

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2021

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

Decision (including any steps ordered)

1. The complainant has requested from the BBC the total amount it had spent on social distancing devices. The BBC refused to provide the requested information, citing section 43(2) – commercial interests.
2. The Commissioner's decision is that the BBC has cited section 43(2) correctly.
3. The Commissioner does not require the BBC to take any further steps.

Request and response

4. On 7 January 2021 the complainant made the following request for information under the FOIA –

"I am sending this request under the Freedom of Information Act. - Please state the total budgeted to purchase social distancing devices by the BBC -Please state the total spent to date on purchasing social distancing devices by the BBC. Please limit this

request to information that is centrally held. Please note that total order costs, shorn of any other contractual information, are not commercially sensitive, as per ICO guidance on section 43, and this exemption cannot be applied to this request."

5. The BBC responded on 3 February 2021 and refused to provide the requested information, citing section 43(2) – commercial interests.
6. On the same day the complainant requested a review.
7. The BBC provided an internal review on 22 February 2021 in which it maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 7 May 2021 to complain about the way his request for information had been handled. He explained that he had made a subsequent request to the BBC in an attempt to understand why the information had been withheld but that heavy redaction had not enabled him to understand the decision.
9. The Commissioner considers that the scope of this case is the BBC's citing of section 43(2) to the requested information.

Reasons for decision

10. Section 43(2) of the FOIA states 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.
11. The Commissioner has defined the meaning of the term "commercial interests" in her guidance on the application of section 43 as follows:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity"¹
12. Most commercial activity relates to the purchase and sale of goods. The Commissioner understands that the requested information relates to the

¹ [Section 43 - Commercial interests | ICO](#)

supply of social distancing proximity devices which alert wearers when they are less than two metres apart from someone else.

13. There are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests.
14. The exemption is subject to the public interest test which means that, even if it is engaged, the Commissioner also needs to assess whether it is in the public interest to release the information.
15. A public authority cannot simply argue that because information is commercially sensitive, its disclosure would, or would be likely to, prejudice commercial interests. It must be able to demonstrate a causal relationship between the disclosure of the information in question and the prejudice it envisages. Its disclosure should also be liable to cause real (or significant) harm to the owner. There is also a need to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, whether disclosure would or would be likely to result in prejudice, or that there is a real and significant risk of the prejudice occurring.

The complainant's view

16. The complainant explained that he had delayed coming to the Commissioner whilst he attempted to obtain more information from the BBC about how his request had been handled. He wanted to ascertain if there was a reasonable thought process behind the decision to withhold the information before making a complaint.
17. Therefore the complainant made a further request for the records relating to the handling of the original request and the internal review. He explained that the response from the BBC was almost completely redacted which he suggested there was no reason for.
18. He argues that for section 43 to apply, the BBC has to demonstrate that, firstly, release would be likely to prejudice the commercial interests of any party and secondly, that the public interest lies in withholding the information.
19. The complainant does not accept that total spending amounts, without any breakdown of per unit price, or any other financial information about the contract is commercially sensitive. If it was, he contends, routine spending disclosures on most public bodies' publication schemes would be in breach of section 43(2). His view is that just knowing how much money was spent on something, without any further details, does

not reveal information that could be useful to competitors or prejudice either party's position.

20. He acknowledged before review that the BBC had stated that release could,

"damage the BBC's (and/or a third party's) business reputation, prejudice the negotiating position of the BBC, weaken the competitive position of the BBC or a third party in their particular market and harm the ability of the BBC or a third party to obtain goods and services in the future"

However, he argued that the BBC *"provided no evidence whatsoever"* that the release of the requested information *"could conceivably have this effect"*.

21. The complainant maintains that the "would be likely to" test has not been met and that there is a strong public interest in allowing the licence fee payer to hold the BBC accountable for its spending which he does not consider has been taken into account.

The BBC's view

22. The Commissioner has been provided with the withheld information by the BBC.
23. The BBC has confirmed that it is its own interests and those of the third party supplier that would be likely to be prejudiced if the withheld information was disclosed.
24. The BBC explained to the Commissioner that it had again liaised with the same representative that had advised on the original response. This was *"a senior representative from the relevant division of the BBC; Quality, Risk and Assurance who is responsible for the budget and spend relating to social distancing devices"*.
25. The position of the BBC is that, at the time of its original response, disclosure of the total budget and spend was likely to be prejudicial to the commercial activities of the BBC. It further explains that the information involves commercially sensitive information, providing the example of its engagement with the suppliers of goods and services.
26. The BBC argues that the release of the total spend would provide details relating to individual unit price which, it contends, is information that has been previously released to the public under FOIA. This would therefore prejudice the negotiating position of the BBC in ongoing negotiations and weaken the BBC's bargaining position with the

suppliers of goods and services. Finally, the BBC added its view that this might, in turn, weaken a third party supplier's bargaining position with other customers.

27. On 5 November 2021, the Commissioner wrote again to the BBC because she required it to provide further argument as to why this particular information would be commercially prejudicial. She wrote as follows:

"I note that the complainant's request asked for the total budgeted to purchase social distancing devices and the total spend to date purchasing social distancing devices. The withheld information provided to the Commissioner appears to contain more information than was requested.

- Does the BBC maintain that if it solely provided the totals requested, it would be prejudicial to its commercial interests?*

The BBC has suggested that releasing this information will be likely to be prejudicial to the BBC's commercial interests, if matched with previous disclosures, as it would reveal unit price. If so –

- Please provide further detail about any previous disclosures which could be linked to this particular information in this way..."*

28. The BBC responded by attaching six responses (including the complainant's) that it had made to similar requests about the BBC's purchasing of social distancing devices. Four of these responses were provided on 3 February 2021 (including the complainant's), one on 4 February 2021 and one on 3 March 2021. Five of these included requests for cost information which was refused under section 43(2).
29. The BBC maintains that between 2020 and 2021, it received six requests for information which it said must be considered in tandem with the request that is the subject of this decision. The BBC released the total number of social distancing devices purchased for use at BBC worksites as part of its response to the Covid-19 pandemic. The total number of devices bought was 2250. However, the BBC withheld the total costs of these devices under section 43(2) of the FOIA on the basis that disclosure would be likely to prejudice the commercial interests of the BBC.
30. It is the BBC's position that the release of the total spend when put together with the information it had already released, the total number of social distancing devices, would enable the public to calculate the individual unit price.

31. The BBC explained that it had entered into a "*careful negotiation with the supplier*" in order to achieve a "*bespoke price per unit*". The release of the information would be likely to prejudice the BBC's commercial interests because it would be likely to result in a price increase for any future procurement of the same or similar devices and weaken its negotiating power. It could cause "*unwarranted reputational damage to the BBC*" by subjecting the BBC to public scrutiny concerning how it procures its services.
32. The BBC argues that in the context of a global public health crisis the BBC needs to adopt and implement strategies in order to respond to medium term health and safety risks. The purchasing of social distancing devices is one of these strategies. The BBC explains that it is incumbent on it to comply with its obligations under its Royal Charter. Ensuring value for money for licence fee payers is one such obligation including for the procurement of services. It may need to enter into similar agreements as the pandemic evolves to protect staff and other individuals. The BBC's view is that it is essential that it can negotiate value for money with suppliers in a competitive market.
33. Views regarding the commercial interests of the supplier were also sought by the BBC. The supplier objected to the release of the information as it considered it to be prejudicial to its commercial position in the supply of complex proprietary technology based products that it provides to other customers than the BBC and that it intends to provide similar products in the future.

The Commissioner's view

34. The Commissioner notes that the BBC said the following at internal review stage:

"I consider that the release of total spend would provide details relating to individual unit price which is information which has been previously been (sic) released to the public."

35. She considers this to be a slightly ambiguous sentence because it is not completely clear what information has been previously released that would enable the public to join the dots. Presumably, the BBC meant that if the individual unit price had been released at the same time as the total cost of the devices, it would be an easy task to work out what each had cost. Although the BBC reference numbers do not necessarily appear to correlate with exactly when the requests were received (this may be for procedural reasons) the BBC does refer to the date of

request in each of its responses. It would seem that the first time the number of units was released was on 4 February 2021, the day after the refusal to disclose the costs was provided by the BBC. If that is the case then, at refusal, the other information enabling the cost of each unit to be deduced was not yet in the public domain.

36. The Commissioner notes that all the requests relating to social distancing proximity devices appear to have been received in 2021.
37. Even where the lower threshold for engaging the exemption is being relied upon (that disclosure would be likely to result in prejudice) public authorities need to identify specific harm, link it to specific information, and explain how disclosure would cause that harm.
38. With regard to "likely to prejudice", the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*"(paragraph 15).
39. The Commissioner accepts that the criteria have been met, that the causal link has been made and that the lower level of prejudice is of real substance, particularly in relation to the supplier, and to a lesser extent, the BBC. In the case of third party suppliers of goods and services, the BBC provided the view of the supplier at a very late point. However, the Commissioner has concluded that the release of this information would be likely to be prejudicial to both the supplier and the BBC.
40. The BBC also provided examples, late in the day of what information is in the public domain that could be linked to this particular information that would make it commercially prejudicial. It might have helped to explain more fully to the complainant the relevant information that was in the public domain at refusal, as his review request was based on incomprehension that the total alone could cause commercial prejudice. The fact that information was already in the public domain (though technically this seems to have been the day after) was only briefly referred to.
41. The Commissioner accepts that the BBC had considered five of the six requests around the same time and would have coordinated its response to this request accordingly. The Commissioner has to consider matters as they stood at the time of the request but can consider matters as they stood up to internal review. At review, the number of units had been released. In light of this, the exemption is engaged and the Commissioner has gone on to consider the public interest.

Public interest test

Public interest in disclosing the requested information

42. The BBC states that there is a public interest in promoting transparency, accountability and public understanding of the decision-making processes of the BBC in relation to the use of goods and services. It says that there is also a specific duty under Article 12 of the Charter to seek to maximise transparency, openness and accountability.
43. In its refusal notice, the BBC said that there is a public interest in it using public money effectively and getting value for money when purchasing goods and services. It also acknowledged that its commercial activities, such as procurement, need to be conducted in an open and honest way.
44. The complainant argues that there is a very strong public interest in release by allowing the BBC to be properly accountable for its spending.

Public interest in favour of maintaining the exemption

45. The BBC considers the public interest in maintaining the exemption outweighs that in disclosure because it may cause "*unwarranted reputational damage*". The BBC provides the view that it may lead to negative perceptions about how it negotiates value for money in procuring goods and services and/or lead to loss of customer confidence. This may damage its commercial interests through the loss of trade.
46. In its refusal notice, the BBC had argued that disclosure would be likely to have a detrimental effect on its commercial revenue by weakening its competitive position and that of the third party supplier by disclosing sensitive information that might be used by competitors to gain a commercial advantage.

Balance of the public interest

47. The Commissioner understands the complainant's argument that the BBC (like any public authority) needs to be accountable for its spending. However, deciding to release the number of devices rather than the total spend, resulted in the complainant not being able to ascertain how much money was spent.
48. Nevertheless, the Commissioner accepts that, if the BBC released the number of social distancing devices and the total cost, the individual unit price would be clear. She agrees that the BBC might be placed at a commercial disadvantage during procurement and the ensuing

negotiations, if suppliers knew what the BBC was prepared to pay. If the BBC is forced to pay higher prices this would not be in the public interest. Neither would it be in the public interest for the supplier's unit costs to be released. This would be detrimental to the supplier and has the potential to lead to suppliers being less willing to engage with the BBC to provide goods and services. Her view is that the potential detriment to the supplier is more significant in this respect as she thinks that companies will always want potentially lucrative business from the BBC. However, the Commissioner accepts that reduced competition is not in the public interest.

Other matters

49. The Commissioner considers that it may have been possible to avoid this complaint, had the BBC explained more clearly to the complainant how releasing this information would be detrimental to its commercial interests and those of its supplier and provided more exact reasons why.

Right of appeal

50. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.
52. 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

**Janine Gregory
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