

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 November 2016

**Public Authority:** British Broadcasting Corporation

**Address:** Room BC2 A4  
Broadcast Centre White City  
Wood Lane  
London W12 7TP

#### **Decision (including any steps ordered)**

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1. In a four part request, the complainant has requested information about an instance of whistleblowing in 2012. The British Broadcasting Corporation ('the BBC') says it does not hold information within the scope of one part and cannot categorially verify that it holds information within the scope of one other part. The BBC says that, under section 40(5)(b)(i) of the FOIA, it is not obliged to confirm or deny that it holds the information requested in the remaining two parts because to do so would reveal the personal data of a third person.
2. The Commissioner's decision is that:
  - On the balance of probabilities, the BBC does not hold information that falls within the scope of parts 1 and 4 of the request.
  - Under section 40(5)(b)(i), the BBC is correct to neither confirm nor deny it holds the information requested at parts 2 and 3 of the request as to do so would release the personal data of a third person.
3. The Commissioner does not require the BBC to take any steps.

#### **Request and response**

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4. On 3 December 2015, the complainant wrote to the BBC. He referred to a report entitled '*TRUST (13) 39 The BBC Whistleblowing policy and processes*' and requested information in the following terms:

*"1. Did the individual who requested the investigation into whistleblowing with respect to the Data Protection Act in 2012 receive notification of the outcome of this investigation by the time the attached report was published? If so, did the individual above receive notification of the outcome of this investigation after the attached report was published? If so, on what date did this occur?"*

*2. Did the individual above claim they had suffered any form of detriment, bullying or harassment, and if so was an investigation made into such a claim, and in turn if so, on what date was the individual notified of the outcome?"*

*3. Has the individual above received any offer of compensation, and if so, on what date was this offer made?"*

*4. Was the instance of whistleblowing in 2012 investigated by the Information Commissioner? If so, what was the outcome of the investigation, and was the individual who requested the investigation into whistleblowing notified of this outcome?"*

5. Information on the BBC's initial response to the request, dated 21 December 2015, is contained in a confidential annex to this notice.
6. The BBC wrote to the complainant again on 3 March 2016. It said it does not hold the specific information requested at parts 1 and 4 of the request. With regard to part 1, the BBC said that from the records that it does hold, it is unclear whether the individual who reported the allegation of a data protection breach was updated with the outcome of the inquiry prior to the report on whistleblowing being published. The BBC confirmed that the investigation log contains an entry stating that the individual who made the complaint was liaised with and thanked for raising the issue. This entry is dated prior to the report's publication.
7. With regard to parts 2 and 3, the BBC confirmed that it will usually only disclose the identity of someone who reports a concern under its whistleblowing policy with their consent. As such, a whistleblower who did not provide consent for their identity to be disclosed would not be identified elsewhere in the organisation.
8. The BBC said that to the extent that the information requested at part 2 of the request may be held by its Investigations team, it considered that this information would constitute the personal data of a third person and so be exempt from disclosure under section 40(2) of the FOIA. Regarding part 3 of the request, the BBC said that its Investigations team does not process claims for compensation. It was therefore unable to confirm from its records whether the relevant individual would have received any form of compensation from the BBC at any point.

9. The BBC undertook two internal reviews. In the first, dated 20 April 2016, the BBC considered its response to parts 2 and 3 of the request.
10. Referring to the definition of personal data provided in the Data Protection Act 1998 (DPA), the BBC said it considered that the information requested in these parts is information relating to a living individual. Furthermore, although not known to the wider BBC, part of the BBC is in possession of other information which, together with the requested information, would render the individual concerned identifiable. The BBC was therefore satisfied that the information sought under parts 2 and 3 of the request constitutes personal data and that it would not be fair or lawful to disclose it.
11. Particular information provided by the complainant in his wider correspondence with the BBC, which relates to the BBC's consideration of an alternative section 40 exemption, is discussed in the confidential annex.
12. The BBC's second internal review, dated 6 May 2016, dealt with the complainant's dissatisfaction with the BBC's indication that, at the time of the request, it did not hold some of the information he had requested.
13. In this review, the BBC explained that it had identified that its Investigations team and its Workplace and Information Rights team within the Legal Division would be the teams most likely to hold the information requested at parts 1 and 4. The BBC confirmed that these areas of the BBC had carried out searches and that it considered the scope of these searches to have been appropriate and adequate.
14. In light of the complainant's dissatisfaction and complaint to the Commissioner, however, the BBC said it had carried out further extensive searches.
15. With regard to part 1, the BBC confirmed that it holds records relating to the complaint in question but that these do not indicate whether or not the Whistleblower that is the subject of the complainant's request had received notification of the outcome of the investigation. As at paragraph 6, the BBC again volunteered that while its records do indicate that contact was made with the Whistleblower on a specific date, the entry does not specify whether or not the outcome of the investigation was communicated.
16. With regard to part 4, the BBC said that, in light of information the complainant had provided, it had conducted searches of its records relating to data protection complaints (including matters investigated by the Information Commissioner) for 2012. No records were found for this period that matched the circumstances that the complainant had

described. Nor were any records located that included the additional information provided by the complainant, which is discussed in the confidential annex. This had been communicated to the complainant.

17. Following the complainant's complaint (to the Commissioner), the BBC said it had carried out further extensive searches. This had included individually reviewing the records for each of the BBC's complaints for 2012 and 2013, and liaising with the Investigations team in relation to the subject matter. As a result, records had been identified relating to a complaint referred to the BBC by the Information Commissioner in 2013.
18. The BBC said that it is not possible to verify that this complaint related to the same incident that was the subject of the 2012 incident of whistleblowing referred to in the request. The BBC confirmed, however, that the outcome of the Information Commissioner's investigation into the 2013 complaint was that no enforcement action was necessary.
19. The BBC confirmed that it does not hold records as to the source of the complaint to the Information Commissioner, or as to whether the source was informed of the outcome of the Commissioner's investigation.
20. The BBC told the complainant that its Legal Division does not hold a record of whether the outcome of the complaint that generated the 2013 investigation was notified to the whistleblower in question. However, the BBC noted that it does not know whether the Whistleblower who is the subject of the current request was the source of the complaint to the Information Commissioner that was investigated in 2013, and it could not categorically confirm that these relate to the same issue. Finally, the BBC said its Legal Division's records do not give any indication that the outcome of the Commissioner's 2013 investigation was notified to its Investigations team and its Investigation team's records do not indicate that the whistleblower in question was advised of the outcome of this particular complaint.

## **Scope of the case**

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21. The complainant initially contacted the Commissioner on 10 June 2016 to complain about the way his request for information had been handled. At that stage he considered that the BBC was attempting to block disclosure of the information he had requested (see confidential annex). He subsequently confirmed to the Commissioner that he is not satisfied with the BBC's application of section 40 to two parts of his request, and he disputes that the BBC does hold information within the scope of the remaining two parts.

22. The Commissioner's investigation has focussed first on whether, on the balance of probabilities, the BBC holds information that falls within the scope of parts 1 and 4 of the request.
23. Second, the investigation has considered whether, under section 40(5)(b)(i) of the FOIA, the BBC is correct to neither confirm nor deny that it holds information related to the parts 2 and 3 of the request as to do so would release the personal data of a third person.
24. Further information on the second exemption that the Commissioner has considered is contained in the confidential annex.

## **Reasons for decision**

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### **Section 1(1) – information held/not held**

25. Section 1(1) of the FOIA says that anyone making a request for information to a public authority is entitled to (a) be informed if the authority holds the information and (b) if it does, to have the information communicated to him or her.
26. With regard to the information requested at part 1 of the request, the BBC has clarified that it holds information on the Investigations team's database about the data protection issue raised by the Whistleblower in 2012 (as referred to in the Trust report). The BBC says that a file note was made on the database on or after 12/06/2013 (this is the date a file note was opened, and may not reflect the actual date that the communication took place). This file note notes that communication was made with the Whistleblower but there is no indication as to whether the Whistleblower was advised of the outcome of the investigation. The BBC has confirmed that the content of the file note was volunteered to the complainant in its original response of 3 March 2016 and the internal review of 6 May 2016.
27. Regarding the information requested at part 4 of the request, the BBC has told the Commissioner that its Legal Division has identified a complaint referred to the BBC by the Information Commissioner in July 2013. This concerns a data protection matter, similar to the data protection issues raised by the Whistleblower who is the subject of the current request.
28. The BBC has referred to its internal review of 6 May 2016, in which it advised the complainant that it is not possible to categorically verify that this relates to the same incident that was the subject of the 2012 incident which is referred to in the complainant's request. The BBC says that this is because the BBC does not hold records as to the source of

the complaint to the Information Commissioner, or as to whether the source was informed of the outcome of the Information Commissioner's investigation. The BBC has confirmed that the outcome of that particular investigation was that the Information Commissioner indicated to the BBC that no enforcement action was necessary. As noted, the BBC made the complainant aware of this outcome in the internal review of 6 May 2016.

29. In its submission to the Commissioner, the BBC has referred to the searches it undertook to locate any information it holds within the scope of parts 1 and 4 of the request; originally and following further information supplied by the complainant. These are detailed at above. The BBC has told the Commissioner that its Corporate Security & Investigations team and its Information Rights team within its Legal Division were identified as the teams most likely to hold relevant information and it was these teams that undertook the searches.
30. The Corporate Security & Investigations team hold their information on an electronic database and the relevant case files were searched for information relating to part 1 of the request. In relation to part 4, the Information Rights team searched the networked computer on which it would hold any information related to this part.
31. The BBC has confirmed that there is no evidence to suggest that relevant information may be held on privately owned computers or in private email accounts. It therefore considers that it would not have been reasonable to extend the scope of a search to personal computers, mobile phones or private emails.
32. Similarly, the Corporate Security & Investigations team holds information on a database and an audit of activity is recorded (ie if a new document is added to the database, or a deletion occurs, this information is recorded). The BBC has confirmed that no records indicate that any relevant information held was deleted or destroyed. Neither is there any evidence to suggest that the Information Rights team deleted or destroyed relevant information.
33. The Commissioner has considered the BBC's submission, the searches it undertook and the circumstances of this case.
34. The Commissioner has also noted the points raised by the complainant. In one piece of correspondence with her, the complainant says that the BBC had first said it did not hold information relating to part 4 of the request but that in its internal review, the BBC "*admitted that they do hold the requested information*". This is not correct. The BBC identified information that it holds relating to a complaint referred to the BBC by the Information Commissioner in 2013. The Commissioner has seen

this information. However, as explained above, it is unable to verify that this is the same complaint and resulting investigation that is the subject of the complainant's request. The BBC says it cannot therefore confirm that it holds information within the scope of part 4 of the request and has therefore not admitted that it holds information relevant to this part. A point the complainant has raised with regard to this particular matter is discussed in the confidential annex.

35. Having seen the information that the BBC holds regarding the 2013 investigation, the Commissioner notes that the whistleblower's name or other means of identification have not been given in this material. Consequently, the Commissioner is prepared to accept that the BBC holds no information that would suggest that the incidence of whistleblowing in 2012 is linked to the 2013 investigation, about which the BBC does hold information. The Commissioner is therefore prepared to accept that the BBC cannot be said to hold information within the scope of part 4 of the complainant's request.
36. The Commissioner considers that the searches the BBC undertook for information relating to parts 1 and 4 of the request were satisfactory and that, on the balance of probabilities, the BBC does not hold information falling within the scope of these parts.

### **Section 40(5) – neither confirm nor deny information is held**

#### Section 40(5)(b)(i)

37. In its submission to the Commissioner, the BBC confirmed that it is relying on the exemption under section 40(5)(b)(i) with regard to parts 2 and 3 of the request. It considers a related exemption could also apply and this is discussed in the confidential annex.
38. As referred to above, section 1(1) of FOIA says that any person making a request for information to a public authority is entitled (a) to be informed whether the authority hold the information and (b) if it does, to have that information communicated to him or her.
39. However, in relation to personal information, section 40(5)(i)(b) says that a public authority is not obliged to confirm or deny that it holds information if giving confirmation or denial to a member of the public would contravene any of the data protection principles, or section 10 of the DPA.

This subsection is about the consequences of confirming or denying whether the information is held, and not about the content of the information. The criterion for engaging it is not whether disclosing the

information would contravene data protection principles, but whether the simple action of confirming or denying that it is held would do so.

The Commissioner's guidance on section 40(5) explains that there may be circumstances, for example requests for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that information about an individual can itself reveal something about that individual. To either confirm or deny that information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process.

40. For the BBC to have correctly relied on section 40(5)(b)(i) the following conditions must be met:

- confirming or denying whether information is held would reveal personal data of a third person; and
- confirming or denying whether information is held would contravene one of the data protection principles.

41. In order to reach a view regarding the application of this exemption, the Commissioner has first considered whether confirming or denying relevant information is held would reveal personal data of a third person as defined by the DPA.

*Would confirming or denying the information is held reveal the personal data of a third person?*

42. As the BBC referenced in its first internal review, the DPA says that for data to constitute personal data, it must relate to a living individual, and that individual must be identifiable.

43. In its submission to the Commissioner, the BBC has confirmed that the personal data, if held, would relate to the Whistleblower and that this individual is believed to be living. The requested information, if held, concerns details about whether an individual claimed that they had suffered any form of detriment, bullying or harassment, and details about that investigation ie details of notification to the Whistleblower, any offers of compensation, and dates any offers were made. Some of this information also constitutes sensitive personal data. Further information concerning how the Whistleblower might be identified is contained in the confidential annex, under 'Other matters'.

44. The Commissioner considers that the requested information, which concerns an investigation into any claims of bullying and any resulting compensation, relates to the Whistleblower concerned. As discussed in the confidential annex, the BBC says that the Whistleblower could be



identified and the Commissioner agrees this is a possibility. Consequently, the Commissioner is satisfied that confirming or denying that it holds the information requested at parts 2 and 3 would reveal the personal data of the Whistleblower; that is, whether or not the Whistleblower had claimed to be subject to any bullying or harassment and whether or not they had received an offer of compensation.

*Would confirming or denying whether information is held contravene one of the data protection principles?*

45. The BBC considers that the first data protection principle – that personal data shall be processed fairly and lawfully – would be breached if it confirmed or denied it holds the requested information.
46. When assessing whether disclosure would be unfair and so constitute a breach of the first data protection principle, the Commissioner takes into account factors such as whether the information relates to the individuals public or private life, what their reasonable expectations might be and whether or not the individual has consented to the disclosure of their personal information.
47. It is the BBC's position that the information, if held, relates to sensitive topics including detriment, bullying or harassment and would be handled in line with the BBC's Whistleblowing Policy. Its current BBC Protected Disclosure Policy says: "*You may decide that you want to raise your concern in confidence. You can do so by asking for your identity to be protected, therefore it will not be disclosed without your consent.*" The BBC says that if a whistleblower followed the procedure set out in the BBC's [Whistleblowing] Policy at the time of raising the issue (whether technically covered by the Policy or not), it would treat the information as confidential and, subject to certain exemptions, would not disclose it without the whistleblower's consent.
48. Due to the sensitive nature of the requested information, the Whistleblower's expectation that their concern was raised in confidence and the potential for the individual to suffer distress at the disclosure, the BBC says its position is that the individual would have the reasonable expectation that the requested information, if held, would not be disclosed without his or her consent.
49. The BBC has told the Commissioner that it understands that its Investigations team asked the Whistleblower whether he or she would consent to their name being disclosed and the individual did not consent. The Commissioner must assume that the individual would not consent to other of their personal data, such as the requested information, being disclosed.

50. The Commissioner is prepared to accept that confirming or denying the requested information is held would be unfair to the Whistleblower because it would disclose their personal data; namely whether or not they had claimed to be subject to any bullying or harassment and whether or not they had received an offer of compensation. To confirm or deny this information is held would therefore breach the first data protection principle and the Commissioner is satisfied that the BBC has correctly applied section 40(5)(b)(i) of the FOIA to these parts of the request.

*Balancing the individual's rights and freedoms against the legitimate interest in confirming or denying information is held*

51. As part of the Commissioner's investigation, the BBC was asked whether the sixth condition of Schedule 2 of the DPA had been met – this condition concerns balancing the legitimate interests of the general public and the rights and freedoms of the data subject (the Whistleblower in this case). The BBC has confirmed that it considers that there is insufficient public interest in the requested information that would justify overriding the rights and freedoms of the data subject.
52. The BBC's position is that any public interest in disclosing information relating to the BBC's whistleblowing procedures is satisfied by the information in the public domain ie that is published on its website.
53. The BBC also says that there is also a wider public interest in withholding information received via its whistleblowing procedures. It argues that if the requested information is released, it may deter further employees or members of the public from making complaints or reporting suspected allegations of discrimination. The BBC considers that this would not be in the public interest.
54. While the complainant may have their own concerns, the BBC says it is mindful that, under the FOIA, disclosure of the information, if held, would be to the world at large. Disclosing the Whistleblower's personal data could cause harm or distress and unfairly prejudice and impinge on their personal life.
55. The Commissioner agrees with the BBC that, if held, the Whistleblower would not expect their personal data to be disclosed and that disclosing it could cause distress to that individual. The Commissioner acknowledges that the requested information is of interest to the complainant but does not consider it is of sufficient wider public interest such that it would outweigh the Whistleblower's legitimate interests. The Commissioner therefore remains satisfied that the BBC is correct to neither confirm nor deny it holds this information as to do so would release the personal data of a third person and would breach the DPA.

## **Other matters**

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56. Further information on the additional exemption the BBC considers could be applied to parts 2 and 3 of the request is contained in the confidential annex, under 'Other matters'.

## Right of appeal

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57. 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: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. 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.
59. 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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