forthcoming.
13. On 12 March 2008 the Commissioner informed the BBC that given the significant delays in the BBC responding to his letter of 21 February 2007 he was now planning to issue an information notice on 17 March 2008 which would require the BBC to provide a response to the letter of 21 February 2007 within 28 days.¹
14. On 13 March 2008 the BBC provided the Commissioner with arguments as to why it considered the derogation to apply to the information requested at questions 1 – 3 of the first request. The BBC also explained why it considered this information to be exempt from disclosure on the basis of section 43(2) of the Act.²
15. With regard to the information covered by the fourth part of the first request and the information covered by the second request, the BBC's letter of 13 March 2008 suggested to the Commissioner that it would send its arguments in relation these requests 'shortly'.
16. Having received no further response from the BBC, the Commissioner informed the BBC on 8 April 2008 that he was planning to issue an information notice

¹ Under section 51 the Commissioner can serve an information notice on a public authority requiring it to provide him with information in order to determine a complaint he has received under section 50 of the Act. If a public authority fails to comply with the requirements of an information notice, the Commissioner can treat this as contempt of court.

² During the course of the Commissioner's investigation the complainant indicated that he no longer wished the Commissioner to consider the BBC's decision to refuse to disclose the information relating to the amount paid for the rights costs for Neighbours. Therefore, the Commissioner has not considered this aspect of the first request in this decision notice.

shortly which would require the BBC to provide a response to the outstanding points of his letter of 21 February 2007.

17. On 9 April the BBC provided the Commissioner with arguments as to why it considered the derogation to apply to the information requested at questions 1 and 2 of the second request. The BBC also explained that it considered this information to be exempt from disclosure on the basis that to provide this information would exceed the cost limit and in addition that it was exempt from disclosure on the basis of section 43(2) of the Act.

Analysis

The Schedule 1 derogation

18. 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).
19. 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.
20. In this case the requested information falling within the scope of the first request consists of information the BBC classes as in-house production costs – i.e. the annual budget for Top Gear, Newsnight and Eastenders. The BBC has explained that it also considers the information falling within the scope of the second request, i.e. advertisement costs, to be an in-house production cost.

The BBC's view

21. 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.
22. Whilst the BBC notes that production cost information can be held for multiple purposes, its position is that the dominant purpose for which this information is held is to support the production of its content and therefore the information is held for the purposes of journalism, art or literature. The BBC has argued that the economic reality is that costs are an important part of the creative process – it could not be undertaken without them – and therefore the costs of a production or trail make a huge contribution to the tone, the look and direction of each facet of the final programme or trail.

23. In support of this position, the BBC has identified the following points to support its position that the details of in-house production costs fall under the scope of the derogation:

(a) The Commissioner's view in his Provisional Decision in the case of *Sugar v Information Commissioner* was 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.'

The Commissioner's view

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

25. 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.

26. The Commissioner accepts that the requested information supports the creation of programme content and trails. It is self evident that in the majority of cases some form of financial support is necessary to produce such content. The BBC and the Commissioner agree on this point and he has not considered it further.

27. However, 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. 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 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 purposes. At the time of this complaint the 1996 Charter was in force, however, at the time this complaint is to be determined the 2006 Charter is in force. Although drawing directly upon the 1996 Charter to determine for what purposes the requested information was held by the BBC in this case, the Commissioner has also considered the 2006 Charter to assist future cases
29. The Commissioner has noted the following provisions in the 1996 Charter:
- (a) Article 7 (1) 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...”*
 - (b) Article 16 (1) states that the BBC is authorised, empowered and required to *“collect the Licence Revenue and to receive all funds which may be paid by [the] Secretary for State...and to apply and administer such funds in accordance with the terms and conditions...attached to the grant”*
 - (c) 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...”*
30. 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 functions 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.
31. Therefore the Commissioner believes that, as a result of both Charters, 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.

32. In the Commissioner's view failure by the BBC to hold information relating to the cost of in-house productions would have a prejudicial effect on the ability of the Governors and Executive Board to performing their respective functions and operational duties under the Charters.
33. 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.
34. 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 I derogation.
35. 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 I 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 I.
36. The Commissioner does not believe that information relating to the costs of in-house productions possesses enough journalistic application to enable it to be held for a dominant journalistic or similar purpose. Rather, the Commissioner considers the requested 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 I.
37. Therefore, the Commissioner considers the BBC to be a public authority with regard to the information falling within the scope of both requests.

First request of 31 May 2006

38. As noted above the BBC has argued that the information covered by questions 1, 2 and 3 in the first request is exempt from disclosure on the basis of section 43(2)

of the Act. Section 43(2) states that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person.

39. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). This interpretation followed the judgment of Mr Justice Mundy in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In this case the Court concluded that 'likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not'. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The information Commissioner* commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

Section 43(2)

The BBC's position

40. As discussed above in relation to the derogation, the BBC considers the budget for *EastEnders*, *Top Gear* and *Newsnight* to be in-house production costs. The BBC has highlighted the fact that in a recent decision notice (FS50067416) the Commissioner agreed that the BBC was not obliged to disclose the cost of the programme 'Ask the Family' because the information was exempt from disclosure on the basis of section 43(2) as its disclosure would be likely to prejudice the commercial interests of the BBC.³ The BBC therefore suggested to the Commissioner that as:

'the information requested in this case is of exactly the same nature as that in FS50067416, being the cost of the BBC of producing three separate in-house productions, and in the event of a similar finding on Schedule 1, it follows that the information must also be exempt under section 43(2) of the Act.'

41. In order to support its position that the information in this case is exempt on the basis of section 43(2), the BBC provided the Commissioner with the following more detailed explanation of how its commercial interests would be harmed by disclosure of the requested information:
42. Disclosure of the information may result in a ratchet effect among bids from independent production companies (IPCs) in respect of licence deals for similar programmes. In the BBC's opinion this could lead to the position that IPCs will

³ In fact the decision notice that concerned a request about the programme 'Ask the Family' was reference FS50072937. However, decision notice FS50067416 also involved a request for information about in-house production costs.

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 because it will be forced to increase what it pays IPCs for those licence deals, or face losing the deals.

43. The BBC has highlighted a number of features of in-house productions and the market for IPCs which support this argument:
44. Firstly, information about the cost of in-house productions is not widely known. Very few people have knowledge of deals outside their own company; those in the BBC responsible for commissioning programmes will have knowledge of the relevant sums and staff moving between companies may take knowledge with them, although it will be current and of value for a limited period only. All such information is treated as confidential within the BBC and access is limited to those with a need to know.
45. Therefore, the disclosure of information relating to in-house production costs by the BBC alone would have the effect of creating an informational asymmetry. The BBC has argued that it is well known that the effect of such asymmetry is to change bidding strategies and to provide relative strength to the beneficiaries of the asymmetry. In support of this argument the BBC have cited Paul Klemperer's paper on Bidding Markets which illustrates that a change to the relative flow of information between participants in an auction can affect the outcome of that auction.⁴ In this case where the information relates to the final cost of an in-house production it enables IPCs to ascertain with certainty what price the BBC is willing to pay in respect of a particular programme. This knowledge would then enable IPCs to increase their bids for licence deals with the BBC in order to provide the same services.
46. Furthermore, the BBC has highlighted its purchasing obligations under its Agreement with the Department for Culture Media and Sport. Under this Agreement the BBC has to produce a specific quota of programmes through IPCs, currently 25%. A further 25% of output must be produced as a result of competition between IPCs and in-house production departments (known as the Window of Creative Competition). As a result competition between IPCs and in-house production departments is placed on an even contractual footing.
47. In order to demonstrate the likelihood of this prejudice occurring the BBC have highlighted the fiercely competitive nature of the media and entertainment industry which means that margins on programmes are very low. Consequently, a minor adjustment in the cost of an individual programme, as a result of a ratchet effect among bids from IPCs, can have a huge and deleterious effect on the broadcaster. Moreover, the BBC has highlighted the fact that since it is funded by the licence fee and has a corresponding duty to exercise careful stewardship of public money, this places it in a difficult position. In the short-term it may well be unable to afford the increased bids from IPCs. In the long term it is possible that

⁴ This paper can be viewed at http://www.competition-commission.org.uk/our_role/analysis/bidding_markets.pdf

the BBC suffers an outflow of programming from IPCs (i.e. fewer IPCs would be willing to contract with the BBC) and a reduction in programming quality.

The Commissioner's position

48. Firstly, the Commissioner wishes to comment on the BBC's submissions to him in its letter of 13 March 2008. In the quote at paragraph 40 above, the BBC appears to be suggesting that as the information is of a similar type as in a previous case it therefore 'must' also be exempt under section 43(2). Whilst the Commissioner accepts that the information requested in this case is of similar nature as that in earlier cases cited by the BBC to the extent it is information relating to the total budget of in-house productions, he does not accept that this therefore means that the information in this case 'must' also be exempt. Such a suggestion does not fit with the Commissioner's approach of investigating the application of exemptions on a case by case basis; simply because information is exempt in one case it does not necessarily follow that similar information will be exempt on the same basis in the next case. Rather, the Commissioner has to consider the application of the exemptions in each case on their merits on the basis of the arguments advanced by public authorities.
49. In the Commissioner's opinion such a point is key to the application of section 43(2) in this case. It is the Commissioner's understanding that the prejudice to the BBC's commercial interests will occur because IPCs will alter their behaviour with regard to auctions for licence deals for similar programmes. This will result in the BBC having to pay a higher price to commission a similar programme in the future. The Commissioner accepts that such a suggestion is, in theory, logical.
50. However, obviously key to this argument working in practice, and not just in theory, is the fact that there are similar programmes to those which the complainant has asked for information on which the BBC envisages auctioning licence deals on in the future. Obviously if there are no programmes which are similar to those which the complainant has asked for information on the market for such similar programmes will not be affected and thus the BBC's commercial interests not harmed.
51. This issue was discussed by the Information Tribunal case *John Connor Press Associates v Information Commissioner* (EA/2005/0005). In this case, the public authority, the National Maritime Museum ('NMM'), argued that disclosure of financial information relating to the commission of a piece of art would prejudice the commercial interests of the NMM. The prejudice claim arose from the fact that the NMM's bargaining position would be compromised if other artists were aware of the commission's value in this case. The Tribunal decided that prejudice might occur in this case but this would depend on the nature of the information and the degree of similarity between the two transactions.
52. In its submissions to the Commissioner the BBC made no attempt to highlight which programmes it considered similar to those which the complainant requested, e.g. disclosure of the budget for Eastenders will affect the auction for

programme x or y. Without knowing which these programmes are, and indeed when or whether the auctions for these licence deals are to occur, the Commissioner finds it difficult to see the connection between the disclosure of this information and any clear and evidential prejudice to the BBC's commercial interests.

53. Indeed the BBC appears to have simply relied on the same generic argument to support its application of section 43(2) that it has advanced in previous similar cases despite the fact that the information being requested related to different programmes and therefore the likelihood of prejudice for disclosure of the different types of information is likely to be very different. Indeed the BBC's position is that the information falling within the scope of questions 1, 2 and 3 is exempt for exactly the same generic reason. However, in the Commissioner's opinion the likelihood of this prejudice occurring for each different piece of information requested must be different. That is to say, the number of programmes similar to EastEnders (a long running soap opera shown four times a week in a primetime slot) will be distinct from the number of shows that may be similar to Top Gear (a weekly light entertainment programme). As a consequence, the likelihood of prejudice will be different.
54. Obviously, the Commissioner could speculate on the likelihood of prejudice occurring following disclosure of the various pieces of requested information. However, as he has made clear on a number of occasions, the onus is on public authorities to provide clear evidence and to demonstrate why information is exempt from disclosure under the Act. Having reviewed the BBC's submissions on this case, the Commissioner does not accept that the BBC has provided sufficient evidence to demonstrate that disclosure of this information will be likely to prejudice its commercial interests. Rather the BBC has simply asked the Commissioner to accept a generic argument in relation to the in-house production costs which fails to take account of the different types of information actually being requested in this case, and thus the different levels of likelihood of prejudice occurring.
55. In line with the Tribunal's approach in the NMM case cited above, the Commissioner has concluded on the basis of the evidence before him that there is insufficient similarity between the three programmes covered by this request and other programmes which the BBC may produce and therefore disclosure of the requested information will not result in a level of prejudice that can be described as real and significant. Moreover, the Commissioner notes in the BBC's opinion, information about the cost of programmes will only be current and of value for a limited period only (see paragraph 44). Therefore, even if there are sufficiently similar programmes to those covered by this request, and the Commissioner accepts that the auction process of such programmes may be affected by disclosure of this information, then in the Commissioner's opinion it is possible that by the time these auctions take place the requested information will be of insufficient commercial value to significantly prejudice the BBC's commercial interests.
56. On the basis of the above, the Commissioner has concluded that the BBC has failed to provide sufficient evidence to demonstrate that the information requested

at points 1, 2 and 3 of the first request will be likely to prejudice its commercial interests and therefore the Commissioner is not satisfied that section 43(2) is engaged.

57. (The Commissioner wishes to note that in his opinion the BBC has had ample opportunity to provide him with specific arguments to support the application of section 43(2) as it took the BBC over a year to respond to the Commissioner's opening letter of 21 February 2007).

Second request of 1 August 2006

Section 1 and section 12

58. As is detailed above the complainant's second request included the following two questions:

'1. How much the BBC spent on advertising BBC3 and BBC4 in 2005?

2. How much was spent on advertising BBC1 and BBC2 programmes on BBC3 and BBC4?'

59. In its submissions to the Commissioner on its position with regard to disclosure of this information, the BBC outlined how it produces adverts such as those covered by the above request. For purposes of this decision notice the Commissioner considers it useful to outline this background information in question.
60. Firstly, the BBC noted that it refers to the promotional slots as trails rather than advertising since they are not adverts in the traditional sense. The monies spent on these trails are from the budget of the Marketing, Communications and Audiences (MC&A) division within the BBC and not from the budget of any particular channel or programme. The MC&A's budget is split across various activities which facilitate communication with the BBC's audiences such as events, corporate communications, marketing campaigns and trails.
61. Within the MC&A is the Brand & Planning department. This department has what is known as a 'Prioritisation Process' which selects and monitors priority marketing campaigns across all areas of the BBC. There are approximately 12 priority campaigns per quarter.
62. The BBC has explained that some of these priority campaigns involve cross promotion – as the complainant's request implies, some of the trails for BBC1 and BBC2 programmes are played on BBC3 and BBC4. The BBC has explained that these cross promotions are allocated on a pan-BBC basis according to the Prioritisation Process. The costs for the trails therefore come entirely from the MC&A budget and not from a particular channel or programme budget.

The BBC's position

63. On the basis of the facts as detailed above, the BBC has therefore explained that 'the trails are already paid for and as there is no cost to the BBC to air these trails on its various channels and radio stations, there is no reason for the channels and stations to charge each other to promote programmes'. Consequently, the BBC has argued that it does not hold information in relation to the second question 'How much was spent on advertising BBC1 and BBC2 programmes on BBC3 and BBC4?' because the BBC's channels do not charge each other for trailing each others programmes.
64. However, the BBC has explained that it does hold some information falling within the scope of the first question: 'How much the BBC spent on advertising BBC3 and BBC4 in 2005?' This information consists of an **estimated** figure of the amount spend by the MC&A on trails for each channel. However, the **precise** figures needed to answer this request are not held in a readily accessible form. The BBC has explained that this is because it does not hold the costs of producing the trails broken down by channel in a readily accessible form simply because it has no business need to do so. This is because the costs incurred by the MC&A are not reported by channel, but rather by what the BBC terms 'service licence'.
65. The BBC has explained that the estimated figure is collated from two areas, firstly, 'Priority Productions' which include the major campaigns for the year broken down by a particular programme or campaign and secondly, by 'Core Production Work' which comprises the bulk of production work and includes slides⁵, short trails and longer more creative pieces; the cost of these pieces is not broken down by programme or campaign. Consequently, the BBC has explained that the aggregate figure which it holds for each channel is not exact because although it is based upon the specific programme information from the Priority Production figures, it is also based upon the proportion of spend for that channel from the Core Production Work which is only an estimate.
66. The BBC has also explained that it believes that to retrieve the necessary information in order to produce a **precise** figure to answer this question would exceed the cost limit. This is because in order to produce a precise figure the BBC would need to ascertain the exact proportion spent per channel on Core Production Work. In order to do this the BBC would need to review the large volume of relatively low value transactions involved in producing the trails as part of the Core Production Work. The trails in question have been produced by a third party, Red Bee Media Limited ('Red Bee'), a company with which the BBC has a preferred supplier arrangement for the production of trails. The BBC would need to locate and collate all of the invoices from Red Bee and manually check each invoice in order to ascertain whether it pertains to a programme or campaign for either BBC3 and BBC4 and add these figures together.

⁵ The terms slides refers to items such as the 'Coming Up' announcements which inform viewers of the schedule of viewing to be aired on a particular evening. The BBC has explained that thousands of such slides are produced annually.

67. In summary, the BBC's position with regard to the second question is that it does not hold any information. With regard to the first question it does hold some estimated information falling within the scope of this request, but to provide the **precise** information falling within the scope of this request would exceed the appropriate cost limit. The BBC consider the **estimated** figure to be exempt from disclosure on the basis of section 43(2).

The Commissioner's position

68. With regard to the second question, the Commissioner accepts that on the basis of the facts outlined above, the BBC does not hold any information falling within the scope of this request. This is because there is no financial transaction which takes place between the various BBC channels when they trail each others' shows and therefore it is difficult to attribute any particular costs to the showing of trails on BBC3 and BBC4.
69. With regard to the first question, the Commissioner is also satisfied that the BBC is correct to rely on section 12 as a basis to refuse to disclose the precise figures in response to request 1.
70. Section 12 of the Act of the states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations) specify that the appropriate limit for the BBC is £450 based upon a charge of £25 per hour. Regulation 4(3) specifies the activities which a public authority can charge for, namely:
- (a) determining whether it holds the information,
 - (b) locating a document containing the information,
 - (c) retrieving a document containing the information, and
 - (d) extracting the information from a document containing it.
71. The Commissioner understands that Red Bee not only produces trails for programmes on BBC3 and BBC4 but, also provides other creative services for the BBC including advertisements, promotions and trailers for radio, television and interactive service. Consequently, the Commissioner accepts that there will be a significant number of invoices which the BBC will have to search in order to collate the invoices which are relevant to this request, i.e. those pertaining to the trails for programmes on BBC3 and BBC4. (Indeed as the BBC has noted it commissions a vast number of slides each year – see footnote 5). Having undertaken this exercise the BBC would then have to extract the figure from each invoice and then add these in order to create the total figure requested by the complainant. Given the number of invoices that would have to be analysed and the time consuming nature of this task the Commissioner accepts that to identify the precise figure would exceed the cost limit.

72. In summary, the Commissioner accepts that the BBC does not hold any information falling with the second question. Furthermore, the Commissioner agrees with the BBC that to provide a precise and accurate response to the first question would exceed the cost limit. However, the Commissioner notes that the an estimated of the cost of advertising BBC3 and BBC4 programmes is held by the BBC and could be provided within the cost limit. Therefore, the Commissioner has gone on to consider whether this estimated figure is exempt from disclosure on the basis of section 43(2).

Section 43(2)

The BBC's position

73. The BBC has argued that the disclosure of the estimated cost of advertising BBC3 and BBC4 programmes would be likely to harm Red Bee's commercial interests as well as its own commercial interests.

Red Bee's commercial interests:

74. The BBC has explained that although the figures it holds are not one hundred percent accurate, they are nonetheless 'robust estimates'. Consequently, disclosure of the information (i.e. the amount paid by the BBC to Red Bee for two major television channel campaigns) would reveal valuable pricing information not only to Red Bee's potential and existing customers, but also to their competitors (for both BBC and non-BBC work).
75. Consequently, disclosure of the price paid by the BBC to Red Bee is likely to place Red Bee at a disadvantage when competing for work. The BBC has suggested that the advertising market is a very competitive area and Red Bee competes with a large number of other advertising agencies for such contracts. The release of this information would create an informational asymmetry whereby Red Bee's competitors would be able to ascertain with some certainty the amount Red Bee was likely to bid, but Red Bee would not be in possession of the same information from its competitors. The BBC has noted that the effect of such an asymmetry in an auction is to change bidding strategies and to provide relative strength to the beneficiaries of that asymmetry. In this case, the disclosure of the requested information would be likely to assist Red Bee's competitors in outbidding them in order to secure these contracts.
76. Disclosure of this price is also likely to place Red Bee at a disadvantage when negotiating with existing and potential clients for other non-BBC work. Red Bee has a large client base and provides its services to such well known media organisations as Channel 4, Five, UKTV, ITV, Endemol and Virgin Media Television. Information about the costs of trails, or of what the BBC paid for certain concepts, is not widely known. The BBC has therefore argued that it would be greatly beneficial to Red Bee's clients to learn the prices charged by Red Bee to the BBC for particular campaigns. In the BBC's opinion this information could be used by both the client's and potential customers for Red Bee's services will be able to use this information as a bargaining tool.

The BBC's commercial interests:

77. The BBC has argued that disclosure of the cost of these campaigns could lead to a ratchet effect among potential future suppliers of trails and related concepts to the BBC. The BBC's current contract with Red Bee runs until 2015 and the BBC anticipates re-tendering for the supply of trails will commence in late 2013. The BBC has therefore argued that information pertaining to a major proportion of the current contract price will remain valuable information to potential suppliers of trails to the BBC until the new contract is finalised. The BBC has noted that Red Bee is not guaranteed the contract in 2015 and it will have to compete alongside other bidders such as the major advertising agencies noted above.
78. Disclosure would also result in an information asymmetry in these circumstances with the beneficiaries being potential suppliers to the BBC. Since suppliers will assume that a minimum level of funds are available for a particular concept or the production of a set of trails, they will have an incentive to price their bid beyond that level. Disclosure would therefore prejudice the BBC's ability to secure the best possible terms with potential suppliers of trails in the future.
79. If this above prejudice occurred, the BBC has explained that the BBC will be in a position of having to increase its payments to suppliers of trails and therefore will suffer an attendant drop in value of money to the licence payer.

The Commissioner's position

80. In considering the engagement of prejudice in this case, the Commissioner has been mindful of the test of likelihood outlined above in paragraph 39.
81. With regard to the prejudice that may occur to Red Bee's commercial interests, the Commissioner accepts that it is reasonable to argue that if the requested information was disclosed then Red Bee would be placed at a disadvantage because its competitors would be able to establish with certainty the price for which Red Bee was prepared to undertake a particular piece of work for. Therefore, the Commissioner accepts that it is logical to assume that the affects of an informational asymmetry as noted above may occur. Moreover, the Commissioner accepts that the BBC has been able to identify who these potential competitors are, e.g. advertising agencies such as Rainey Kelly Campbell Roalfe Y&R, Fallon Worldwide and AMV Group, who also provide also provide similar services to media organisations such as the BBC.
82. Similarly, the Commissioner accepts that it is logical to argue that if the current and potential customers of Red Bee were aware of how much it was prepared to provide certain services for, these customers would be in a stronger position when entering into future contract negotiations with Red Bee. As in the previous paragraph, for this argument to be sustainable, the Commissioner believes that there has to be some likelihood of Red Bee actually entering into contract auctions with other potential customers. The Commissioner understands that Red Bee provides a range of media services to a significant number of channels and key players in the media industry, e.g. Channel 4, Five, UKTV, ITV, Endemol and Virgin Media Television. Therefore, the Commissioner is satisfied that there is a

real and significant likelihood that if this information was disclosed the commercial interests of Red Bee would be likely to be harmed.

83. With regard to the prejudice that may occur to the BBC's commercial interests, again the Commissioner accepts that it is logical to assume that if this information was disclosed it may lead to a ratchet effect among potential future suppliers of trails and related concepts to the BBC because these suppliers will know with some certainty the minimum price the BBC is prepared to pay for such contracts. In contrast to its submissions in relation to the production costs above, the BBC has also identified exactly how this prejudice will occur, i.e., they have identified a specific negotiation process which will be affected: The BBC's current deal with Red Bee runs until 2015 and the BBC anticipates that re-tendering for the new contract will begin in late 2013. The Commissioner accepts information pertaining to a major proportion of the current contract price, including the price paid for the trails produced by Red Bee for BBC3 and BBC4, will remain valuable information to potential suppliers of trails to the BBC until the contract is finalised. Therefore, the Commissioner is satisfied that there is a real and significant likelihood of the BBC's commercial interests being prejudiced if this information was disclosed.

Public interest test

84. Section 43(2) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
85. The BBC has identified the following arguments in support of its position that the public interest favours non-disclosure of the information regarding trails:
- There is a clear public interest in ensuring that the BBC is able to provide quality programming and value for money in respect of its use of the licence fee. Both of these objectives will be threatened if a presumption is created in favour of the general disclosure of financial information relating to trails.
 - There is little public interest in the disclosure of the cost of trails as the information will only enable the public to take an informed view of whether the BBC is procuring trails on a competitive basis if it is in possession of the same information in respect of the commercial broadcasters. Since this information is not publicly available, information relating to the BBC is of little use.
 - The public would not be in possession of supporting information about the other factors, besides cost, taken into account in choosing a winning bidder. Details of these factors are in themselves commercially sensitive. Therefore, as information about these other factors are not publicly available, information relating to cost alone would not enable the public to judge whether the BBC's procurement process is providing the best value for money.

- In any event, the public interest in transparency and accountability in respect of how the BBC already uses the licence fee is served by the broad range of oversight mechanisms both internal and external. The BBC highlighted the oversight of the BBC Trust, the Executive Board, Ofcom and the fair trading and competition law in general. The BBC also highlighted the fact that some limited information about expenditure is already published in its Annual Reports.
86. The Commissioner believes that there is a general and underlying public interest in facilitating transparency and accountability with regard to how public money is spent. With regard to this case, as the public authority involved is the BBC, the Commissioner believes that this transparency and accountability is owed to the licence fee payers.
87. Furthermore, the Commissioner believes that there is a strong public interest in the licence fee payers having a sound understanding of how their licence fees are spent. The Commissioner acknowledges that commercial broadcasters are not subject to the disclosure requirements of the Act and therefore the public will not be able to assess the BBC's level of spending of promotion of its channels against Sky's spending of trails for its channels for example. Nevertheless the Commissioner believes that the public could still form a view as to the value for money gained by the BBC in spending this money on trails by considering publicly available viewing figures for the respective channels.
88. Moreover, the Commissioner believes that it could be argued that disclosure of the requested information would lead to increased transparency which would reinforce trust in the BBC as an organisation with robust controls on the way that public money is spent.
89. Having considered the public interest arguments outlined above, the Commissioner has concluded that in this case the public interest lies in not disclosing the requested information. Although the Commissioner believes that there are significant benefits to be gained from increased transparency and accountability, he considers that these are outweighed by the likely harm to the BBC's commercial interests if the information was disclosed, and by implication an attendant drop in the value for money to the licence fee payer. The Commissioner has also taken into account the fact that disclosure of this information may not just affect the BBC's negotiations with third parties for provision of trails for BBC3 and BBC4, but could also negatively affect the BBC's bargaining position with regard to future auctions for trails for other similar transactions. Consequently, the public interest in disclosure has to be weighed against the harm and related public interest disadvantages on a wider scale.
90. The Commissioner has therefore concluded that in the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Procedural matters

91. The complainant submitted his requests on 31 May 2006 and 1 August 2006 and the BBC refused to disclose the information covered by these requests on 1 June 2006 and 15 August 2006 respectively. In its refusal letters the BBC relied on the Schedule I derogation and therefore did not specify the exemptions under which it considered the information to be exempt from disclosure under the Act. As the Commissioner has concluded that the information is not covered by the Schedule I derogation and therefore falls within the scope of the Act, he must conclude that technically breaches of section 17 have occurred when the BBC refused both of these requests.
92. Section 17(1) requires that when a public authority refuses access to information it must specify in a notice to the applicant the exemptions on which it is refusing the request and why, if not clear, those exemptions apply. Section 17(3) requires a public authority to explain why, if relying on a qualified exemption, it has concluded that the public interest favoured maintaining the exemption.
93. With regard to the request of 31 May 2006 the BBC failed to provide the complainant with a refusal notice citing section 43(2) and therefore breached sections 17(1) and 17(3).
94. With regard to the request of 1 August 2006 the BBC failed to provide the complainant with a refusal notice citing sections 12 and 43(2) and therefore breached sections 17(1) and 17(3).

The Decision

95. 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:
 - the requested information covered by the scope of both requests is held by the BBC for purposes other than those of journalism, art and literature. Therefore the BBC has not dealt the complainant's request in accordance with Part I of the Act in that it failed to comply with its obligations under section 1(1).
 - the BBC breached sections 17(1) and 17(3) of the Act by failing to provide refusal notices covered by the scope of both requests.
 - The information covered by questions 1, 2 and 3 of the first request dated 31 May 2006 and not exempt from disclosure on the basis of section 43(2).
96. However, the Commissioner is satisfied that the BBC dealt with the following elements of the complainant's request in accordance with the Act:

- The BBC was correct to state that it does not hold any information falling within the scope of question 2 of the request dated 1 August 2006.
- The BBC was also correct to withhold the information falling with the scope of question 1 of the request of 1 August 2006 on the basis that it is exempt from disclosure on the basis of section 43(2).

Steps Required

97. The Commissioner requires the BBC to disclose the following information within 35 calendar days:

- The budget of the current series of Top Gear, (i.e. the current series at the time of the complainant's request in May 2006) and an indication as to whether this includes presenters' fees.
- The annual budget of Eastenders (in May 2006), including confirmation as to whether this figure includes actors' fees.
- The annual budget of Newsnight (in May 2006) including confirmation as to whether this figure includes presenters' and journalists' salaries.

Failure to comply

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

Right of Appeal

99. 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

Reference: FS50140478



Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 22nd day of May 2008

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Relevant Statutory Obligations and Provisions under the Act.

Section (1) states that –

“Any person making a request for information to the 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 the information communicated to him.

Section 2(1) states that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 2(2) states 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 3(1) states that –

“in this Act “public authority” means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
- (b) a publicly-owned company as defined by section 6”

Section 7(1) states that –

“Where a public authority is listed in schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority.”

Section 12(1) states 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 17(1) states 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 43(2) states that –

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

BBC resources

2006 Royal Charter

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/bbcagreement_july06.pdf

1996 Royal Charter

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

Reference: FS50140478



Information Commissioner's Office

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)