

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 October 2011

Public Authority: Channel Four Television Corporation
Address: 124 Horseferry Road
London
SW1P 2TX

Decision (including any steps ordered)

1. The complainant has requested 'documentary substantiation of a statement by Channel 4 that the £731,000 paid to Andy Duncan on his resignation was a contractual requirement that could not be avoided'.
2. The public authority ('Channel 4') originally confirmed that they held the information but that it considered it exempt. It explained that section 40(2) [third party personal data] was the key exemption and that it also believed that sections 41 [confidentiality] and 43 [commercial prejudice] would be likely to apply to. It confirmed its position in its internal review.
3. The Information Commissioner ('the Commissioner') has considered the information and finds that section 40(2) was applied appropriately by Channel 4. He therefore requires no remedial steps to be taken.

Request and response

4. On 8 February 2011 the complainant requested the following information from Channel 4:

'Documentary substantiation of the statement by Channel 4 that the £731,000 paid to Andy Duncan [Channel 4's old Chief Executive] on his resignation was a contractual requirement that could not be avoided.'
5. Channel 4 responded on 10 March 2011. It confirmed that it held relevant information, but explained that it believed that sections 40(2) [third party personal data], 41[actionable breach of confidence] and 43

[prejudice to commercial interests were relevant]. It explained in detail why it believed that section 40(2) applied. It explained that the information was employment information, that there was a reasonable expectation of confidentiality and that disclosure would be unfair to Mr Duncan. It considered that the public interests in openness and transparency were fully met by what was published in its Annual Report, which provided the amount paid to Mr Duncan.

6. The complainant requested an internal review on 26 March 2011 and Channel 4 provided one. It provided more detail about why it believed that section 40(2) applied to this information. The relevant arguments will be considered in the 'reasons for decision' part of this Notice.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He provided detailed arguments about why the exemptions were not applied correctly. They are listed below:
 1. 'To the average person, it would be incredible that an employee of a publicly owned company can be given six months [sic] salary simply for handing in their notice to quit, as Mr Duncan was.'
 2. the House of Commons Select Committee on Media, Culture and Sport were told both that Mr Duncan left without serving the full notice period and that Channel 4 were legally obliged to pay him £731,000;
 3. There is considerable need for the public to understand the events that led to his departure and exactly why the money was paid (particularly when Mr Duncan was paid for time that he did not work); and
 4. It is necessary for the public to understand how this payment was in its interest.
8. It should be noted that the Commissioner cannot make any comment about the circumstances that led to Mr Duncan leaving Channel 4 or what happened afterwards. His role is only to consider the relevant requested information and whether it can be disclosed to the public under the Freedom of Information Act.

9. The Commissioner has therefore considered whether Channel 4 applied any exemption correctly to the information that it withheld, or whether this information should be disclosed to the public.
10. Finally, it should be noted that the Commissioner is constrained from what he is able to say in the 'reasons for decision' part below as he must for obvious reasons ensure the integrity of the withheld information. He has provided his detailed analysis in a confidential annex. The confidential annex will only be provided to Channel 4 and be used by the Commissioner in the event of an appeal. It will not be disclosed to the public as to do so would defeat the purpose of his role which is to decide whether or not it is appropriate for the withheld information to be disclosed to the public.

Reasons for decision

11. Information is exempt from disclosure if an exemption has been applied correctly to it. The Commissioner has considered section 40(2) [third party personal data] first in this case.
12. Before considering the operation of the exemption, it is necessary to outline the relevant background to understand the Commissioner's decision and what he has taken into account.
13. In response to Question 92 of the House of Commons Culture, Media and Sport Select Committee consideration of Channel 4's 2008-2009 Annual Report¹, Mr Duncan explained on 12 May 2009 that he had no intention of leaving his post.
14. Channel 4 then announced Mr Duncan's departure in a press release dated 16 September 2009 entitled '*Andy Duncan to step down as Channel 4 CEO before year end*'. The Press release is no longer on its website, but can be located on the internet. It has been considered during the course of this investigation.
15. In response to Question 44 of the House of Commons Culture, Media and Sport Select Committee consideration of Channel 4's 2000-2010 Annual Report, it was confirmed by Channel 4 that the money was paid, that it was a contractual entitlement and that Mr Duncan did not work the full notice period.

¹ HC 518-i, Session 2008-09
<http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcomeds/415/415.pdf>

16. The Committee's final report outlined the money that Mr Duncan received and commented that in its view the money paid was unacceptably high.
17. Section 40(2) ['the third party personal data exemption'] of the FOIA states that:

'Any information to which a request for information relates is also exempt information if –

- (a) It constitutes personal data which do not fall within subsection 40(1); and*
- (b) Either the first or the second condition below is satisfied.'*

18. In summary, the conditions specified are either that disclosure would contravene one or more data protection principles, or that the information would not be available to the data subject if he made a Subject Access request under the Data Protection Act ('DPA') for it.
19. 'Personal data' is defined by section 1(1) of the DPA. The withheld information is the information evidencing the contractual obligation on Channel 4 to make payments to Andy Duncan of £731,000 in lieu of notice. The information does constitute Mr Duncan's personal data because it relates to an identifiable living individual. It also does not constitute the complainant's own personal data. Section 40(2)(a) is therefore satisfied.
20. In relation to section 40(2)(b) Channel 4's main arguments have been focussed on why disclosure would contravene the first data protection principle and this is what the Commissioner has focussed on.
21. The first data protection principle has three components. They are that the disclosure of the information to the public must be:
 - fair to the data subject;
 - in accordance with one or more conditions in Schedule 2 of the DPA; and
 - lawful to the data subject.
22. All three conditions must be satisfied for the first data protection principle not to be contravened and the exemption not to apply.

Is the disclosure of the information unfair to the data subject?

23. In accordance with his decision issued on **FS50286813** (Stroud District Council), the Commissioner has looked to balance the consequences of

any release of personal data and the reasonable expectations of the data subject with general principles of accountability and transparency.

24. To do so, he has specifically borne in mind the following factors:
- The individual's reasonable expectations of what would happen to their personal data – including the individual's seniority;
 - Whether the information relates to the public or private life of that individual;
 - Whether disclosure would cause any unnecessary or unjustified damage to the individual; and
 - The legitimate interests of the public in knowing these details weighed against the effects of disclosure on the data subject.
25. Channel 4 has argued that Mr Duncan has a reasonable expectation that the information evidencing the contractual obligation on Channel 4 to make payments to Andy Duncan of £731,000 in lieu of notice would not be disclosed.
26. Channel 4 provided information about how these expectations were engendered, but it is necessary for the Commissioner to discuss these matters in a confidential annex as to do otherwise would disturb the integrity of the withheld information. However, he can say that in the circumstances of this case, he is satisfied that Mr Duncan had these expectations.
27. To assess reasonableness, the Commissioner has received Channel 4's submissions, Mr Duncan's submissions, considered the sort of information that has been requested (alongside the withheld information itself) and Mr Duncan's seniority. His detailed analysis is also contained in the confidential annex. However, he can say the following:
- he is satisfied that Mr Duncan had the expectation that the withheld information would not be released;
 - Channel 4 has handled the information in a way that reflects that this is so;
 - Channel 4 drew the Commissioner's attention to the fact that the information requested is HR information and in previous decisions, the Commissioner has accepted that there is a genuine expectation that this sort of information would remain private. The Commissioner agrees that the information can be characterised as HR information and that there is an expectation of privacy in relation to information of this sort; and

- in previous decisions the Commissioner has accepted that the more senior a role occupied by a data subject the greater the prospect that disclosing information about that individual's public duties will be warranted or fair. This is based on the understanding that increasing seniority corresponds with an individual's increasing responsibility for making influential policy decisions and decisions that will directly affect the expenditure of significant amounts of public funds. In this case it is common ground that the individual held the most senior role at Channel 4. His role was both public facing and had a real public profile. Indeed, the role requires decisions to be made of significant impact to the public and concern potentially very significant amounts of public money. The Commissioner therefore appreciates that in normal circumstances a high degree of scrutiny would be expected. However, for reasons discussed in the confidential annex, he has been satisfied that a high level of further scrutiny would not be expected in this case.
28. For the reasons specified in the confidential annex (and alluded to above) the Commissioner is satisfied that Mr Duncan's expectations that the disputed information would not be disclosed are reasonable in this case.
 29. The Commissioner considers that the information evidencing the contractual obligation on Channel 4 to make payments to Andy Duncan of £731,000 in lieu of notice is something which concerns both Mr Duncan's private and public life. It affects his private life because it concerns a great part of his identity, may concern his specific financial standing and potentially could affect his future employability. It also affects his public life because he was employed by a body with public responsibilities that is owned (although not funded) by the tax payer. The Commissioner also considers that as the information becomes more specific, it becomes more private and less fair to disclose to the public.
 30. Channel 4 has explained that in its view the disclosure of information would be likely to cause the specified individual damage and distress. Firstly, it would erode their trust and confidence in Channel 4 doing what it said it would with his personal HR data. The Commissioner considers that there is force in these arguments, but can only explain why in the confidential annex.
 31. When assessing the legitimate interests of the public, the Commissioner considers that viewers will have a natural, and legitimate, interest in knowing how a publicly owned organisation with public broadcasting duties allocates its funding and how it remunerates its staff, including when they depart from it. The Commissioner considers that there is also a weighty public interest in knowing the process by which the contractual obligation on Channel 4 to make payments to Andy Duncan of £731,000 in lieu of notice came about and how Channel 4 deals with

its employment matters more generally. This is particularly pronounced in this case because the sum is a considerable sum and there is controversy attached to it.

32. However, Channel 4 has pointed out that these legitimate interests are offset to some extent by the information that is available in the public domain. It is known from its accounts that Mr Duncan received the sum of money stated and from the Select Committee questions that indicated he was contractually entitled to it. Channel 4 argued also that at the time of Mr Duncan's departure none of its funding came from the tax payer as it was commercially generated. However, it should be noted, that Channel 4 is publicly owned and does get some other non-monetary benefits in return for it undertaking public service broadcasting². Channel 4 explained that its funding arrangements reduced the expectations of transparency and that instead it should be judged on the same lines as its commercial competitors. The Commissioner agrees that the fact that the money is not taken from the tax payer does mitigate the necessity in transparency to a significant effect. In short, he considers that the legitimate interests of the public are not as great as the prejudice to the interests of Mr Duncan in this case.
33. For completeness, the Commissioner has also considered whether there are any 'exceptional circumstances' where a greater level of disclosure may be warranted. In his guidance, the Commissioner lists the following five situations:
- There are current controversies or credible allegations;
 - There is a lack of safeguards against corruption;
 - Normal procedures have not been followed;
 - The individual in question is paid significantly more than the usual salary for their post; and
 - The individual/s have significant control over setting their own or others salaries.
34. Having considered the situation, without revealing the withheld information, the Commissioner is satisfied that none of the 'exceptional factors' are relevant in this case. There are no credible allegations about

² These include free analogue and digital spectrum, 'must carry status' and prominence on TV guides.

the conduct of Mr Duncan. In particular, the Commissioner does not see any evidence of misconduct or financial impropriety connected with Mr Duncan that the Commissioner accepts may potentially have strengthened the case for the release of the information. Mr Duncan was well paid. However, in the Commissioner's view the sum paid was not substantially more than equivalent positions in this case. Mr Duncan did not have control over the setting of his own salary and the Commissioner is satisfied that the correct procedures were followed (although he cannot say more outside the confidential annex).

35. Overall, the Commissioner concludes that the disclosure of the disputed information would be unfair. He is satisfied that the disclosure would amount to an unwarranted intrusion into Mr Duncan's personal circumstances and be a disproportionate invasion to his right to privacy. It follows that disclosure would contravene the first data protection principle, the third party personal data exemption has been applied correctly and no information should be disclosed in this case. Further details about this conclusion can be found in the confidential annex.
36. The Commissioner has also considered whether it is possible to provide any of the information (redacting the rest) in a manner so that disclosure would be fair to the data subject. He considers that it is not possible in this case.
37. As disclosure is not fair, the Commissioner does not need to consider the other aspects of the first data principle. He also need not consider any of the other data protection principles, or the other exemptions that were cited by Channel 4.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

39. 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.
40. 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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