

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 17 March 2008

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

Summary

The complainant asked the BBC how much the new weather graphics cost. The BBC refused to provide the information on the basis that it was not a public authority in relation to the complainant's request because the information was held for the purpose of journalism, art or literature within the meaning set out in Schedule 1 of the Act. As an alternative argument the BBC has applied the exemption under section 43 (commercial interests) to withhold the information from the complainant. After a careful evaluation of the nature of the request, and the relevant provisions of the Act, the Commissioner's decision is that the BBC has incorrectly applied Schedule 1 and that the information is held for purposes other than those of journalism, art and literature. However, the Commissioner finds that the exemption under section 43 is engaged and that the public interest favours maintaining the exemption.

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 19 June 2005, the complainant made a request to the BBC for information regarding '*the cost of the new weather graphics*'.

3. The BBC responded on 22 June 2005. It advised that the request '*fell outside the scope of the Act because the BBC, Channel 4 and S4C are covered by the Act only in respect of information held for purposes other than journalism, art or literature*'. Consequently, the complainant was informed that the BBC is not obliged to supply this information as it is held for the purposes of creating its output (i.e. its programmes) or information that supports and is closely associated with these creative activities.
4. The BBC further advised the complainant that no internal review procedure was available to him as his request for information was considered to be outside of the scope of the Act, although he was advised of his right to make a complaint to the Commissioner.

The Investigation

Scope of the case

5. On 2 August 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 the following point:
 - Whether the information had been correctly withheld – the complainant argued that the information does not fall under journalism, art or literature, it is financial information.

Chronology

6. On 29 August 2006, the Commissioner wrote to the BBC and requested it provide any further arguments for withholding the information on journalistic, artistic and literary grounds.
7. In a second letter dated 18 January 2007, the Commissioner asked the BBC to provide additional arguments supporting any further exemptions that it may wish to rely on in the event that the derogation did not apply.
8. The BBC responded on 19 April 2007, maintaining that the information requested falls outside the scope of the Act and provided further arguments and references in support of this view. In addition, and without prejudice to its position that the Act does not apply, the BBC also provided alternative arguments for withholding the information under the section 43 exemption. It contended that disclosure of the requested information would prejudice both its, and the supplier's commercial interests.

Analysis

The Schedule 1 derogation

9. 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).

10. In this case the requested information relates to the cost of the new weather graphics.

The BBC's view

11. 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 considers 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.

12. The BBC states 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.'

13. In support of this view the BBC cites 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.'

15. In summary, the BBC's position is that in house production costs are not held for purposes other than journalism, art or literature and are therefore outside of the scope of the Act.

The Commissioner's view

15. The Commissioner has noted the arguments put forward by the BBC.
16. 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.
17. The Commissioner accepts that the requested information (the cost of the new weather graphics) 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.
18. 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 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.
19. 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 (19 June 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.
20. 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..."*

21. 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.
22. Under the 2006 Charter, the BBC Trust is the guardian of the licence fee revenue and the public interest (paragraph 22 refers). 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) ensuring that the Executive Board conducts the BBC's operational financial affairs in a manner best designed to ensure value for money.
23. 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.
24. The cost of the new weather graphics constitutes financial information and therefore serves a number of purposes in addition to that accepted by both the BBC and the Commissioner, i.e. that it supports the creation of programme content.
25. 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.
26. In this case the information held on the cost of the new weather graphics serves the following purposes:
 - (i) It enabled the BBC to monitor its expenditure against its agreed budget for that year;
 - (ii) It enables the BBC to predict with some certainty the future costs of new weather graphics production systems.

- (iii) It contributed to meeting the BBC's obligations to publish annual accounts.
 - (iv) 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.
27. The final factor which the Commissioner has weighed, in coming to a decision on whether the derogation applies, is whether the decision on the cost of the new weather graphics constituted a creative decision.
28. 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.
29. In the context of this complaint, the decision to employ a new weather graphics could be considered as a creative decision. However, the actual cost of these graphics would not.
30. 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, Schedule 1 is not applicable to the cost of the new weather graphics and the BBC is a public authority with regard to this information.

Exemptions

31. The BBC provided additional arguments, without prejudice, as to the exemption which it would seek to rely on, in the event that the Commissioner found that the derogation did not apply in this case. It has relied on the exemption under section 43 only.

Section 43 – Commercial interests

32. Section 43(2) states that information is exempt if its disclosure would, or would be likely, to prejudice the commercial interests of any person.
33. It is the BBC's position that disclosure of the requested information would prejudice, or would be likely to prejudice, the commercial position of both itself and Metra Information Ltd ("Metra").
34. Metra is the international subsidiary of the Meteorological Service of New Zealand. It provides weather related products and services to customers around the world for the energy sector, broadcasting and media corporations and the print industry. The BBC's weather graphics are based on Metra's Weatherscape XTTM system, with added bespoke features tailored to the BBC's requirements.

35. The BBC contends that the market for this type of system is very competitive and if the cost of the contract were disclosed, this would prejudice Metra's commercial position by making available sensitive pricing information to their competitors.
36. In its letter dated 19 April 2007, the BBC advised the Commissioner that the system under discussion does not have an off-the-shelf price that is generally available, rather in each case purchasers are likely to enter into detailed discussions, if not the full tender process undertaken by it, about which features of the current system are required together with any additional new features. This together with a number of other factors will affect the price at which Metra offers the system.
37. The BBC also contends that disclosure of the price paid in isolation by the BBC is likely to place Metra at a disadvantage when negotiating. Potential customers for Metra's products will try to use this as a bargaining tool, without being aware of the other factors taken into account when it selected Metra as its supplier.
38. The BBC maintains that prejudice in this case is likely because it is generally accepted that the release of information about programme costs can harm the legitimate interests of firms or individuals. The BBC cites the Competition Commission and section 244 of the Enterprise Act as supporting this view as it excludes confidential commercial information from its reports.
39. In addition it cites both the Public Services Contracts Regulation 1993 and the Public Contracts Regulations 2006 which state that:

*“Any information specified in the Contract Award notice may be omitted in a particular case where to publish such information –
(c) would prejudice the legitimate commercial interest on any person
(d) might prejudice fair competition between economic operators.”*
(Section 31(2) of the Public Contracts Regulation 2006)
40. Further to this, the BBC confirmed that it routinely elects not to publish any contract price information on the ground that it is commercially sensitive. Accordingly, the contract value was omitted from the published Contract Award Notice for the BBC/Metra contract.
41. The BBC has advised the Commissioner that it has consulted Metra on the likely effect of disclosure and they strongly believe putting their price for this contract into the public arena would prejudice their commercial interests.
42. The BBC has also advised that the contract between BBC and Metra is marked as “Commercial in Confidence”. As such Metra has stated that it considers pricing issues between a supplier and its client to be confidential. Metra has also stated that it entered into negotiations with the expectation that this information would not be disclosed to any third parties.
43. The Commissioner agrees with the BBC's contention that the market for providing programme production systems such as the type in question is a competitive market. The BBC has confirmed that it received 12 bids in response to its

invitation to tender and the Commissioner's own investigation has revealed several other companies which offer similar bespoke weather graphics systems to the media industry e.g. MeteoGroup, CustomWeather and the Met Office.

44. The Commissioner is also aware that Metra itself provides weather production programmes services to several other broadcasters including Nine Network in Australia, Channel 7 in Australia, Irish Language Channel TG4 and various others across New Zealand, Australia, Europe, Asia and Middle East. The sums that Metra has charged for providing similar services to these other broadcasters are not in the public arena.
45. The Commissioner is aware that since the BBC contract was signed in 2004 Metra has subsequently sold the system to a number of other broadcasting organisations, i.e. TG4, Nine Network and Channel 7. The Commissioner considers at the time of the request (June 2005) it is likely that Metra would have been in active negotiations with these relevant broadcasters. As such he believes that disclosure of the sum the BBC has paid for these services at this time may have put Metra at a disadvantage when negotiating these new contracts. It is also important to note that Metra is still currently marketing the Weatherscape XT™ system.
46. Having considered all of these points, the Commissioner agrees that disclosure of the price paid by the BBC for the new weather graphics system would, or would be likely to, prejudice the commercial interests of Metra.
49. The BBC also believes that disclosure of the information would, or would be likely to prejudice its own commercial interests for the following reasons.
50. It is the BBC's position that disclosure of the cost of this type of programme could lead to a ratchet effect among suppliers of production systems. It maintains that suppliers will assume that a minimum level of funds are available for a weather graphics system, and will have an incentive to price their systems beyond that level. In procurement negotiations, the BBC is often in the position of being able to secure a significant reduction in price; this would be much more difficult if bidders know what they had previously paid for a product or service. This will prejudice the BBC's commercial interests because it will be forced to increase what it pays in the future.
51. The BBC contends that information about the cost of content production systems such as this, is not widely known. Very few people have knowledge of deals outside their own company. Unsuccessful bidders for this contract would have received feedback on their own bid, however, they were not provided with details of the contract price for either the winning bidder Metra or another unsuccessful bidder.
52. It also maintains that such information is treated as confidential within the BBC and access is limited to those who need to know, which in this case is fewer than 30.

53. Furthermore, the BBC has advised that disclosure of the contract value by Metra or its employees is prohibited by a confidentiality provision in the BBC/Metra contract which states:

‘11.1 Except to the extent required for the purposes of performing its obligation under the Contract, Metra will not use or make available at any time during or after the Contract to any third party any information relating to the business or affairs of the BBC which is disclosed or otherwise is in its possession under or in respect of the Contract, including this Contract and its subject matter’

54. The BBC acknowledges that occasional and sporadic disclosures of programme costs do occur in breach of confidentiality provisions within the relevant contracts. However, the BBC goes on to state that if disclosures of this sort were to be institutionalised via the Freedom of Information Act (i.e. become the norm) this would reduce the uncertainty that currently exists about the winning bids for previous contracts and therefore reduce the uncertainty of competitors engaging in future contract tenders.
55. The BBC claims that the ultimate effect of this is that, were disclosure to occur, an informational asymmetry would be created. An informational asymmetry occurs when one party to a transaction has more information than the other party. Due to this informational asymmetry it would be possible for commercial companies to ascertain with certainty what price the BBC is willing to pay in respect of that type of system and give them an incentive to bid beyond that level, when previously they may have priced below it.
56. This argument bears similarity to those put forward in the Information Tribunal decision *John Connor Press Associates v The Information Commissioner (EA/2005/005)*, insofar as the National Maritime Museum contended that the disclosure of financial information relating to the commission of a work of art would prejudice the commercial interest of the museum. The prejudice claim arose from the fact that the Museum's bargaining position would be compromised if other artists were aware of the commission's value in this case. The Information Tribunal decided that prejudice might occur in cases of this kind, but that this would depend on the nature of the information and the degree of similarity between the two transactions.
57. Having considered this argument carefully, the Commissioner is of the view that future transactions would be very similar and the information in question key to the BBC's goal of obtaining value for money.
58. Therefore, the Commissioner is satisfied that disclosure of the information would, or would be likely to prejudice the BBC's commercial interests. In reaching this decision the Commissioner has considered the fact that the invitation to tender for a specific contract cannot be viewed as a one-off; indeed the BBC's current contract with Metra is due to run out in less than 3 years time and at this time the BBC may either extend the contract with Metra, or invite tenders from potential suppliers for a new system. If the price the BBC paid for this system were known

by rival suppliers they would then be in a position to artificially inflate the winning bid.

59. It could be argued that the information may no longer be considered commercially sensitive since the contract was completed in 2004. However, the Commissioner is aware that the BBC's contract with Metra is ongoing and as such the financial details remain commercially sensitive.
60. The Commissioner is therefore satisfied that the exemption is engaged and must now consider where the balance of the public interest lies, applying the test in section 2 of the Act.

Public interest test

61. Section 43 is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. This states that information is exempt information where the public interest, in all the circumstances of the case, in maintaining that exemption outweighs the public interest in disclosing that information.
62. 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 licence fee. Both these objectives will be threatened if a presumption is created in favour of the general disclosure of financial information relating to programme production...*
 - (ii) *...there is little public interest in the disclosure of the cost of programme production systems, as this information only enables the public to take an informed view of whether the BBC is procuring production systems on a competitive basis if it is in possession of production systems 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 licence 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 trading 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.'*
63. In the Commissioner's view there are three public interest factors in favour of disclosure:

- there is a general public interest in facilitating accountability and transparency in the way public money is spent;
 - there is a public interest in furthering the public's understanding of, and participation in, public debate on the programme and production costs associated with the BBC;
 - there is a public interest in facilitating accountability and transparency of public authorities for their decisions;
64. Therefore the Commissioner must balance the factors in favour of disclosure with those against. If the balance lies in favour of maintaining the exemption the information will be exempt from disclosure.
65. The Commissioner's view is that although there is a strong public interest in understanding the way in which public money is spent it is not clear that disclosure in this case would be of significance to the public. In order for information of this nature to be of great value to the public they would require access to information about the costs to other broadcasters of commissioning similar systems. Other PSBs are subject to the Act, specifically S4C and Channel 4, but the remainder of the broadcasting industry is not. It is possible for the public to form subjective views about the quality of a programme and therefore whether the money was well spent by, for example, combining it with publicly available information about viewing figures. However, without information about other broadcasters' programme costs the requested information is of less value to the public as a whole; however it would have particular value within the industry potentially exposing the BBC to commercial prejudice as identified above.
66. The cost of programmes broadcast by PSBs, and particularly the BBC, is of interest to the public and would aid their understanding of the industry and the difficulties that PSBs face in winning and retaining quality programming. The increased transparency would reinforce trust in the BBC as an organisation with robust controls on the way that public money is spent. However these controls are evident anyway. 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 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 internal scrutiny internally.
67. As regards transparency in the decision-making process, the Commissioner does not consider that, in the circumstances of this case, this factor carries great weight; there is already a significant amount of information in the public domain; the BBC already publishes its accounts on an annual basis and is subject to a variety of mechanisms to ensure both value for money and fairness in the way it commissions programmes. Further disclosure here may actually hamper this

process by increasing the cost of commissioning a new weather graphics system making it more difficult for the BBC to meet its obligations.

68. Having weighed these factors the Commissioner's view is that the balance of the public interest favours maintaining the exemption under section 43 and therefore the requested information should not be released. Overall there are real benefits from increased transparency and accountability, however these are outweighed by the damage that disclosure would be likely to cause to the BBC's commercial interests, it being more difficult to maintain quality and more expensive to procure content. Arguably these are similar factors to those affecting other public authorities which procure goods and services in a competitive environment, for example local government and the procurement of waste management services, but such comparisons are superficial. A local authority inviting tenders for waste management services could obtain similar information about other local authorities operations in this area and competitors for services (i.e. other local authorities) would be subject to the same disclosure provisions unlike the BBC.
69. On this basis the Commissioner is satisfied that the requested information is exempt from disclosure under section 43 and that the public interest favours non-disclosure.

The Decision

70. 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 covered by the request 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 request in accordance with Part 1 of the Act in that it failed to comply with its obligations under section 1(1).
 - (ii) The BBC breached sections 17 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.
71. However, the Commissioner has decided that the following aspect of the request was dealt with in accordance with the Act:
- (i) The information covered by the request is exempt from disclosure under section 43 of the Act.

Steps Required

72. The Commissioner does not require the BBC to take any further steps as a result of this decision.

Right of Appeal

73. 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 17th day of March 2008

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Relevant Statutory Obligations and Provisions under the Act

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 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 43 provides that –

- (1) Information is exempt information if it constitutes a trade secret.
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).