

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 9 February 2009**

**Public Authority:** British Broadcasting Corporation  
**Address:** White City  
201 Wood Lane  
London  
W12 7TS

### Summary

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The complainant requested information from the BBC in relation the spending on radio stations and radio budgets. The BBC refused to provide this information on the basis that it was held for the purpose of journalism, art or literature. During the course of the investigation the BBC also sought to rely on exemptions under the Act to withhold the information. The Commissioner has investigated and concluded that the BBC misapplied the Schedule 1 derogation and that the information requested falls within the scope of the Act. The Commissioner investigated the BBC's application of the exemptions and found that some of the information was exempt from disclosure under section 12(1) of the Act and some of the information was exempt under section 43 of the Act. The Commissioner found that some of the information was not exempt under section 43, 40 or 41 of the Act and he now requires that the BBC disclose this information to the complainant. In not communicating this information to the applicant the BBC also breached section 1 of the Act. The Commissioner also found that some information was not held.

### The Commissioner's Role

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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

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2. The complainant has advised that on 6 May 2005 she made the following request for information to the British Broadcasting Corporation (BBC):

*“As part of our response to the DCMS consultation on BBC Charter Review, I would like to be able to comment on the cost of BBC Radio’s activities. I would therefore be most grateful if you would be kind enough to let me know the following financial information at your earliest convenience.*

- (i) Station by station spending, with breakdown by topic (e.g. talent costs, production, right, royalties)*
- (ii) How central spending (e.g. new, promotions, strategy is allocated)*
- (iii) Spending on external promotions*
- (iv) Whether an internal charge is made for cross-promotion on other BBC services and, if so, on what basis and how much has been charged.*
- (v) How much the BBC is paying Ofcom for its regulation.*
- (vi) The budget for the Radio 1 Breakfast show*
- (vii) The budget for the Radio 1 Chart show*
- (viii) The budget for the Jonathon Ross show*
- (ix) On what basis budgets are determined.”*

3. The BBC responded on 17 May 2005 informing the complainant that, although there was no reference to Freedom of Information in his request, it has considered this in determining its response. The request was being refused as the information falls within the derogation of the Act relating to journalism, art and literature and it was therefore not obliged to disclose it. The BBC informed the complainant that its Annual Report 2004/5 was due to be published in July and will include the amount of direct spending on each radio network. The BBC also explained that it had recently supplied a detailed pack to an enquiry which gives a more detailed analysis of the cost of the BBC’s analogue radio networks for the last 5 years, it provided the complainant with a link to this information. The BBC explained in relation to question (v) that Ofcom has recently disclosed the regulatory fees paid by the BBC for 2004/5 in response to an FOI request and as such the BBC has decided to provide this information annually in its reports and accounts.
4. On 8 September 2005 the complainant responded asking the BBC to reconsider its response that it was unable to supply the request information that fell within the ‘derogation’ relating to journalism, art and literature. The complainant specifically informed the BBC that the request was being made under the provision of Freedom of Information.
5. The BBC responded on 16 September 2005 reiterating its position that the requested information is not covered by the scope of the Act as it is held for the purpose of journalism, art or literature.

## The Investigation

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### Scope of the case

6. On 29 September 2005 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 if the requested information was held for the purposes of journalism, art or literature and therefore not covered by the scope of the Act.
7. The Commissioner notes that there is no timeline for the information requested. The BBC have therefore treated the request to refer to the financial year at the time of the request.

### Chronology

8. The Commissioner began his investigation by writing to the BBC on 30 January 2006. The Commissioner asked the BBC to explain which elements of the requested information are already available in the public domain.
9. The BBC responded on 8 February 2006 explaining that the only information available publicly is the information requested in part 1 of the request as explained to the complainant in the refusal notice. The BBC also explained in more detail its reliance on the derogation. The Commissioner notes that only some of the information requested in part 1 is available via the annual report i.e. the headline figures and not the specific information requested – the breakdown of the spending
10. The Commissioner wrote again on 12 February 2007 requesting further arguments to support the application of the derogation and without prejudice for any exemption it would seek to rely on in the alternative.
11. The BBC responded on 10 July 2007 providing further arguments regarding the application of the derogation and also explaining in detail why it considered the information would also be exempt under sections 12, 43, 40 and 41. The BBC also explained that some of the requested information is not held.
12. The Commissioner responded on 21 December 2007 asking for further explanation regarding the application of the exemptions and for details as to why the BBC believed some of the information was not held.
13. The BBC provided a part response to this letter on 18 March 2008 explaining in detail the application of section 12 to the information requested in parts one and three of the request.
14. The BBC provided the Commissioner with a response to the remaining outstanding questions on 16 June 2008.

15. The BBC wrote again on 8 July 2008 providing the Commissioner with the information falling within the scope of request (ix) on what basis (radio) budgets are determined. The BBC stated it would now provide this information to the complainant.

### Findings of Fact

16. The information requested which has not been disclosed to the complainant is that relating to parts (i), (ii), (iii), (iv), (vi), (vii) of the request, and (viii). The BBC maintains that all the requested information is exempt as it is covered by the derogation. In the alternative the BBC state that to provide the information in (i) and (iii) would exceed the cost limit and so is exempt under section 12, that the information requested in parts (ii), (iv), and (viii) is not held and the information in parts (vi) and (vii) is exempt under section 43 and 40 of the Act. The information requested in part (v) and (ix) has been disclosed.
17. The Commissioner further notes that the BBC have not aggregated the various parts of the request but have only claimed that it would exceed the cost limit to respond to requests (i) and (iii) alone.

### Analysis

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#### Procedural matters

18. In the Commissioner's view, for reasons communicated to the parties separately, the information requested in parts (ii), (iv), and (viii) is not held. As the BBC is a public authority only for information **held** for purposes other than journalism, art and literature. The way the derogation is worded means that if the information is not held, the BBC is not a public authority. Schedule 1 of the Act lists all public authorities who are subject to the Act; the BBC is included in Part VI but the wording states:

*“The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature”.*

Therefore, if no information is held, regardless of the purpose it could, or would have been held for, the BBC is not covered by the Act. The Commissioner has investigated if the information requested in parts (ii), (iv) and (viii) of the request is held and has concluded that it is not. As such it falls outside the scope of the Act and will therefore not be considered any further in this notice, as the Commissioner has no jurisdiction to rule on these matters in a Decision Notice. However, he has explained in detail his findings on this matter to both parties in a separate letter.

19. In contrast, the Commissioner believes that the information requested in parts (i), (iii) (vi), and (vii) is held for purposes other than journalism, art and literature and is therefore caught by the Act. The remainder of this notice will therefore investigate the BBC's decision to withhold this information only.

## The Schedule 1 derogation

20. 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).
21. 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.
22. In this case the requested information is financial information in relation to station spending and radio show budgets.

### The BBC's view

23. 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.

24. 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.'*

25. 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.'

26. In summary, the BBC's position is that financial information, such as that requested is not held for purposes other than journalism, art or literature and is therefore outside of the scope of the Act.

### The Commissioner's view

27. 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.
28. The Commissioner accepts that the requested information 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.
29. However, the Commissioner's view is that the requested information is held by the BBC for operational purposes in **addition** to being held for journalistic, literary and artistic purposes. The Commissioner believes that financial information and information related to financial allocation 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.
30. 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. It should be noted that the Royal Charter in existence on the date of the complainant's request for information (6 May 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. 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. 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. 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 station by station spending, financial allocation, show budgets and spending on promotions constitutes financial information and therefore serve a number of purposes in addition to that accepted by both the BBC and the Commissioner, i.e. that they support 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 information requested 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 enable the BBC to predict with some certainty of future programming costs

- (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 budgets and spending of money in relation to radio stations constitutes 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. As such, the Commissioner does not consider that the requested information constitutes a creative decision.
41. After carefully balancing these competing purposes, the Commissioner finds that the requested information was, or was more likely 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, the Schedule 1 derogation is not applicable to the information requested in parts (i), (iii), (vi), and (vii) and the BBC is a public authority with regard to this information.

## Analysis

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### Procedural Matters: Section 17 'Refusal of a request'

42. Section 17(1) states that a public authority which is relying on a claim that the information is exempt, must, within the time for complying issue a refusal notice which:
- (a) states the fact that information is exempt,
  - (b) specifies the exemption in question, and
  - (c) states why the exemption applies.
43. Section 17(5) stated that a public authority, which in relation to any request for information is relying on a claim that section 12 applies must, within the time for complying issue a refusal notice stating that fact.
44. The refusal notice of 17 May 2005 did not explain which exemptions the BBC considered applied to the request information. This is in breach of the requirements of section 17(1) and 17(5) of the Act.



## Section 12 'Cost Limit'

45. 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 Appropriate Limit and Fees Regulations 2004 set a limit of £450 to the cost of complying with a request for all public authorities subject to the Act not listed in Schedule 1 part I. The cost is calculated at a rate of £25 per person per hour, which therefore translates to 18 hours of staff time. 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.
46. The BBC have explained that it estimates that to provide the information requested in parts one and three of the complainant's request (station by station spending by topic and spending on external promotions) would take more than two and a half days.

### **Station by Station Spending, with breakdown by topic (e.g. talent costs, production, rights, royalties)**

47. The BBC pointed out that it already makes public high level financial information on station by station spending in its Annual Report % Accounts (ARA). Since 1 April 2007, divisions became required to report costs by Service licence (in radio each 'service' matches a radio station)<sup>1</sup>. The total figure for each service is broken down into the following categories: content, distribution infrastructure / support and other items.
48. The BBC explained that difficulties arise in providing station by station spending at the time of the request because of the size of its radio services and the fact that information is held in a number of different places. There are 40 Local Radio stations in England alone and six dedicated radio services in the Nations; music of all kinds on Radio 1, 2, 3, 1Xtra, 6 Music and the BBC Asian Network; a wide range of speech programmes on Radio 4; news and sport on Five Live and Five Live Sports Extra; and comedy, drama and children's programming on BBC 7. In addition BBC radio broadcasts in the UK on analogue, DAB digital Radio, digital television and online.
49. The Commissioner notes that the request asked for station by station spending broken down by topic, with examples given such as talent costs, royalties and production rights. The BBC have interpreted this request to be one for a detailed breakdown of the spending by station including elements to include all the different costs associated with a stations spending (which could vary from station

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<sup>1</sup> Service licences for radio are as follows: BBC Radio 1; BBC Radio 3; BBC Radio 4; BBC Radio Five Live; BBC Radio Five Live Sports Extra; BBC 6 Music; BBC 7; BBC Asian Network; BBC local Radio (covers all of the individual stations for local Radio in England); BBC Radio Scotland; BBC Radio nan Gaidheal; BBC Radio Wales; BBC Radio Cymru; and BBC Radio Ulster / BBC Radio Foyle.

to station). The Commissioner recognises that the request by the complainant did not provide a complete list of topics but gave some examples. From these examples which range from broad topics such as talent to the more specific cost of royalties that the complainant's request was for a comprehensive breakdown including staff costs, costs by topic such as news and production costs.

50. The BBC explained that different types of costs are held within the BBC's systems at different levels and managed in different ways depending on the nature of the cost and the level of financial risk involved. For example there are costs which are common to all services which are held centrally rather than by station or by channel. One such examples of this is Newsgathering. Newsgathering spend is not incurred solely for any particular programme or division but is used across online, radio and television and the most efficient way to manage this is to do so centrally. The cost is then allocated out to each Service Licence. Further examples of costs which are centrally managed are: accommodation; local division management; BBC central management and marketing; communications and audiences costs (e.g. trails).
51. The BBC stated that it is extremely difficult to compile these different costs and provide a comprehensive breakdown of station by station spending as requested. The BBC explained that financial information is held primarily within its SAP based financial system. Information within this system is grouped by group (i.e. radio), division and then by genre or category of spend. The BBC stated that to locate the for examples 'staff costs' by radio station searches would need to be undertaken for example in:
- (a) the SAP Human Resource Database – to extract the staff costs for each of the individual radio stations (although this would then need further analysis as many staff work across different stations)
  - (b) the Proteus Business System – which holds records of all Radio Programmes, including scheduling, presentation details, transmission etc – to check which programmes have been transmitted in a particular period and on which station. This would be necessary to establish the staff costs by station
  - (c) Staff Scheduling Systems – to check staff details against the programmes that they worked on and the time spent on a particular programme.
  - (d) the ACON system (which holds payment and contract information for performers, writers, composers and other contributors) – to extract talent fees for each of the individual radio station budgets. This would be cross references against the Proteus data to ascertain the number of shows and therefore staff costs attributable to a period.
52. The BBC assert that to provide a comprehensive breakdown it would first need to locate the appropriate financial information (and relevant non financial information needed to calculate the station by station costs) from the databases as described above. Next it would need to locate the centrally held costs and estimate the allocations of these costs for each station. The allocations are done based on the use the different station makes of the resources and the allocations of each of

these elements, the BBC estimates that this would take at least one day to extract.

53. As an example the BBC explained that for news, it would have to extract the basic costs from the newsgathering budget and then attempt to attribute these to a particular station. A piece of news footage could be used in any number of ways by different stations for example the audio could be aired on a BBC local radio station or it may be published on Radio 1 Newsbeat online. The BBC state it would have to establish for each aspect of news output produced for use across a range of stations exactly how the footage was used so that a part of the cost of producing that footage could be allocation to a particular station.
54. Another example provided by the BBC was providing the staff costs for any given station. The BBC explained that many staff work across different areas of programming. This means that to establish the total staff costs of Radio 1, for example, it would need to locate both the direct costs (staff employed directly and solely for Radio 1) and for example the News staff costs. As news staff work across different programmes and stations the BBC would need to go back through its records and (where possible) establish the time spent by the staff on each station and allocate a cost from this. This process would need to be done for each station. The same situation arises with children's programming provided to Radio 7 which is a subset of broader children's output – CBBC produces all children's content for the BBC as part of a wider, multimedia operation.

### **Spending on external promotions**

55. The BBC explained that there is a distinction to be made between the trails produced by Red Bee Media Limited for television and print media and trails and continuity aired on radio. The bulk of promotion of the BBC's radio stations is done by air on those stations.
56. The BBC stated that this information consists of a large volume of relatively low value transactions and it would be necessary to locate and retrieve all the invoices received from Red Bee Media Limited. The BBC would then need to manually check each individual invoice to see if it pertains to a programme or campaign on Radio and then add the figures together.
56. For trails and continuity, promotion is more integrated and it can be difficulty to distinguish between promotion and presentation on air, for example a newsreader upon reaching the end of a bulletin may then state that 'coming up on Radio 4, Henry Goodman reads from Christopher Bigsby's biography...'. The BBC considers that this constitutes external promotion and it is done constantly across all of the BBC's Radio stations, however, it states that it would take in excess of 18 hours to attributes a cost to each instance of this type of external promotion as in line with the examples for station by station spending to establish the cost would involve searching the Human Resource database, establishing the salary of the staff member who promoted the show, the time it took them to do so and then allocating a cost to that action. To do this for instance of external promotion

would also involve a review of each show to find instances when this type of promotion took place.

57. The Commissioner considers that in light of the examples provided above that for the BBC to comply with the request for information in part (i) and (iii) it 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 and the BBC is not obliged to comply with parts one and three of the request by virtue of section 12(1)

### **Section 16 'Duty to provide advice and assistance'**

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58. Section 16 of the Act provides public authorities with a duty to provide advice and assistance. In most cases of this nature the Commissioner would expect the public authority to go back to the complainant and ask them to refine their request in order to bring it within the cost limit. However, in this case, as the BBC's position remains that the information is derogated; the Commissioner did not deem it appropriate in this case to ask the BBC to undertake this course of action until the arguments for derogation had been considered.
59. As the Commissioner has found that the information requested is not covered by the derogation; he now finds that the BBC should contact the complainant to assist him in refining his request to see if it is possible to bring it within the cost limit. The Commissioner therefore finds that in failing to offer the complainant advice and assistance in accordance the BBC breached the requirements of section 16(1).

### **Exemption: Section 43 'Commercial Interests'**

60. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person (including the public authority) holding it.
61. As a background to the request the BBC explained that BBC investment in independently produced radio content stimulates creative competition in the radio market. On this basis in 1991, the BBC made a commitment to the government that it would operate a voluntary 10% target for independent radio production across its network stations by 1996. The BBC has exceeded this target and currently estimates that 14% of radio content is produced for the BBC by independent production companies (indies).
62. The BBC stated that when it committed to these targets there was less activity in the market for independent radio content. The BBC was the only significant buyer and its stations were not generally competing with others. The BBC explained that the market has now entered a period of significant change with the entry of new players from the wider media industry, in particular those online. The major

newspapers are increasing the amount of online radio content on their websites as their formats become multiplatform (such as podcasts).

63. The BBC argues that this demonstrates that it is now formally competing with other broadcasters for content. The BBC also point out that there is a case for the BBC increasing the level of external supply as the independent sector in radio has been in existence for over 10 years and has demonstrated its ability to produce high quality programming for the BBC networks.
64. In relation to the information requested, the budgets of the Radio 1 Breakfast show and the Radio 1 Chart show, the BBC state that disclosing the overall costs of these two programmes would be likely to prejudice the commercial interests of the BBC. The BBC explained that this assertion is based on the fact that an industry insider could extrapolate an estimate of the commercial valuable items from the budget which would be damaging to the BBC's commercial interests.
65. The BBC explained that the production process in radio is far simpler than that of television and there are a number of resource costs that are standard across the industry for example; studio costs such as studio equipment hire; production costs such as phone calls and ISDN line or recording materials; and staff costs such as radio manager or engineering support. The BBC's charges are available from BBC Resources Limited website [www.bbcradioresources.com/productions/pricelist.html](http://www.bbcradioresources.com/productions/pricelist.html). The BBC stated that it is required under the BBC's fair trading regime to charge for the use of the resources at a fair market rate and these are comparable to the internal charges for in-house productions using these resources.
66. Additionally the BBC explained the Radio Industry is relatively small and there is a significant amount of movement between the public and private sectors. The BBC claim that it is possible that the competitor would also have specific experience and knowledge of the BBC and its systems and therefore is likely to even more readily arrive at estimates of talent and staffing costs (after calculating as above the other production costs). This educated guess will give valuable information to indies and the BBC's competitors in the market for independently produced contents and will prejudice the BBC's interests. To support this argument the BBC explained; in relation to each budget requested how disclosure would be likely to prejudice its commercial interests.

### The Radio 1 Breakfast Show

67. The BBC stated that the most significant harm that would be likely to arise from disclosure of the Breakfast show budget would arise from the extrapolation of the talent costs. The BBC does not wish to give its competitors in the market information which would allow them to out-bid it for the services of that talent. The BBC states that there are two elements to the specific prejudice which would be likely to occur.
68. Firstly disclosure of the overall budget would likely result in commercial radio increasing bids for key talent. In the past three years direct commercial

competitors have made bids for a number of key presenters to join them to present their breakfast shows. The BBC asserts that the success or failure of a show often rests solely with the talent engaged to present the show.

69. Secondly the BBC argue that disclosure would be likely to result in a ratchet effect among bids from the talent themselves as they would know that a minimum of funds was available and therefore have an incentive to negotiate up to or above that level. Further the BBC state that disclosure of the information may result in a ratchet effect from the independent producers (indies) for licence deals in respect of similar programmes. This will prejudice the BBC's commercial interests as it will be forced to increase what it pays indies for those licence deals.
70. As the BBC explained, the market for indies is growing quickly and the BBC is in direct competition with a number of players in the media industry. Some of the BBC's major slots are produced by indies, such as the Jonathon Ross Show, and the BBC wishes to continue to compete to commission for independently produced content on the same basis as all other participants in the market. If the BBC is forced to release what it pays for the Radio 1 Breakfast show this is likely to drive inflation in the bids received from indies for licence fee deals and hinder the BBC's efforts to obtain the best ideas for the best possible price.
71. The BBC explained that although the primary variable cost of the Breakfast show is the cost of talent, there are also significant secondary costs, in particular staffing. This information has the same commercial value, for the same reasons, as talent costs. The BBC's concern specifically relates to the producers of the show who make a vital creative contribution to the show. Producers normally have a rare degree of knowledge and ability in their field and are difficult to substitute. The BBC also notes that producers form relationships with particular individuals and often move with that individual if they leave from one employer to another. The BBC also provided to the Commissioner details of a number of recent high profile staff moves from the BBC to a competitor station.
72. In considering whether the exemption applies in this case, the Commissioner has applied the tests for 'would or would be likely to prejudice' as set out in the Tribunal decision EA/2005/005 John Connor Press Associates v the Information Commissioner. The Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (Para 15). This was further expanded in the Tribunal decision EA/2005/0026 Hogan v The Information Commissioner and EA/2006/0060 Bexley v the Information Commissioner.
73. In these cases the Tribunal considered what was meant by "would be likely to prejudice" and when a prejudice based exemption might apply. The Tribunal found that 'prejudice must be real, actual and of substance'. It went on to explain that there are two alternative ways in which disclosure can be said to prejudice and that one of these must be shown. Where prejudice 'would be likely to occur' the likelihood need not be more probable than not, though it should be real and significant; where prejudice 'would' occur, the chance should be greater – more probable than not. In this case the Commissioner has applied the test for 'would be likely to prejudice'

74. The Commissioner notes that the BBC's three main arguments for non disclosure are: increased bid from indies for licence deals from similar programmes; commercial competitors would be able to outbid the BBC for indies; disclosure would reveal talent and staffing costs and enable competitors to out bid the BBC for these individuals or the talent themselves to their increase bids.
75. Firstly the Commissioner notes that the arguments must be specific to the actual show in question. The Commissioner notes that the show in question is fairly unique and it would not be reasonable to accept that disclosure in respect of the breakfast show could be easily compared with other radio or television shows. It does not follow that a ratchet effect for other shows would be likely to follow disclosure. The Commissioner is also not convinced that any specific costs could be identified for talent or producers in respect of this information and the lack of precision a vague educated guess at talent/staff costs would provide is a relevant factor.
76. However, the Commissioner also finds that being outbid for talent is not necessarily a prejudice to the BBC's commercial interest. Losing a presenter (due to a better financial package) will not always impact negatively on the commercial aspect of securing talent, as the decision whether to use certain presenters will driven by a number of factors, not just based on market driven commercial principles. The Commissioner also notes that the BBC's commercial competitors have often made bids for BBC presenters to join their shows and it is unclear whether an FOI disclosure will exacerbate a situation that already exists. These bids are already taking place, with competitors using insider or industry knowledge that to some extent will always be prevalent. This inside knowledge may be more useful than the educated guess that would have to be used from the information disclosed from this request. Also, if a situation arises where talent seek to increase their financial packages using comparison with others the BBC are not always bound to accept these demands and will always be acting in the wider interests of BBC as set out in the Charter..
76. The Commissioner also notes that the Breakfast show was not produced by an indie at the time of the request and so therefore does not accept that the BBC's arguments regarding the ratchet effect and indies are persuasive.
77. The Commissioner therefore considers that the BBC has not provided relevant evidence and explanation to support a causal link between disclosure and likely prejudice. It is merely hypothetical.
78. The Commissioner does not consider that in relation to the Radio 1 Breakfast show, the BBC have demonstrated that disclosure would be likely to prejudice its commercial interests. The Commissioner therefore finds that section 43 is not engaged for this information.

## The Radio 1 Chart Show

79. The BBC explained that the arguments supplied in relation to the Radio 1 Breakfast Show also apply to the Chart Show. This show also has talent and staffing costs which could be extrapolated from the release of the overall budget figure and which as a stand alone figure is commercially valuable information. However, the BBC explained, in this case there is a third significant variable which is the contract with the Official UK Charts Company (OCC)<sup>2</sup>, disclosure of which would be likely to prejudice the commercial interests of the BBC.
80. The BBC has a contract with the OCC which gives it the exclusive rights to a number of specified charts collated by the OCC, including the UK top 40. The BBC has exclusive rights over this chart until 6pm when it is released to the public; the agreement also gives the BBC access to the OCC database for the chart. The contract between the parties was signed on 7 April 2006 and will terminate on 31 March 2009. The Commissioner notes that at the time of the request a previous contract was in force providing similar provisions to the new contract, which was in the process of being renewed.
81. The BBC maintain that disclosure of the fee paid to the OCC or release of information which would allow an industry insider to make a sufficiently close estimate and outbid the BBC for the exclusive rights and thus create a ratchet effect which would be likely to prejudice the commercial interests of the BBC and the OCC. As described above, there are a number of fixed costs associated with radio production and an industry insider would be able to estimate the amount paid to the OCC. Disclosure of the price is likely to place OCC at a disadvantage when negotiating with existing and potential clients for other non-BBC work. The OCC has a large client base with many licences across the music industry. Information about the cost of licences for charts is not widely known and it would be greatly beneficial to the OCC's customers to learn the prices charged by the OCC to the BBC for the top 40 chart.
82. The Commissioner has applied the test described in paragraphs 72 and 73 and considers that arguments in respect of the Chart Show are more persuasive on particular commercial context set out above, disclosure of information may have allowed an educated guess of fee paid to OCC and in this context the educated guess would be likely to create a ratchet effect and therefore would be likely to prejudice the BBC's commercial interests. He therefore finds that disclosure of this information would be likely to prejudice the BBC's commercial interest.

### **Public Interest Test**

83. Section 43 is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that information is exempt

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<sup>2</sup> The OCC provides the chart information for the Radio 1 Chart Show, which counts down the UK top 40 singles each Sunday from 4-7pm. The OCC, formerly the Chart Information Network (CIN) was formed in 1998 and is a joint venture between BPI (British Phonographic Industry) and ERA (Entertainment Retailers Association). The OCC is responsible for the commissioning, marketing, distribution and management of the UK's official music and video charts. Sales and chart data is produced on behalf of Music and Video Industries and is only provided on payment of a subscription fee.



information where the public interest, in all circumstances of the case, in maintaining the exemption outweighs the public interest in disclosing the information.

84. The BBC advances three broad public interest arguments in favour of the maintenance of the exemption. These are as follows:
- (i) *There is a clear public interest in ensuring the BBC is able to provide quality programming and value for money in respect of its use of the license fee. Both these objectives will be threatened if a presumption is created in favour of the general disclosure of information relating to license deals....*
  - (ii) *...there is little public interest in the disclosure of license deal information as this information only enables the public to take an informed view of whether the BBC is contracting with indies on a competitive basis if it is in the possession of license deal information relating to commercial broadcasters. Since this information is not publicly available, information relating to the BBC is of little use.*
  - (iii) *...the general public interest in the transparency and accountability of the BBC in respect of its use of the license fee is served by a broad range of oversight mechanisms, internal and external. These include the oversight of the BBC Trust, the responsibilities of which include commissioning value for money investigations into specific areas of BBC activity (Article 24 (2) (i) of the Charter), the Executive Board, the responsibilities of which include conducting the BBC's operational affairs in a manner best designed to ensure value for money (Article 38 (1) (h) of the Charter), Ofcom and the fair trade regime, and competition law in general. Indeed... certain limited information on expenditure is provided in the Annual Report. Disclosure beyond this threatens to pose considerable harm to the BBC's commercial interests, without offering a proportionate benefit to the public.*
85. In the Commissioner's view there are three public interest factors in favour of disclosure. These are as follows:
- i. there is a general interest in facilitating accountability and transparency in the way public money is spent;
  - ii. there is an interest in furthering the public's understanding of, and participation in, public debates on a given topic;
  - iii. there is an interest in facilitating accountability and transparency of public authorities for their decisions;
86. The Commissioner's view is that although there is a strong interest in understanding the way in which public money is spent, it is not clear that disclosure in this case would aid the public significantly. In order for information of this nature to be of use to the public in this way they would need access to information about the costs to other radio broadcasters of commissioning similar

content to enable them to consider if the BBC is obtaining value for money from its radio content. However, the Commissioner does note that the budget of the Chart Show could be compared against the total budget for Radio 1 which would enable the public to decide whether the Chart Show offers value for money compare with spending in other parts of the BBC.

87. Increased transparency would reinforce trust in the BBC as an organisation with robust controls on the way that public money is spent and budgeted. The BBC has a variety of mechanisms which seek to ensure value for money and high quality, for example, the Window of Creative Competition is a mechanism that ensures that 25% of BBC broadcasts are produced by the independent sector, and that a further 25% of broadcasts are opened to competition between the private sector and the BBC's in-house production divisions. The Trust (formerly the Board of Governors) has oversight of the way the BBC seeks to meet its corporate objectives providing a further level of scrutiny internally. The fact that there is no evidence that the BBC is not controlling costs effectively and no evidence to suggest the control mechanisms are failing means that the weight given to this public interest factor is limited.
88. Having weighed these factors, the Commissioner's view is that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information and that therefore the budgets the Radio 1 Chart Show should not be released. The Commissioner accepts that in this case, there was a strong public interest in ensuring the BBC could provide value for money in terms of its use of the licence fee. Overall, the benefits in terms of transparency and accountability are outweighed by the damage that disclosure would be likely to cause in respect of the BBC's commercial interests.

#### Section 40 'Personal data'

89. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the DPA.
90. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal information as:

*'...data which relate to a living individual who can be identified*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'*

91. The BBC state that if it was to disclose the budget details for the Radio 1 Breakfast Show it would allow many in the industry to extrapolate the costs to the BBC of engaged the talent for that particular show.

92. The Commissioner does not accept this is the case. As discussed above the budget for the Radio 1 Breakfast Show will include the amount paid to talent, other staff costs and some fixed costs. The BBC explained that many staff such as news staff work across a number of shows and or stations and to extrapolate a cost for these staff per station would exceed the cost limit (see arguments in paragraphs 49-54). Even if there are a number of fixed costs which industry insiders could establish the Commissioner does not consider it would then be possible to establish the talent costs as asserted by the BBC with any sort of precision to make it reasonable to assert the information to be disclosed could lead the public to identify a living individual. The Commissioner accepts it may be possible for the BBC itself, as the data controller to identify individuals; he deals with that issue below.
93. The Commissioner therefore finds that section 40(2) is not engaged as the information does not constitute personal data as defined in section 1(1) of the Data Protection Act. The information to be disclosed does not enable a living individual to be identified. This analysis is consistent with the decision of the House of Lords in *CSA v Scottish Information Commissioner* [2008] UKHL 47, in particular the Commissioner relies on the speech of Lord Hope, at paragraphs 24-25 of the judgment. Lord Hope made it clear that rendering data anonymous in such a way so that the individual is no longer identifiable, would enable the information to be released without having to apply the data protection principles. If this could be achieved then the anonymised information could be released, as it would no longer be personal data.

#### **Section 41 'Information provided in confidence'**

94. The BBC have applied section 41 to payments to talent which they assert as above could be extrapolated from the overall budget figure.
95. As detailed in paragraph 92, the Commissioner does not accept that payments to talent can be extrapolated from the overall budget figure. He therefore finds that section 41 is not engaged as the information cannot be classed as information obtained in confidence from an identifiable person.

#### **The Decision**

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96. 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 requested 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 complainant's request in accordance with Part 1 of the Act in that it failed to comply with its obligations under section 1(1)(a) in that it failed to confirm or deny with it held the requested information.

ii. The BBC breached section 17(1) of the Act because it failed to provide a refusal notice stating which exemptions it believed applied to the information covered by the request listed in the previous paragraphs and section 17(5) stating it was relying on section 12 in respect of parts (i) and (iii) of the request.

iii. Sections 43(2), 40(2) and 41 were applied incorrectly with respect to the budget of the Radio 1 Breakfast show. As the BBC did not communicate this information to applicant this was a breach of section 1(1)(b) of the Act.

iv. In not proving advice and assistance in relation to parts (i) and (iii) of the request the BBC breached section 16 of the Act.

97. However, the Commissioner has decided that the following aspects of the request were dealt with in accordance with the Act:

i. The budget of the Radio 1 Chart Show was correctly withheld under section 43(2) of the Act.

ii. The BBC is not obliged to comply with parts (i) and (iii) of the request by virtue of section 12 of the Act.

## Steps Required

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98. The Commissioner requires the BBC to take the following steps to ensure compliance with the Act:

- contact the complainant to offer advice and assistance in accordance with the section 45 Code of Practice and section 16(1) of the Act in respect of parts (i) and (iii) of the request..
- Disclosure the budget of the Radio 1 Breakfast show previously withheld under section 43(2), 40(2) and 41(1). This will be the current budget held at the time of the request.

## Failure to comply

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99. 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

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100. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 9th day of February 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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