

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 August 2013

Public Authority: British Broadcasting Corporation
Address: Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the BBC for copies of correspondence regarding the BBC pension scheme. The BBC had initially withheld some information from the complainant under the section 43 (commercial interests) exemption. During the course of the Commissioner's investigation the BBC disclosed some further information to the complainant but some information was redacted and withheld under the section 36 (prejudice to effective conduct of public affairs) exemption which the BBC now sought to apply for the first time. The complainant also complained that the BBC had failed to identify all of the information falling within the scope of the request.
2. The Commissioner has investigated the complaint and found that the BBC has disclosed all of the information it holds falling within the scope of the request with the exception of the redacted information. This information has been withheld under sections 36(2)(b)(ii) and 36(2)(c) and the Commissioner finds that the exemptions apply and the public interest in maintaining each exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 23 February 2012 the complainant made a freedom of information request to the BBC which read as follows:

"Could I have copies of the correspondence between the BBC and the BBC Pension Scheme Trust regarding the additional contributions mentioned in the 2011 annual report as below?"

4. The annual report referred to by the complainant revealed that there was a significant funding shortfall in the BBC pension scheme and that this was to be eliminated by additional contributions being paid by the employers participating in the scheme.
5. The BBC responded on 19 March 2012 when it disclosed a quantity of information falling within the scope of the request. The complainant contacted the BBC again on 3 April 2012 to ask for an internal review of the BBC's handling of his request. In doing so he queried the extent of information which was disclosed and outlined what information he felt was missing.
6. The BBC presented the findings of the internal review on 5 September 2012. At this point it identified further information falling within the scope of the request but explained that this was exempt from disclosure under section 43 FOIA as it was commercially sensitive. For the other information which the complainant said he expected to fall within the scope of the request, the BBC explained that the information was not held.

Scope of the case

7. On 12 September 2012 the complainant contacted the Commissioner to complain about the BBC's decision to refuse to disclose information falling within the scope of his request. He also complained that the BBC had failed to identify all of the information falling within the scope of his request.
8. The Commissioner had attempted to resolve the complaint informally with the result that the BBC eventually disclosed to the complainant all of the information it held with the exception of two passages which were redacted from a letter written to the BBC Pension scheme trustees. During the course of the Commissioner's investigation the BBC sought to rely on the 36(2)(b)(ii) and 36(2)(c) exemptions as a basis for withholding this information.
9. The complainant continued to question whether the BBC holds further information in relation to his request which it had not identified in its response to him or in communications with the Commissioner.
10. The Commissioner considers the scope of the case to be to determine whether the redacted information should be withheld on the basis of

section 36 and if the BBC has identified all of the information falling within the scope of the request.

Reasons for decision

Section 1 - Information not held

11. The Commissioner has first considered the issue of whether the BBC has identified all of the information falling within the scope of the request.
12. Having been sent some information by the BBC the complainant was concerned that it had not identified all of the information. Some of these concerns were addressed during the course of the investigation. The Commissioner has repeated below the comments made by the complainant in his request for internal review giving two specific instances where he continues to believe that additional information is held.
 - i. *"Firstly, there is no paperwork relating to the initial decision made by the BBC Trust prior to the meeting of 14 January 2011 that additional contributions be paid to the BBC Pension Scheme from the licence fee to meet the funding shortfall of £1.131 billion. Please provide the appropriate minutes and briefing papers."*
 - ii. *"in the minutes of the meeting of 3 March 2011 mention is made of 'an outstanding issue with regard to pre-abandonment of the pension augmentation deal for staff moving to Salford' and that WH [named individual] 'was to inform [named individual] that she should look at the issue of pre-abandonment of the pension augmentation deal for staff moving to Salford with the North Team and update the Trustees'. No such paperwork was provided and it is now sought."*
13. The BBC responded to the first point at the internal review stage where it explained that there are no relevant documents as no decision was required. It said that this was because it is a regulatory requirement when the Pension Scheme is in deficit and therefore no approval by the BBC Pension Scheme Trust was required. The complainant disputes this and maintains that there must be some BBC papers on which the Trust based their decision and also a confirmation of that decision. He suggests that "it is impossible to believe a decision to spend nearly £1 billion was not minuted and an explanation written down" and that at the least there must be some information recording the BBC Pension Scheme Trust's approval of the decision to make up the shortfall from

the licence fee. The complainant asked the Commissioner to consider whether any information existed prior to the 14 January 2011 meeting.

14. As regards the second point the BBC said that an email had been sent to the individual referred to by the complainant but this email was not kept. The complainant has not challenged the BBC's position that this particular email was not retained but suggests that further "prior and post documentation" must be held on the issue of the "pre-abandonment of the pension augmentation deal for staff moving to Salford".
15. In order to determine whether the BBC had identified all of the information it might hold the Commissioner had asked it to outline what steps it took to search for the requested information and to respond to the complainant's comments.
16. In response the BBC explained that on receipt of the request it had made an assessment of where the information would be held and emailed the relevant FOIA representatives. The search was wide ranging and the Commissioner notes that the request was referred to the Finance department as well as the 'People' department, the Director General's Office and the 'COO's office'. However, the different departments were also explicitly instructed to consider whether any other part of the BBC might hold the information and therefore the BBC maintains that this should have uncovered any relevant material.
17. The BBC went on to say that every employee that is involved in the handling and responding of FOIA requests is required to undertake FOI training. In that training employees learn that FOIA applies to any and all information held in forms which include but are not limited to:
 - Hard and soft copy documents and files
 - Emails
 - Board papers
 - Meeting minutes and agendas
 - Correspondence
 - Notes for file
 - Handwritten meeting notes
 - Diaries
 - Yammer
 - Drafts
 - Third party information
 - Staff are also reminded that if BBC work is stored on personal laptops and email accounts, which should not be the case but may have occurred if they have done any work on a home PC, then it is also subject to FOIA requests.

18. When discussing what search terms were used to locate any relevant information the BBC said that the request is provided to the FOIA representative in relevant departments who will lead on the collection and drafting on the FOIA response. The search terms used are the points that the requester has used as well as staff determining their own names of people who have been working with the information requested. The BBC argues that performing the search in this way “ensures that the information captured is accurate and wide”.
19. As regards the specific points made by the complainant the BBC confirmed again in its response to the Commissioner that it held no information on the initial decision that additional contributions to the pension scheme be made up from the licence fee. It confirmed that in searching for information it had carried out a thorough and comprehensive search for all information related to the complainant’s request up until the date of his request and therefore had considered all information including anything prior to the 14 January 2011.
20. On the second point, on the pre-abandonment of the pension scheme for staff moving to Salford, the BBC explained that an email had been sent between the individuals referred to by the complainant but that it had been deleted and could not be recovered. The Commissioner also asked the BBC whether when conducting its searches for requested information it had looked for “prior and post documentation” regarding the pre-abandonment of the pension augmentation deal for Salford staff when searching for information falling within the scope of the request. In response the BBC confirmed that it had considered these issues when searching for requested information. It said that its Information Policy and Compliance team disseminated the original request to all relevant parties and asked for all of the information requested. The search terms used were the points that the complainant requested. It said that it was confident that performing the search in this manner ensured that the information captured is accurate and wide and avoids any individual interpretation of the search terms.
21. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).

22. In this case the Commissioner has considered the steps taken by the BBC to search for the information and is satisfied that it took all reasonable measures to locate any information, including asking all departments involved in dealing with the issues mentioned in the request. The various departments were also able to consider if there was anywhere else in the organisation where the information might be held. The Commissioner is satisfied that the scope and thoroughness of the search was appropriate in the circumstances. Therefore, without any evidence to the contrary, the Commissioner must accept that the BBC does not hold any further information falling within the scope of the complainant's request beyond which it has already identified.

Section 36 – prejudice to effective conduct of public affairs

23. The BBC has made two redactions from a letter sent to the BBC Pension Trustees discussing the strength of the BBC's political covenant. This information has been withheld under the exemptions in section 36(2)(b)(ii) and 36(2)(c) of FOIA.

24. Section 36(2) of FOIA provides that information is exempt if in the reasonable opinion of the qualified person disclosure:

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

25. When deciding if the exemption is engaged the Commissioner has to first establish that an opinion was given on the application of the exemption by a proper qualified person. In this case the BBC obtained the opinion of its Chairman Lord Patten when it decided to apply the section 36 exemption, during the course of the investigation. The Chairman of the BBC is the head of the organisation and the qualified person for the purposes of the FOIA. Therefore the Commissioner is satisfied that the opinion was properly obtained.
26. In order to determine whether the exemption is engaged the Commissioner must then go on to consider:
- whether the prejudice claimed relates to the specific subsection of section 36(2) that the BBC is relying upon;

- the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
27. The Commissioner has recently issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:
- "The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."*
28. The withheld information in this case consists of two redactions from a letter sent to the BBC Pension Scheme Trustees regarding the strength of the BBC's covenant – the ability of an employer to fund its pension scheme. The redacted information discusses the BBC's view on the strength of its case in relation to the renewal of its charter and in particular, two live issues which it anticipates will form part of the charter renewal and licence fee negotiations.
29. The BBC argues that section 36(2)(b)(ii) is engaged because disclosure would be likely to inhibit the free and frank exchange of views between its senior executives and advisors regarding key issues to be negotiated in the upcoming 2016 charter renewal and Licence fee settlement. Section 36(2)(c) is engaged because, it argues, disclosure would undermine its negotiating position in the upcoming charter renewal and licence fee settlement.
30. It is important to note that when considering whether section 36 is engaged the Commissioner is making a decision not on whether he agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.
31. Having reviewed all of the information placed before the qualified person the Commissioner is satisfied that the information included the relevant arguments. He was provided with a copy of the withheld information and a detailed submission prepared by his officials, allowing him to form a reasonable opinion on the likely effect of disclosure of the information.
32. The Commissioner has also considered the opinion itself and is satisfied that it was reasonable for the qualified person to form the opinion that disclosure would be likely to lead to the prejudice in section 36(2)(b)(ii) and section 36(2)(c). The Commissioner must be careful not to disclose

the information in this decision notice and therefore is limited in what he can say about the reasons why the exemption has been applied. However, he would say that the two issues mentioned are, according to the BBC, very likely to be discussed in the upcoming charter renewal and licence fee negotiations and could imply a weakness in the BBC's negotiating position if disclosed. In the case of one of the redactions the Commissioner also understands that the BBC's position may change on the issue being discussed. The Commissioner is also mindful of the fact that the negotiations have yet to take place and the BBC has yet to decide upon its negotiating position. The BBC has said that its internal thinking on these issues continues to develop and the issues remain live.

33. Therefore, as regards section 36(2)(b)(ii), disclosure would be likely to result in a chilling effect whereby staff are discouraged from discussing issues freely and frankly. Disclosure would also inhibit future policy discussions because the information might be taken to signal a BBC position on the issues that, upon further internal debate and analysis may be subject to change. As regards section 36(2)(c) disclosure would undermine the BBC's negotiating position which could lead to it making unnecessary concessions. This would prejudice the effective conduct of public affairs because it would pose a risk to the level of licence fee funding and consequently the BBC's output and services.
34. The Commissioner is satisfied that the qualified person's opinion was reasonable and that therefore section 36(2)(b)(ii) and section 36(2)(c) are engaged. Therefore he has gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

The public interest test

Public interest arguments in favour of disclosure

35. The complainant has argued that the public interest favours disclosure because the public have a right to know how decisions were made by the BBC since it involves significant amounts of public money in the form of the licence fee being used to make up a shortfall in the pension scheme.
36. The BBC has itself acknowledged that the public interest would be served by assuring licence fee payers that decisions on charter renewal and negotiations are sound as they have been made after appropriate discussion and deliberation and on the best information available.
37. There is a public interest in demonstrating to licence fee payers that the BBC is advocating effectively on their behalf.

Public interest arguments in favour of maintaining the exemption

38. As regards the public interest in maintaining the exemption, the BBC advanced a number of arguments which are summarised below.
- There is a public interest in the BBC having the opportunity to robustly explore options in the work required for the charter negotiations; to inform the development of policy in the knowledge that undeveloped proposals will not be disclosed.
 - There is a public interest in the BBC staff being able to discuss and give advice freely and frankly to management on live and sensitive topics that will affect the future of the licence fee. This is vital to ensure that all factors are taken into consideration and are robust.
 - There is a public interest in the BBC being a strong advocate on behalf of licence fee payers by negotiating the best value licence fee settlement in the 2016 charter negotiations.
 - There is a public interest in assuring the Pension Trustees as to the strength of the BBC covenant.

Balance of the public interest arguments

39. First of all the Commissioner would say that whilst the redacted information was featured in a letter to the pension trustees the information says very little that would add to the public understanding of the decision to make up a shortfall in the BBC pension scheme from the licence fee. In the Commissioner's view the BBC has taken a balanced approach by only making two minor redactions to the wealth of information it disclosed on the subject of pensions where these relate to two issues which will be the subject of future negotiations and where it has yet to reach a final position. Having said that, the Commissioner does accept that there is a general public interest in disclosure in terms of greater transparency and accountability. He also recognises that there is a public interest in demonstrating to licence fee payers that decisions on charter renewal are made after considering all the relevant options. The Commissioner has given limited weight to the public interest in disclosure.
40. As regards the public interest in maintaining the section 36(2)(b)(ii) exemption, the Commissioner considers that the fact that the issues under discussion were 'live' weighs in favour of the information being withheld. Negotiations on the licence fee and charter renewal had not formally begun at the time of the request and so disclosure at this very early stage in proceedings would have a greater impact because it would act as a distraction from the deliberation of the BBC's officials and would have hindered their ability to consider all options. Moreover, at the time

of the request the negotiations would need to cover a 14 year period (this is assuming the charter renewal would run from 2016 until 2026) and therefore it is very important that the BBC is able to have a safe space to discuss all possible options so that they can understand how they might develop over the course of the next charter period.

41. The information was also relatively recent at the time of the request (barely a year old) and this, coupled with the fact that the charter negotiations had yet to formally begin, means that the chilling effect on the ability of the BBC to discuss the two issues in a free and frank manner will be greater in the circumstances.
42. As regards section 36(2)(c) the Commissioner considers that the public interest in protecting the ability of the BBC to negotiate effectively is very strong indeed. The consequences of the BBC failing to obtain the best deal for licence fee payers in its negotiations on charter renewal and the licence fee settlement would be a reduction in funding. This would potentially impact on all areas of the BBC and would seriously affect its operations and services and ultimately its public missions and other obligations as set out in the BBC charter. In the Commissioner's view the extent and severity of the prejudice would be significant.
43. For both sections 36(2)(b)(ii) and 36(2)(c) the Commissioner considers that at the time of the request the extent and severity of the prejudice caused by disclosure would be particularly significant. Therefore, taking into account all the circumstances, and having given due weight to the opinion of the qualified person, the Commissioner finds that the public interest in maintaining each exemption outweighs the public interest in disclosure.

Right of appeal

44. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Pamela Clements
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