



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2008/0043**  
**Information Commissioner's Ref: FS50081562**

**Heard at Procession House, London, EC4**  
**On 13<sup>th</sup> October 2008**

**Decision Promulgated**  
**3<sup>rd</sup> December 2008**

**BEFORE**

**CHAIRWOMAN**

**Melanie Carter**

**and**

**LAY MEMBERS**

**Michael Hake**  
**Andrew Whetnall**

**Between**

**IAN C FITZSIMMONS**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**and**

**BRITISH BROADCASTING CORPORATION**

**Additional Party**

FOIA : Cost of compliance and appropriate limit s.12; Duty to advise and assist s.16;  
Decision of commissioner s.50(2)-(6)

Cases: Robert Andrew Brown v Information Commissioner EA/2006/0088; Urményi v  
Information commissioner EA/2006/0093; Randall v Information Commissioner  
EA/2007/0004

## **Hearing on the papers**

### **Decision**

The Tribunal upheld the Decision Notice and dismissed the appeal.

### **Reasons for Decision**

#### **Introduction**

1. This appeal concerns a request for information made by Mr Ian Fitzsimmons in an email dated 5 January 2005, asking for:

*“ Details of all approved expense statements for Andrew Marr of the BBC which have been incurred by the BBC as a result of travel, entertainment and hospitality provided to the DCMS and ALL OTHER GOVERNMENT DEPARTMENTS.*

*Details of all approved expense statements for Natasha Kaplinsky of the BBC, which have been incurred by the BBC as a result of travel, entertainment and hospitality provided to any third party.”.*

2. This request was initially made to the Department for Culture Media and Sport and sent on to the BBC on 1 February 2005. The BBC responded on 22 February 2005 stating that the information requested was held for the purpose of journalism, art or literature and therefore fell within a derogation to the Freedom of Information Act 2000 (“FOIA”). Information which falls within the derogation is outside of FOIA’s jurisdiction. The request was therefore refused.

#### **The complaint to the Information Commissioner**

3. Mr Fitzsimmons was dissatisfied with this refusal and made a complaint to the Information Commissioner (“IC”) on 24 June 2005. The investigation into this complaint was not commenced until 15 June 2006 and then not concluded until the Decision Notice was issued on 25 March 2008.
4. During the course of the IC’s investigation, the BBC sought also to rely upon section 12 of FOIA on the basis that its estimate of the costs of complying with the request would exceed the prescribed costs limit.

**The IC’s Decision Notice found that the derogation did not apply in this case. The IC upheld however the BBC’s reliance upon section 12, suggesting informally that it should contact Mr Fitzsimmon’s to assist him in refining his request so as to come within the costs limit.**

## The appeal to the Tribunal

5. Mr Fitzsimmons appealed the IC's Decision Notice on 28 April 2008. The appeal had been submitted out of time, but in the light of the BBC's failure to revert to Mr Fitzsimmons in accordance with the informal suggestion in the Decision Notice, the Tribunal decided to allow the appeal to proceed. The BBC told the Tribunal that the failure to act on the Commissioner's suggestion had been an oversight.
6. Mr Fitzsimmons' grounds of appeal can be summarised as:
  - a. that there is no statutory time limit for the purposes of FOIA;
  - b. that the BBC is unable to provide the information within the cost limit should not prevent its disclosure;
  - c. that the Commissioner should have prioritised the public interest in this case; and
  - d. the time limit should be varied by the Information Tribunal to accommodate this public interest.
7. The application of the derogation in this case is not under appeal, although the Tribunal understands that the scope of the derogation has been considered before a differently constituted Tribunal and involving a different Appellant. The BBC did not cross appeal in this case, such that this Tribunal has not considered the correct application of the derogation. It has proceeded on the basis that FOIA does apply to this request. The Tribunal noted that the BBC, at the time of responding to this request, was operating in the belief that the derogation did apply.
8. The Tribunal met on 13<sup>th</sup> October 2008 but adjourned in order to receive submissions on the interplay of sections 12 and 16 of FOIA and to call for further evidence from the BBC. The Tribunal met on a second occasion on 21 November 2008 to finally determine the appeal.

## The issues

9. The Tribunal identified the issues before it as follows:
  - a. the Appellant's express grounds of appeal as set out in paragraph 7 above;
  - b. whether the IC had been correct in law in upholding the BBC's reliance upon section 12 and in particular whether the BBC's estimate of cost had been reasonable;
  - c. whether the IC should have found a breach of section 16 of FOIA on the basis that the BBC had failed to revert to Mr Fitzsimmons to advise how he might narrow or redefine his request so as to come within the costs limit;

## Evidence

10. The main evidence before the Tribunal was that contained in the statement of Mr Nigel Etienne, a Projects and Planning Manager in BBC Finance. It was his responsibility to liaise with the BBC's Information Policy and Compliance Unit in respect of FOIA requests relevant to BBC finance. His evidence was as to his own estimate for compliance with the request rather than evidence as to the estimate actually reached at the time of refusal of the request. His estimate was initially that it would take 160 hours of staff time to comply. This was subsequently revised downwards in a second statement to 120 hours (see paragraphs 33 & 34 below).
11. Mr Etienne explained that there were two ways in which the expense claims for Mr Marr, an employee of the BBC, might have been made – electronically or manually. In relation to Ms Kaplinsky who was a contractor, all her expense claims were made manually as part of her invoicing for her fees. In addition, Mr Etienne told the Tribunal that the BBC incurred expenses for travel and accommodation in relation to both persons through a central booking system.
12. It was a key feature of compliance with the request that it was only expenses incurred in relation to hospitality/dealings with third parties (in Mr Marr's case central government) that were within the scope of the request. Mr Etienne explained that this entailed significant work in identifying which expenses related to third party dealings as opposed to other types of journalistic activity.
13. Thus, in relation to Mr Marr's electronic expenses it was said that the BBC needed 26 hours to search their data base for his expense claims (submitted by Mr Marr electronically), to refine this to search for travel and hospitality and then refine further to find references to government departments. It was noted that if the text fields entered by Mr Marr did not contain any such reference, further investigation work would be required to ascertain whether a particular expense claim fell within the request. There was no time estimate given for this further work.
14. Mr Etienne gave details as to what would be required in relation to the manual expense claim forms for Mr Marr. In the light however of the BBC's subsequent discovery that these were no longer held for the relevant period, the Tribunal did not take this particular evidence into account.
15. For Ms Kaplinsky, who only submitted manual expense claims via the 'artists contracting process', the search was said to entail accessing this system (presumably electronically), reviewing all payments to her for the relevant period in order to identify payments for expenses (as opposed to fees) and to note the date and number of invoice on which the expenses appear. It would be necessary then to retrieve the relevant invoices from the BBC's offsite storage facility and manually to review each relevant invoice to extract those which fell within the request. It was said that this would entail one week's worth of work.
16. In addition to Mr Etienne's statement, the Tribunal was provided with copies of sample online expense claim forms (not relating to Mr Marr). It was not provided with any examples of manual expense claim forms. The Tribunal was concerned that had there been manual monthly expense claim forms provided by either individual this would have considerably reduced the scope of the exercise. The Appellant had produced such a form for Michael Grade and was arguing that similar

such forms must exist for Mr Marr and Ms Kaplinsky. The Tribunal decided to adjourn to call for further evidence on this point.

17. Hence, the Tribunal asked the BBC to provide information as to whether Andrew Marr and Natasha Kaplinsky provided their manual expenses claims on an ad hoc or a monthly basis or both and sample copies of manual ad hoc claims and manual monthly claims made by these two individuals. The Tribunal received a second closed bundle of evidence for the resumed hearing (see paragraph 35 below).

### The Tribunal's jurisdiction and the relevant law

18. The Tribunal's jurisdiction on appeal is governed by section 58 of FOIA. As it applies to this matter it entitles the Tribunal to allow the Appeal if it considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the IC ought to have exercised his discretion differently.
19. The starting point for the Tribunal is the Decision Notice of the IC but the Tribunal also receives evidence, which is not limited to the material that was before the IC. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the IC and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.
20. Section 12 provides an exception to the duty to provide information held under section 1(1) of FOIA. This provides:
- “(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*
- (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit*
- (3) In subsection (1) and (2), the “appropriate amount” means such limit as may be prescribed and different amounts may be prescribed in relation to different cases.”.*
21. For the purposes of section 12, the “appropriate limit” is prescribed in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Regulations”). Regulation 3 provides so far as relevant:

*“(1) This regulation has effect to prescribe..... the appropriate limit referred to in section 12(1) and (2) of the 2000 Act....*

*(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.*

*(3) In the case of any other public authority the appropriate limit is £450.”.*

22. Regulation 4 (3) & (4) provides that:

*“(3) In the case in which this regulation has effect, a public authority may, for the purposes of this estimate, take account only of the costs it reasonably expects to incur in relation to the request in-*

*(a) determining whether it holds the information;*

*(b) locating the information, or a document which may contain the information*

*(c) retrieving the information, or a document which may contain the information; and*

*(d) extracting the information from a document containing it.*

*(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.”*

Given the £450 costs limit and the notional hourly rate of £25, this equates to a figure of 18 hours of work before the costs limit is reached.

23. A public authority does not of course have to rely on section 12; it is free to comply with a request even if it estimates that the cost of doing so will exceed the appropriate limit. If it does rely on section 12, it is not required to make a precise calculation for the time costs of complying with the request. What is required is an estimate. We take it as implied, however, that the estimate must be arrived at on a reasonable basis. This was also the view expressed by a differently constituted Tribunal in *Urmenyi v Information commissioner* EA/2006/0093, at paragraph 16.

24. Also under consideration in this appeal is section 16, the duty to provide advice and assistance. This provides that:

*“(1) 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.*

*(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”.*

25. The Secretary of State for Constitutional affairs has produced a Code of Practice under section 45 on the discharge of public authorities' functions under Part I of

FOIA, which at paragraph 14 states that:

*“Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the “appropriate limit” (ie: cost threshold) the authority should consider providing an indication of what, if any, information could be provided with the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.”.*

26. In the case of *Brown v Information Commissioner EA 2006/0088*, a differently constituted Tribunal found that a failure to consider acting in accordance with section 16 and the course of action set out in the paragraph of the Code above, was such that the public authority could not rely, in the particular circumstances of that case, on section 12. A live issue before this Tribunal was whether, in the absence of the BBC having at any stage reverted to the requester, and consistent with the *Brown* case it ought not to accept reliance upon section 12, however reasonable the estimate.
27. Finally, the Tribunal noted that the suggestion made in the Decision Notice that the BBC should revert to Mr Fitzsimmons to discuss how he might revise his request so as to bring it within the costs limit, was just that – no more than a suggestion. This was done informally and was not a so-called ‘specified step’ under section 50(4) of FOIA. That provision provides:

*“Where the Commissioner decides that a public authority—*

- (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or*
- (b) has failed to comply with any of the requirements of sections 11 and 17,*

*the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.”.*

28. It should be noted that failure to comply with ‘a specified step’ may lead to enforcement action by the IC and proceedings for contempt of court – see section 54 FOIA. Public authorities are not obliged as a matter of law to comply with informal suggestions in Decision Notices.

## Decision

### Mr Fitzsimmons' grounds of appeal

29. The Tribunal considered first the express grounds of appeal set out by Mr Fitzsimmons:

- a. *that there is no statutory time limit for the purposes of FOIA:*

As is explained in paragraph 23 above and featured in a previous Information Tribunal case in which Mr Fitzsimmons was the Appellant, an upper costs limit is prescribed in legislation and a notional hourly rate applied (£25 per hour). Whilst the legislation does not spell out the time limit, it follows that from the statutory provision that the public authority may only carry out 18 hours work at the notional rate before it reaches the prescribed cost limit. There are not therefore limits arbitrarily applied by the BBC or the IC. Nor are they matters of discretion which can be approached in terms of 'reasonableness'.

Mr Fitzsimmons referred on a number of occasions to the power in section 12(3) (see paragraph 21). He took this as evidence that the limit maybe varied whereas this provision simply provides powers for the legislation itself to make different provision in different cases. The word "prescribe" in this context means prescribe in legislation.

- b. *that the BBC is unable to provide the information within the cost limit should not prevent its disclosure:*

It has never been the BBC's position and certainly is not said by the IC in the Decision Notice that the effect of the cost limit is to prevent the BBC from making disclosure. The BBC has chosen to rely upon the cost limit in refusing disclosure. It has been free and remains free to make disclosure if it so wishes (subject of course to any restrictions that arise from the Data Protection Act 1998 or the bounds of confidentiality).

- c. *that the Commissioner should have prioritised the public interest in this case:*

Section 12 does not involve the application of any public interest test. The Tribunal's role in this regard is simply to consider whether the IC was right in upholding the public authority's entitlement to rely upon the section 12 cost limit. It is beyond the jurisdiction of this Tribunal to consider whether in deciding whether to make voluntary disclosure, the BBC should have given greater priority to the public interest as argued by Mr Fitzsimmons.

- d. *The Tribunal understands the time limit should be varied by the Information Tribunal to accommodate this public interest:*

this ground of appeal to be, in effect, that the costs limit should be varied. As this is a matter of statutory provision and no discretion is provided within that provision, this is beyond the powers of all involved, the BBC, the



## Commissioner and the Tribunal.

Section 12: reasonable estimate

30. The Tribunal proceeded to consider whether the BBC had been entitled to rely upon section 12 and therefore to satisfy itself whether the cost estimate for compliance provided by the BBC was reasonable. It took this to mean that the estimate must be sensible, realistic and supported by cogent evidence (*Randall v Information Commissioner EA/2007/0004*).
31. The Tribunal was concerned in a number of regards with the way in which the BBC had approached the estimate and indeed presented its case on appeal.
32. First, the Tribunal was concerned that Mr Etienne had needed to make a second statement to correct a significant error in the first. The first statement had estimated the costs in relation to a period running from when Mr Marr and Ms Kaplinsky started working for the BBC until the date of the statement. This was obviously wrong as the period in relation to which expense statements would need to be scrutinised was from their start dates to the date of the letter of request (treated in this case as the date upon which the request was transferred from the DCMS to the BBC). This raised the question whether the estimate as put together at the time of the refusal of the request had made the same mistake.
33. As a result of this mistake, the BBC revised its time estimate down from 160 to 120 hours to comply with the request. This made sense in that the original statement had said that the period under scrutiny for Mr Marr was 8 and Ms Kaplinsky 5 years, when in fact this should respectively have been 5 and 3 years. Despite this the BBC did not reduce the number of anticipated hours for scrutinising Ms Kaplinsky's manual expense claims, said to be a full weeks work. There was no explanation for this and the Tribunal did not consider that this could be viewed as reasonable. A reduction was required.
34. The Tribunal's next concern was that despite directing that it be provided with samples of the manual expense claims for the two individuals, it had been given copy documents which appeared to be payment dockets. These related to Ms Kaplinsky only and not Mr Marr as the Tribunal were told that all manual expense forms for Mr Marr had been destroyed (in accordance, it was said, with their data retention policy). This of course meant that the estimate given to the IC and reflected in both witness statements of Mr Etienne had been wholly incorrect in this respect. It had been asserted in his witness statement that complying with the letter of request in relation to Mr Marr's manual expense forms would take 2 weeks of work. This simply fell away on further investigation. The Tribunal considered that the BBC should, in forming the estimate, have carried out the preliminary steps of asking its storage contractor a) whether the information still existed and then b) if so, what would be involved in its recovery. Had they gone through these simple preliminary steps, the BBC would have known to reduce its cost estimate.
35. The Tribunal spent sometime considering the costs said to relate to the BBC's central booking system costs. These were costs incurred by the BBC for Mr Marr's travel which were paid for centrally. The Tribunal considered that the request was

unclear as to whether Mr Fitzsimmons had wanted information as to expenses incurred by the BBC in relation to Mr Marr or only expenses incurred by Mr Marr which he then claimed back. Mr Etienne's statement included a significant amount of time for the provision of information from the central booking system.

36. The Tribunal was of the view that it was a reasonable interpretation of the request that information as to central booking costs was required. It was not convinced however that these costs had in fact been included in the original estimate. The Tribunal noted that in correspondence between the BBC and the IC the BBC only referred to expenses claimed back. The Tribunal noted that neither it nor the IC had had sight of any documentation showing how the BBC had originally calculated its estimate.
37. Given its doubts over whether these costs had been included in the original estimate, it decided to discount this aspect in the calculation of whether the costs limit would be reached.
38. The Tribunal's next concern was that on scrutinising the sample electronic claim forms it appeared that it would not always be possible to identify to whom the expenses related (for instance, who Mr Marr lunched with). This was important as the letter of request only concerned expenses incurred by Mr Marr in his dealings with Government departments.
39. Mr Etienne had told the Tribunal about this difficulty in his first witness statement, referring to the need for further investigation but without quantifying the time this would take. This was less than helpful to the Tribunal as it was left guessing how much time this aspect would take. It was however prepared to accept that the BBC would need to be involved in significant and in all likelihood problematic further investigation in tying down dates with events so as to work out if the electronic expense claims came within the request.
40. Whilst the Tribunal took into account the above flaws in the estimate and reduced the proposed hours of work in compliance accordingly, the Tribunal did accept as reasonable in all other respects the assessment of the BBC as to the approximate cost of compliance. Reducing the estimate in relation to the costs relating to Mr Marr's manual expenses and all central booking expenses, this still left the estimated costs for the online expense claims for Mr Marr and Ms Kaplinsky's manual expense claims (reduced to reflect the number of years she had worked for the BBC). The Tribunal accepted moreover further significant investigation would be required in relation to Mr Marr's online electronic expenses. This would clearly take the hours of work required over the 18 hours limit.
41. In the light of the above concerns however, the Tribunal did carefully consider whether the estimate was so flawed that it could simply not be relied upon. It was certainly the case that the Tribunal was not impressed with the way in which the BBC had approached the forming of the estimate and that in certain respects this had resulted in the costs being significantly overstated. In other respects they had been understated.
42. The Tribunal reminded itself however that section 12 was designed to free public authorities from the burden of complying with requests the costs of compliance for

which are above the statutory threshold. The purpose of section 12 would be undermined if the estimate required were to be so detailed and precisely accurate that the public authority ended up spending significant time simply in the production of the estimate. An estimate needs to be reasonable in an overall sense. It should not contain errors of such magnitude that either the costs limit is not in fact reached or it is so flawed that no confidence can be placed upon it.

43. The Tribunal was satisfied, on balance, that the estimate was sufficiently reliable to mean that overall it was reasonable. In forming this view, the Tribunal noted first that complying with the request in relation to Ms Kaplinsky's manual expenses alone would reach the costs limit. Added to this were the clearly reasonable time estimates for the preliminary searches of Mr Marr's online expense claims forms relevant to the request. The Tribunal was moreover prepared to take into account the costs of further investigation in relation to Mr Marr's online expense claims, albeit unquantified. It would have been better if the BBC had quantified the time taken to carry out this exercise, but having alluded to it in Mr Etienne's statements, the Tribunal considered it would not be appropriate to leave these obviously very real costs out of account.
44. The Tribunal concluded that the BBC had been entitled to rely upon section 12 on the basis that its estimate of compliance took it above the costs limit.

#### Section 12: failure to assist Mr Fitzsimmons in refining his request

45. The Tribunal considered then whether the BBC's failure to revert to Mr Fitzsimmons in order either to indicate what could be provided within the costs limit or to assist him in refining the request meant that it ought not to be able to rely upon section 12. This would be in accordance with a previous decision of the Tribunal, differently constituted in the case of *Brown* (see paragraph 27 above). The Tribunal noted that the Commissioner's position, in the further submissions called for between hearing dates, was that sections 12 and 16 were not inextricably linked and that whilst subject to duties under section 16 to advise and assist, a public authority was entitled to rely upon section 12 on the basis of the request before it. The BBC accepted in principle that it may be relevant to consider compliance with section 16 in determining whether section 12 applied, but not on the facts of this particular case.
46. With due respect to the decision in *Brown* which was not, in any event, binding, the Tribunal came to a different conclusion on this point of law. The Tribunal considered that sections 12 and 16 needed to be considered separately from each other. That this was the case was reflected, quite simply, in the fact that they appeared in two separate free standing provisions. There was no indication on the face of the legislation that Parliament intended them to be interlinked in the way previously interpreted by the Tribunal.
47. That they should be approached separately, was reflected in the fact that the two sections had different enforcement mechanisms. Where an authority incorrectly relied upon section 12 (and assuming no other exemption applied) this would lead to a breach of the duty to disclose under section 1(1). A finding to this effect in a Decision Notice by the IC would in the normal course of events lead to a specified

formal step under section 50(4) of FOIA (see paragraph 28). Non-compliance with such a 'specified step' could lead to proceedings for contempt of court. This had to be contrasted with non-compliance with section 16 for which there was, in the Tribunal's view, no formal adverse consequences other than possibly a practice recommendation under section 48. There was no enforcement mechanism for non-compliance with a practice recommendation.

48. On this point, the Tribunal noted that the IC had argued that implicit in section 50 was the power to issue a formal 'specified step' where there was a breach of section 16. The Tribunal did not accept this submission as it was of the view that section 50(4) set out the limits of the IC's powers so to act. The Tribunal considered that insofar as non-compliance with 'specified steps' could lead to contempt proceedings, the clearest wording would be required to substantiate such a power and that this was not the case here.
49. The Code of Practice (see paragraph 26 above) further reflected the Tribunal's interpretation that sections 12 and 16 of FOIA had to be considered separately. Paragraph 14 of the Code applied "*where an authority is not obliged to comply with a request*" indicating that an authority would consider section 12 first but then as a next and free standing step may need to consider assisting the requester to refine down his or her request.
50. The BBC was at the time of refusal adamant that the derogation applied. It would, in the Tribunal's view, have been unreasonable to expect it to have gone through the motions of advising the requester of either what information could be provided within the costs limit or advising him how he might refine his request to do the same, simply then to refuse on the basis of the derogation. To conclude otherwise would be to, in effect, require the BBC to treat all requests as subject to FOIA for the purposes of advice and assistance under section 16, regardless of whether or not the derogation applied.
51. The Tribunal left open the question whether, where there were two ways in which a request could be reasonably interpreted, one of which would definitely take the request over the limit and one of which would not, the public authority ought in order for the eventual estimate to be reasonable, to revert to the requester to clarify the request. In this case, there had been doubt as to whether the expenses for central booking should be included. In the event, even without their inclusion the Tribunal took the view that those parts of the estimate considered reasonable took the BBC over the costs limit. Thus, this particular point did not fall to the Tribunal to decide. It was of the view however that in this limited way (and without reference to section 16), the question of reverting to the requester may have a direct bearing on compliance with section 12.
52. Thus, in conclusion on this part, the Tribunal was of the view that a failure to revert to Mr Fitzsimmons at the time of refusal did not lead to a conclusion that the BBC could not rely upon section 12.

Section 16: duty to advise and assist

53. The next step for the Tribunal was to consider whether a failure to revert to the requester as discussed above amounted to a breach of section 16. For the reasons set out above, the Tribunal accepted that it had been a reasonable position for the BBC to take at the time of refusing the request, that it did not need even to consider reverting to the requester
54. The Commissioner's position now, as set out in his further submissions, was that if the Tribunal were to uphold reliance upon section 12, it ought to go on to find a breach of section 16. This was, of course, inconsistent with the Decision Notice, which had not found a breach of section 16. The BBC conversely argued that a breach of section 16 should not be found on account of the BBC's genuine belief, at the time of refusal, that FOIA did not apply.
55. The Tribunal considered that having concluded that the BBC had been justified in not reverting to the requester at the time of refusal it would be incorrect to find a breach of section 16 now. The Tribunal's task was to consider how the BBC should have acted at the relevant time, in this case date of refusal.
56. Clearly if a new request were to be made in circumstances in which it had been determined that the derogation does not apply and the BBC chose to rely upon section 12, the BBC would, in accordance with its duties under section 16, need to go on to discuss with a requester how he or she might refine a request. This would not be, however, to prejudge where such discussions might eventually lead. The BBC had, in this case, reserved its right to argue that other exemptions, including commercial confidentiality, might apply.
57. In all the circumstances, the Tribunal did not consider that there had been a breach of section 16.

Conclusion

58. The Tribunal upheld the IC's Decision Notice. It agreed that the BBC was entitled to rely upon section 12, although critical of the way in which it had approached the estimate. The Tribunal also concluded that there had been no breach of section 16 on the basis that at the time of the refusal the BBC had been genuinely convinced that on account of the derogation, FOIA did not apply.

59. The decision of the Tribunal is unanimous.

Signed:

Melanie Carter

Deputy Chairwoman

Date: 3 December 2008