

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 October 2007

Public Authority: British Broadcasting Corporation (BBC)
Address: MC3 D1,
Media Centre,
Media Village,
201 Wood Lane,
London,
W12 7TQ

Summary

The complainant requested details of the gross remuneration paid to the 20 highest paid 'entertainers' on the BBC for the previous three years. The BBC refused to provide the information on the basis it was held for the purposes of journalism, art and literature. The BBC also explained that even if this request fell within the scope of the Act, it would need to clarify with the complainant what he meant by the phrase 'entertainer' as it was not a term used by the BBC. Having considered the purposes for which the information is held the Commissioner is satisfied that it falls within the scope of the Act. Consequently, the Commissioner has decided that the BBC should contact the complainant in order to clarify his request in line with its duty under section 16 of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). In the particular circumstances of this complaint, this duty also includes making a formal decision on whether the BBC is a public authority with regard to the information requested by the complainant. This Notice sets out his decision.

The Request

2. On 1 March 2005 the complainant submitted the following request to the BBC:

'I would be grateful if you could send me full details of the gross remuneration of the 20 highest paid on-screen entertainers in the last three

years. In each case, I would like to know the amounts agreed to be paid by the BBC for each entertainer for each financial year.'

3. The BBC responded on 4 April 2005 and advised the complainant that his request fell *'outside the scope of the Act because information about BBC programmes, content and their production is not covered by the Act. (Schedule 1 of the Act says that the BBC, Channel 4 and S4C are covered in respect of information held for purposes other than journalism, art or literature). This derogation effectively excludes information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities'*.
4. The BBC explained to the complainant that no internal review procedure was available to him although he was advised of his right to make a complaint to the Commissioner.

The Investigation

Scope of the case

5. On 5 April 2005 the complainant contacted the Commissioner to complain about the BBC's response to his request for information. The complainant explained that he disagreed with the BBC's position that the requested information was not covered by the Act by virtue of the Schedule 1 derogation.

Chronology

6. On 22 September 2005 the Commissioner contacted the BBC and requested further arguments supporting the BBC's claim that the requested information is not held for purposes other than journalism, art and literature.
7. The BBC responded on 3 November 2005 and provided the Commissioner with a detailed explanation as to why it considered the requested information to be covered by the Schedule 1 derogation.
8. On 3 January 2007 the Commissioner contacted the BBC again and asked it to provide, without prejudice to its position on the application of the Schedule 1 derogation, details of any exemptions it would seek to rely on in the event that the derogation did not apply in this case.
9. The BBC provided the Commissioner with a response on 1 March 2007. In this letter the BBC re-iterated its position that the requested information was covered by the derogation and provided further arguments to justify this position. The BBC also outlined how it would respond to the complainant's request if the Commissioner decided that it fell within the scope of Act.
10. The BBC explained that if this request were covered by the Act it would need to first seek clarification of the term 'entertainer' in order to compile a relevant list of

individuals. The BBC explained that this was because it did not have, or use, an established definition of the term entertainer.

11. The BBC also noted that having clarified the request with the complainant, it was likely that the cost of compiling the information would exceed the appropriate cost limit specified by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') and therefore the BBC would have the right to refuse to answer this request on the basis of section 12 of the Act. The BBC explained that this was because the relevant information was held across more than one records management system, including one that was decommissioned in 2003. Consequently, certain records (prior to mid 2003) were only available on microfiche meaning that they are not readily searchable in terms of extracting this specific information.
12. The BBC further explained that notwithstanding the issues surrounding clarification of the complainant's request and the Regulations, it considered the information to be an example of 'talent costs'. The BBC explained that its position was that this information was covered by the exemptions under sections 43(2), 40(2) and 41(1) of the Act. The BBC provided the Commissioner with a detailed explanation of why it considered these exemptions to apply to the information that was covered by the scope of the complainant's request.

Analysis

The Schedule 1 Derogation

13. 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.
14. 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.
15. In this case the complainant's request was for information which the BBC refers to as 'talent costs', i.e. the amount of money paid by the BBC to various 'entertainers' and that these talent costs form part of the BBC's programme budgets.

The BBC's view

16. The BBC believes that the Schedule 1 derogation applies broadly and therefore its scope includes information such as programme content but also extends to include multi-purpose information, such as financial information related to the cost

of programme making. The BBC argue that although this financial information (including details of talent costs) is not in itself journalism, art or literature, this financial information is part of the production process and therefore has an obvious impact on creativity.

17. 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*, FS50133791 that this sort of budgetary information deals with the 'sustenance...of the creative journalistic purpose that the designation is meant to protect'.

(b) Evidence given by Mr Richard Sambrook, Director of News at the BBC, in relation to appeal of the *Sugar* decision notice to the Information Tribunal (EA/2005/0032). He stated that

'Questions about how you make (various) selections or the resources that are available to make selections, might be characterised on the one hand as management, but they are absolutely core to journalism and determine both the quality, nature and character of journalism.'

(c) A letter from the Home Office to the Department for Culture Media and Sport of 13 January 2000 which states:

'the Government has sought to ensure that...including them [the public service broadcasters] in the Bill does not place them at a commercial disadvantage to their commercial rivals. The Bill therefore provides that the inclusion of the public service broadcasters does not relate to information held for journalistic, artistic or literary purposes.'

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

The Commissioner's view

19. The Commissioner has noted and considered the arguments advanced by the BBC.

20. 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.

21. The Commissioner accepts that the amount paid to talent 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.
22. However, the Commissioner's view is that the requested information is also held by the BBC for operational purposes in **addition** to being held for journalistic, literary and artistic purposes. The Commissioner believes that financial information serves a number of direct purposes; for example, it is used to budget, monitor expenditure, identify opportunities to improve efficiency, and to comply with legal obligations.
23. In the particular circumstances of this case, the Commissioner has found it useful to understand the Royal Charter which constitutes the BBC when considering these purposes. At the time of this complaint the 1996 Charter was in force, however, at the time this complaint is to be determined the 2006 Charter is in force. Therefore, the Commissioner has considered both Charters in order to determine for what purposes the requested information is held by the BBC.
24. The Commissioner has noted the following provisions in the 1996 Charter:
- (a) Article 7 (1) states that it shall be the functions of the Governors to *"satisfy themselves that all the activities of [the BBC] are carried out in accordance...with the highest standards of probity, propriety and value for money in the use of the Licence Revenue and moneys paid..."*
 - (b) Article 16 (1) states that the BBC is authorised, empowered and required to *"collect the Licence Revenue and to receive all funds which may be paid by [the] Secretary for State...and to apply and administer such funds in accordance with the terms and conditions...attached to the grant"*
 - (c) Article 18(1) states that the BBC's accounts shall be audited annually. Article 18 (2) provides that the BBC *"shall...prepare an Annual Report...and attach thereto an Account or Accounts of the Income and Expenditure of the Corporation and...shall include in such Report such information relating to its finance, administration and its work generally..."*
25. The 2006 Charter has similar provisions to the 1996 Charter albeit with a new structure to reflect changes in corporate governance, via the BBC Trust, and the formalisation of the Executive Board as the executive body of the BBC with responsibility for the functions listed in paragraph 38 of the 2006 Charter. Notably, these functions include the operational management of the BBC and the conduct of the BBC's operational financial affairs. Furthermore, the Commissioner also understands that under the 2006 Charter the role of the BBC Trust includes:
- (i) assessing the performance of the Executive Board in delivering the BBC's services and activities and holding the Executive Board to account for its performance;

(ii) representing the interests of licence fee payers and exercising rigorous stewardship of public money; and

(iii) ensuring that the Executive Board conducts the BBC's operational financial affairs in a manner best designed to ensure value for money.

26. Therefore the Commissioner believes that, as a result of both Charters, the BBC holds financial information to enable:

(i) the Governors (and now BBC Trust) to perform their role as 'guardians' under the Royal Charter by assessing the performance of the Executive Board; and

(ii) the Executive Board to manage the BBC's financial and operational affairs in a manner best designed to ensure value for money.

27. In the Commissioner's view failure by the BBC to hold talent costs information would have a prejudicial effect on the ability of the Governors and Executive Board to perform their respective functions and operational duties under the Charters.

28. The Commissioner also considers that if the BBC failed to hold information related to business costs this practice would also be incompatible with the most basic business and accounting practices and would adversely affect the administrative, business and financial operations of the BBC.

29. The Commissioner is therefore satisfied that the requested information is held by the BBC for multiple purposes. Where information is held for a number of purposes the Commissioner's approach is to consider whether the dominant purpose for holding that information is a purpose specified in the Schedule 1 derogation.

30. The Commissioner considers that the ultimate purpose of the derogation is to protect journalistic, artistic and literary integrity by carving out a creative and journalistic space for programme makers to produce programmes free from the interference and scrutiny of the public. While he acknowledges the BBC's view that the information required for the purposes of Schedule 1 does not necessarily need to be journalistic, artistic or literary in nature, it is his view that such information should have the necessary journalistic, artistic or literary application to justify its status as being held for the dominant purpose of schedule 1.

31. The Commissioner does not believe that talent costs information possesses enough journalistic application to enable it to be held for a dominant journalistic purpose. Rather, the Commissioner considers the talent costs information to be central to the operational heart of the BBC's policies, strategies and allocation of resources and the prejudicial consequences of not holding this information support the view that the requested information is held for the dominant purpose of the BBC's operations, rather than one of the purposes of Schedule 1.

32. Therefore, the Commissioner considers the BBC to be a public authority with regard to this information.

Procedural Issues

Section 16

33. As noted in paragraphs 9 to 12, the BBC provided, without prejudice to its position on the derogation, an explanation of how it would deal with this request if it fell within the scope of the Act.
34. The BBC has explained that it does not use the term 'entertainer' nor does it have an established definition of which individuals could be considered to be 'entertainers'. Consequently, the BBC explained that it would need to seek clarification from the complainant before it could compile a list of relevant individuals who may fall within the definition of 'entertainer'. In order to demonstrate the ambiguity of this request the BBC has suggested that individuals contracted to the BBC may be considered to be an 'entertainer' in some roles and not in others. For example, Jeremy Paxman when presenting Newsnight would not be considered to be an 'entertainer'; however, when he is presenting University Challenge he may be considered as such.
35. Having considered the BBC's arguments, the Commissioner accepts that there is a degree of ambiguity to this request primarily because the term 'entertainer' is not used by the BBC. The Commissioner does not consider it appropriate for public authorities to essentially second guess the information being sought where the precise definition is unclear. Therefore, the Commissioner accepts that in order to answer this request the BBC would need to seek clarification from the complainant as to what he meant by the phrase 'entertainer' and how the types of information held by the BBC could fall within the scope of this request.
36. The Commissioner notes that section 16 of the Act places a duty on public authorities to provide advice and assistance to applicants who propose to make, or have made, information requests. In line with this duty public authorities are entitled to seek more details, if needed, in order to enable them to identify and locate the requested information. As the Commissioner has found that the requested information is not covered by the Schedule 1 derogation and therefore falls within the scope of the Act, he must conclude that technically a breach of section 16 has occurred because the BBC failed to clarify with the complainant the nature of his request.

The Decision

37. The Commissioner's decision is that the requested information is held by the BBC for purposes other than those of journalism, art and literature. Consequently, the Commissioner has decided that the BBC breached section 16 of the Act by failing to clarify with the complainant the scope of his requests.

Steps Required

38. The Commissioner requires the following steps to be taken:
39. In line with its duty contained at section 16 of the Act, the BBC should contact the complainant promptly and in any event no later than 35 calendar days from the date of this Notice and seek clarification as to what information the complainant was requesting when he submitted his original request. Having established a clarified request the BBC should either provide the complainant with the information he requests in line with its duty under section 1 of the Act or provide the complainant with a refusal notice compliant with section 17 of the Act.

Failure to comply

40. 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

41. 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@dca.gsi.gov.uk

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 16th day of October 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”