

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 January 2008

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

Summary

The complainant asked the BBC who the highest earner at the BBC Northern Ireland was and the details of their salary. The BBC refused to disclose this information maintaining that it was exempt under section 40 of the Act. The Commissioner has reviewed the requested information and has decided that whilst it would be a breach of the Data Protection Act to disclose the exact salary of the highest earner, it would not be a breach of the Data Protection Act to disclose the pay band within which the highest earner fell along with their name.

The complainant also requested information on the payments made to several named television presenters, and the costs of producing John Daly's television show. The BBC refused to provide the information on the basis that it was not a public authority in relation to this request because the information was held for the purposes 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 exemptions under section 40, section 43 and section 41 to withhold this information from the complainant.

Having considered the purposes for which this information is held, the Commissioner has concluded that the requested information was not held for the dominant purposes of journalism, art or literature and therefore the request falls within the scope of the Act. However, the Commissioner has concluded that the information relating to payments to presenters are exempt by virtue of section 40 of the Act and that the information relating to programme costs is exempt by virtue of section 43 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 I 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 some of the information requested by the complainant. This Notice sets out his decision.

The Request

2. On 4 January 2005, the complainant made a request to the BBC for the following information:
 - *'Who is the highest earner at BBC Northern Ireland? What is [sic] he, she, earn?*
 - *What payments were made in 12-month cycle to John Daly, both for TV and radio shows? What in total did his TV show cost the BBC?*
 - *Stephen Nolan: What does Stephen receive for his morning radio show and also for his TV programme?*
 - *The same query concerning Hole in the Wall gang, Tim McGarry, Michael McDowell, etc.'*
3. For the purposes of clarity, the Commissioner has categorised the requested information into:
 - *Highest Earner Information*, i.e. information about the identity and salary of the highest earner at the BBC Northern Ireland ("BBC NI").
 - *Talent Costs Information*, i.e. information about the payments made to the named presenters: John Daly, Stephen Nolan and Hole in the Wall gang.
 - *In-house Programme Costs Information*, i.e. the costs of John Daly's television show.
4. The BBC responded on 17 January 2005 and advised the complainant that it considered the information relating to the highest earner at BBC NI to be exempt from disclosure under section 40 of the Act.
5. The BBC also advised the complainant the request for information pertaining to talent costs and programme costs *'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.
6. The BBC further advised the complainant of his right to an internal review of its decision not to release the requested information on the basis of the Act's

derogation as it applies to the BBC and also the provisions of section 40 as they relate to the information held about the highest earner at BBC NI.

7. The complainant contacted the BBC on 23 January 2005 requesting an internal review of its decision to withhold the requested information arguing that it is a vital matter of valid public interest.
8. On 21 February 2005, the internal review upheld the original decision that the information about the highest earner was exempt under section 40 and that the information pertaining to talents costs and programme costs fell within the Schedule 1 derogation.

The Investigation

Scope of the case

9. On 7 March 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider both the BBC's decision to refuse to disclose details of the highest earner on the basis of section 40 and the BBC's decision that it was not a public authority with regard to the requests for information about talent costs and in-house production costs.

Chronology

10. On 26 May 2005 the Commissioner wrote to the BBC and requested further arguments to support the decision not to provide the complainant with the requested information.
11. The BBC responded to the Commissioner's request on 28 July 2005. It advised that the highest earner information was withheld because it fell 'within the definition of personal data under the Data Protection Act 1998 ('DPA'), and disclosure of this information would contravene the first principle of the DPA.
12. In the same letter the BBC also advised that because talent and in-house programme costs information formed part of a programme budget, which 'is integral to the production process and held in support of our programmes...This information is therefore held in support of our programmes and is held for the purposes of "journalism, art or literature"'.
13. The Commissioner issued a Preliminary Decision Notice (PDN) on 17 November 2005. In this notice, the Commissioner informed both parties that he was inclined to issue a Decision Notice which would state that:
 - (i) The BBC has incorrectly applied Part VI of Schedule 1 of the Act to the salaries of presenters and cost of programmes. The salaries of presenters and cost of programmes are not held for the purposes of journalism, art or literature. In the particular circumstances of this case, the BBC is a public

authority under the Act and should now deal with the information request within the scope of the Act.

- (ii) Disclosure of the name and salary of the highest earner at the BBC NI would not breach section 40(2) of the Act. In this case the first principle of the DPA would not be breached by disclosure.
14. The PDN also contained an invitation to the parties for further submissions to be provided to the Commissioner.
15. On 23 December 2005 the BBC submitted further arguments to support its contention that section 40 of the Act applied to the highest earner information. The BBC also provided the Commissioner with further arguments to support its position that the information pertaining to talent and programme costs did not fall within the Act.
16. In addition, and without prejudice to its position on the Schedule 1, the BBC provided alternative arguments under the Act for withholding the talent and programme costs information by citing the exemptions contained at sections 40(2), 41, 43(2) of the Act.
17. On 5 March 2006, in order for the Commissioner to fully consider the arguments submitted, he contacted the BBC requesting further information to support the exemptions applied.
18. The BBC responded on 26 April 2006 with further details in support of its application of section 40 to the highest earner information. In addition, the BBC also argued that disclosure of this information would breach the individual's human rights and therefore a statutory prohibition applied under section 44 of the Act.
19. In a second letter dated 4 May 2006, the BBC provided the Commissioner with further details in support of its application of the exemptions contained at sections 40, 41 and 43 with regard to the information relating to talent costs and in-house programme costs.
20. On 12 June 2006 the Commissioner informed the complainant of his decision to suspend making a final decision on the complaint because of the Information Tribunal's imminent consideration of an appeal which would have an impact on his case. (This case involved a request Mr S Sugar made to the BBC under the Act. The Tribunal issued its decision on this case on 29 August 2006 (EA/2005/0032). However, the Tribunal's decision was then appealed by Mr Sugar to the High Court. This case was heard by Mr Justice Davis who handed down his verdict on 27 April 2007).
21. On 1 March 2007 the BBC provided further arguments to support its decision not to disclose the information requested by the complainant. The BBC also reiterated its position that at the time of the complainant's request it held the talent costs information and in-house programme costs information for the purposes of journalism, literature or art.

Analysis

The Schedule 1 derogation

23. 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).
24. 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.
25. In this case the requested information that the BBC considers to be covered by the derogation is the information pertaining to talent costs and in-house programme costs.

The BBC's view

26. 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 and the total cost of in-house productions) 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.
27. 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*, 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.'

28. In summary, the BBC's position is that the talent cost and in-house production cost information is not held for purposes other than journalism, art of literature and therefore is outside the scope of the Act.

The Commissioner's view

29. The Commissioner has noted the arguments put forward by the BBC.
30. 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.
31. The Commissioner accepts that the requested information (talent costs and in-house programme costs) 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.
32. 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.
33. 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 (4 January 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
34. 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..."*
35. 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.
36. Under the 2006 Charter, the BBC Trust is the guardian of the licence fee revenue and the public interest. 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) to ensure that the Executive Board conducts the BBC's operational financial affairs in a manner best designed to ensure value for money.
37. 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.
38. People costs and in-house programme costs constitute 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.
39. 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.

40. In this case in-house programme costs and talent costs information served the following purposes:
 - (i) It supported the delivery of programme content.
 - (ii) It enabled the BBC to monitor its expenditure against its agreed budget for that year.
 - (iii) It enables the BBC to predict with some certainty the future costs of engaging talent.
 - (iv) It enables the BBC to predict with some certainty the future costs of producing programmes in-house.
 - (v) It contributed to meeting the BBC's obligations to publish annual accounts.
 - (vi) 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.
41. 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 in-house programmes and the cost of engaging talent constitutes a creative decision.
42. 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.
43. As such, the Commissioner does not consider that the requested information constitutes a creative decision.
44. 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 in-house programme costs and talent costs information and the BBC is a public authority with regard to this information.

Exemptions

50. The BBC believes that the highest earner information is within the scope of the Act. However, it maintains that this information is exempt from disclosure under section 40 and 44 of the Act.
51. With regards to talent costs and in-house programme costs information, the BBC has provided alternative arguments, without prejudice, as to the exemptions which it would seek to rely on, in the event that the Commissioner found that the derogation did not apply to this information. These were sections 40, 41, 43 in respect of talents costs, and section 43 in respect of programme costs.
52. The remainder of this decision notice will deal with the application of the relevant exemptions to each type of information requested.

Highest Earner Information:

Section 40 - Personal Information

53. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the DPA.
54. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal information as:

'...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

55. The Commissioner considers that the details of the name and salary details of the highest earner in BBC NI clearly falls within the description of personal data as defined by the DPA. This is because this information relates directly to an identifiable living individual, namely the highest earner at BBC NI.
56. The Commissioner notes that the request essentially asked for the exact salary paid to the highest earner. However, in the analysis below the Commissioner has also given consideration as to whether disclosure of the salary band within which the highest earner fell would be exempt by virtue of section 40. Therefore, the Commissioner is basically making two decisions; firstly, is disclosure of the highest earner's actual salary exempt under section 40? secondly, is disclosure of the salary band within which the highest earner falls exempt under section 40?
57. The BBC has argued that the information relating to the highest earner is exempt from disclosure because to do so would breach the first, second and sixth data protection principles.

The first data protection principle

58. The first data protection principle has two components:
1. Personal data shall be processed fairly and lawfully and
 2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
59. In considering whether disclosure of the highest earner information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:

- The highest earner's reasonable expectations of what would happen to their personal data;
 - The seniority of the highest earner within the BBC;
 - Whether the highest earner specifically refused to consent to the disclosure of the requested information;
 - Whether disclosure would cause any unnecessary or unjustified damage to the highest earner; and
 - The legitimate interests of the public in knowing the identity of the highest earner at BBC NI and their salary weighed against the effects of disclosure on the highest earner.
60. The BBC's position is that the highest earner at BBC NI would not expect any details of their salary to be disclosed for a number of reasons. The BBC has highlighted the fact that whilst its Annual Report includes the amount it has spent on wages and salaries in total, it only includes the amounts paid to the senior management board (the Executive Board) and the Board of Governors. There is therefore an understanding amongst BBC employees that unless they sit on either of the two Boards, details of their salaries will not be placed in the public domain. Furthermore, the BBC has noted that although there is no explicit commitment to keep salary information confidential, any information about an individual's salary is communicated to the individual in a letter marked 'personal' or 'staff private' and that monthly payslips are marked 'personal'. Therefore, the BBC contends that individual employees, including the highest earner falling within the scope of this request, have no expectation that details of their salary will be disclosed to the general public.
61. On the basis of the above the Commissioner accepts that the highest earner would have had an expectation that information pertaining to their BBC salary would not be placed in the public domain. However, simply because an individual has an expectation that information held about them will not be disclosed, this does not necessarily mean that this expectation is a reasonable one or that it is conclusive. The Commissioner's guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. Although the guidance acknowledges that there are no hard and fast rules, it states that:
- 'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'*
62. On the basis of this guidance the Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed under the Act.
63. This approach is supported by a recent Information Tribunal decision (*House of Commons v Information Commissioner and Norman Baker MP* EA2006/0015 and

0016). This decision involved a request for information about the details of the travel allowances claimed by MPs. In its decision the Tribunal noted that:

'where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives'. (Tribunal at paragraph 78).

64. The Commissioner also believes that a distinction can be drawn between the levels of information which junior staff should expect to have disclosed about them compared to what information senior staff should expect to have disclosed about them. This is because the more senior a member of staff is the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds.
65. The Commissioner understands that the BBC employees around 22 000 people. Within this number of employees are a number of senior managers who whilst they are responsible for making influential policy decisions and spending public funds, they are not members of either the Executive Board or the Board of Governors and therefore do not have their salaries disclosed. The Commissioner considers the highest earner at BBC NI to be such a person.
66. On the basis of the above, the Commissioner believes that such senior employees at the BBC should have the expectation that some information about their salary may be placed in the public domain and that these senior employees are not limited to those who sit on the management board. Whilst the Commissioner accepts that it may be reasonable for the highest earner at BBC NI to expect that details of the exact salary would not be disclosed, he does not accept that it is reasonable for the highest earner at BBC NI to expect that details of their salary band would not be disclosed. Such a disclosure would be consistent with disclosure of similar details by other public bodies.
67. The Commissioner understands that the highest earner at BBC NI has not explicitly refused to give their consent to the disclosure of any details relating to their salary.
68. On the basis of the above, the Commissioner is satisfied that disclosure of the highest earner's name along with the salary band within which they fell would not be unfair or unlawful.
69. In order to comply with the first data protection principle it is necessary to satisfy one of the conditions for processing in schedule 2 of the DPA. In this case the Commissioner considers that the most relevant condition is six. This states that:

'the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

70. The Information Tribunal in *House of Commons v Information Commissioner and Norman Baker MP* commented on how condition 6 should be interpreted and applied. The Tribunal found that the application of condition 6:

'involves a balance between competing interests broadly comparable, but not identical, to the balance that applies under the public interest test for qualified exemptions under FOIA. Paragraph 6 [i.e. condition 6] requires a consideration of the balance between: (i) the legitimate interests of those to whom the data would be disclosed which in this case are members of the public...and (ii) prejudice to the rights, freedoms and legitimate interests of the data subjects which in this case are MPs'. (Tribunal at paragraph 90).

71. The Tribunal also found that 'because the processing must be "necessary" for the legitimate interests of members of the public to apply we find that only where (i) outweighs or is greater than (ii) should personal data be disclosed'. Thus the burden of proof built into the public interest test that is applied to qualified exemptions is reversed. However, the Tribunal also noted that as a distinction can be drawn between information which relates to an individual's private life and an individual's public life, it suggested that 'the interests of the data subjects...are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives'. The Tribunal's approach to condition 6 has influenced the Commissioner's view in this case.
72. With regard to the effect of disclosing the salary of the highest earner, the BBC has drawn the Commissioner's attention to a number of articles in the press which contained negative comments about the salaries paid to leading presenters at BBC NI. The BBC have argued that this demonstrates that the highest earner could be subject to unwarranted and unwelcome press coverage including potentially personal and attacking material which would cause distress.
73. The Commissioner acknowledges this point. However, in relation to the argument that disclosure would lead to negative press coverage the Commissioner notes that these press articles focussed on the amounts paid to presenters at BBC NI (i.e. talent costs). However, the highest earner information does not constitute talent costs, but the salary paid to a senior salaried employee of the BBC. Therefore, as there is a distinction between the two types of the information the Commissioner does not accept that is an entirely valid comparison. Furthermore, the Commissioner believes that a distinction can be drawn between the effects of disclosure of the exact salary and effects of disclosure of the salary band within which the highest earner falls. Clearly, disclosure of exact salary would lead to a greater infringement into the privacy of the highest earner because it would reveal specific details of the person's financial situation. However, disclosure of the salary band within which they fell, particularly if it was a relatively broad salary band, would have less of an infringement into the highest earner's privacy.
74. The Commissioner has gone on to consider the legitimate interests of those to whom the data would be disclosed. The Commissioner believes that licence fee payers in Northern Ireland have a strong legitimate interest in access to information about the efficient and proper use of public money by the BBC. There

is also a legitimate public interest in openness and transparency of public bodies in relation to the amount it pays its senior managers. Given the size of an organisation such as the BBC the Commissioner does not accept that this interest is fully met by the disclosure of the salaries paid to those on the two Boards. As the Commissioner has suggested above there are clearly senior BBC employees who do not sit on the Boards but are still responsible for taking decisions involving the expenditure of significant amounts of public money.

75. After considering the above points the Commissioner has concluded that the legitimate interests of those to whom the information would be disclosed outweigh those of the data subject with regard to disclosure of the salary band within which the highest earner at BBC NI falls within. Therefore, he believes that, in this case, condition 6(1) of schedule 2 of the DPA is satisfied. Consequently disclosure of this salary band along with the name of the highest earner would not be in breach of the first principle in DPA. However, the Commissioner does accept that disclosure of the highest earner's exact salary would lead to a greater infringement of their legitimate right to privacy that is not outweighed by the legitimate interests of the licence fee payers.
76. The BBC has also argued that the disclosure of the highest earner's salary details would breach the second and sixth DPA principles.
77. The second principle of the DPA requires that personal data shall be obtained only for one or more specified and lawful purpose, and shall not be further processed in any manner incompatible with that purpose or purposes.
78. In regard to the second principle the Commissioner does not consider that disclosure of this information in response to a request under section 1 of the Act would constitute processing incompatible with the purpose for which the information was obtained.
79. The sixth principle of the Act requires that personal data is processed in accordance with the rights of data subjects under the DPA.
80. However, after examining the information concerned and the taking into account the representations of the BBC, the Commissioner is satisfied that the disclosure of the highest earner's name and their salary band would not be in breach of the sixth principle.

Section 44 – Statutory Prohibition

81. In its letter of 26 April 2006 the BBC argued that disclosure of the name and salary of the highest earner at BBC NI was also exempt under section 44(1)(b) of the Act because disclosure would be incompatible with the highest earner's right to respect for a private life under Schedule 1 of the Human Rights Act 1998 implementing Article 8 of the European Convention on Human Rights ('ECHR').
82. In considering the BBC's application of this exemption the Commissioner has been guided by the recent Tribunal decision on the case *Mrs P Bluck v Information Commissioner* (EA/2006/0090). This case involved a request from

Mrs Bluck to Epsom and St Helier University Hospitals NHS Trust for records relating to her daughter, now deceased. The Trust refused to disclose these records relying on section 41 (information provided in confidence). The Commissioner and at appeal, the Tribunal, upheld the Trust's application of section 41.

83. During the course of the appeal the Tribunal also considered the Trust's argument that disclosure of an individual's medical record was prohibited by Article 8 of the ECHR. The Tribunal noted that as it upheld the applicability of the section 41 exemption, its consideration of the section 44 exemption was somewhat academic, nevertheless it suggested that 'were we required to do so we would not be in favour of translating the general principles laid down in Article 8 into the form of a specific legal prohibition to which we believe section 44 is intended to apply'. Ultimately the Tribunal concluded that 'we do not believe that the effect of the Human Rights Act is to elevate to the level of a directly enforceable legal prohibition the general terms of Article 8.' (Tribunal at paragraph 31).
84. On the basis of the Tribunal's findings in the Bluck case, the Commissioner does not accept that disclosure of the salary band and the name of BBC NI's highest earner can be exempt on the basis of section 44 of the Act.

Talent Costs:

85. As noted above in paragraph 16, the BBC provided additional arguments, without prejudice to its view that the derogation was engaged, as to the exemptions it would rely on, in the event that the Commissioner decided that the derogation did not apply to the talent costs. These exemptions were:
- Section 40 – personal data
 - Section 41 – information provided in confidence
 - Section 43 – commercial interests

Section 40 – Personal Information

86. In considering whether the talent costs information is exempt under section 40, the Commissioner's approach has been the same as that outlined in paragraphs 53 to 59 in which he considered whether disclosure of the highest earner information was exempt under section 40.
87. As with the salary paid to the highest earner, the Commissioner is satisfied that the payments made to the talent constitute personal data because details of the financial agreements between each individual and the BBC clearly relate directly to the talent and the BBC's intentions in respect of that talent, e.g. payment of x pounds to John Daly for presenting particular shows.
88. The Commissioner understands that both Stephen Nolan and John Daly's contractual agreements with the BBC contained express confidentiality provisions which explained that each party (i.e. the BBC and the talent) would not disclose any details of the financial agreement.

89. In contrast to the above, the Commissioner understands that the BBC's contracts with Messers Quinn, McGarry and McDowell do not include express confidentiality clauses. Nevertheless, the BBC has argued that the information about the payments made to these three individuals is confidential in nature and throughout the contract negotiations all parties had a tacit understanding that the details of their respective agreements would not be disclosed to other parties.
90. The BBC has acknowledged that, strictly speaking, individuals with knowledge of talent deals are free to disclose that information, e.g. John Daly could publicly announce the details of his financial agreement with the BBC. However, the Commissioner understands that none of the individuals covered by the scope of this request have made any public comment to such an effect. Furthermore, the BBC has explained that in fact there is very little sharing of information of this kind and that this is demonstrated by the newsworthiness of leaks to the press regarding individual talent deals. The BBC argues that if such information were commonplace it would not merit the headlines that it normally does. The BBC has also noted, on occasions where details of deals have been leaked to the press the BBC has received complaints from several agents and from talent themselves about breaches of confidentiality. Therefore, set against this context of talent costs very rarely being proactively disclosed, and the circumstances in which these agreements were negotiated, the BBC believes that individuals concerned would have an expectation that details of the agreement would not be disclosed.
91. On the basis of the above, the Commissioner accepts that the talent covered by this request would have had an expectation that information pertaining to their financial agreements with the BBC would not be placed in the public domain. In reaching this conclusion the Commissioner has placed particular weight on the nature of the contract negotiations, i.e. they were confidential and therefore the BBC owed the individuals a duty of confidence, whether that duty was explicit as with Messers Nolan and Daly or implicit as with Messers Quinn, McGarry and McDowell.
92. However, as the Commissioner has discussed above, simply because an individual has an expectation that information held about them by a public authority will not be disclosed, this does not mean that this expectation is reasonable or conclusive. As the Commissioner has argued above, he believes that senior public sector employees should have an expectation that information about decisions they take may be placed in the public domain.
93. In relation to this point the BBC has argued that payments to talent and are not analogous to the salaries paid to senior employees in public sector organisations, and therefore there is a distinct difference between the amounts of money paid to the highest earner at BBC NI and the amounts paid to the presenters identified in the complainant's request. This distinction is based upon the fact that the sums paid by the BBC to talent do not relate to the performance of a public function, but rather to individuals who are contracted to provide services to the BBC in an entirely private capacity. In the BBC's view disclosure of the requested information would therefore impinge on the private lives of the relevant individuals, particularly given that in the case of talent, their work forms part and

parcel of their lives to such a degree that the professional and private aspects of their lives are often intertwined.

94. In this case, the Commissioner accepts that the talent, (i.e. Stephen Nolan et al), are not in a position to make influential policy decisions or take decisions related to the expenditure of public funds. Therefore, the Commissioner accepts that the talent will have different expectations as to what information will be disclosed about their financial agreements with the BBC than senior salaried employees at the BBC (such as the highest earner at BBC NI). Consequently, the Commissioner accepts that it was reasonable for the talent to expect that details of their financial arrangements with the BBC would not be disclosed despite the different expectations that the Commissioner believes senior salaried employees of the BBC should have with regard to disclosure of their financial arrangements with their employer.
95. In conclusion, the Commissioner is satisfied that the talent had a reasonable expectation that the BBC would not disclose details of their financial agreements with the BBC and consequently to disclose details of this agreement would be unfair. Therefore, to disclose the requested information would breach the fairness element of the first data protection principle and therefore the exemption provided by section 40(2) of the Act is engaged.
96. As the Commissioner has concluded that the talent costs information is exempt under section 40 of the Act, he has not considered whether the information is also exempt under sections 41 and 43.

In-house Programme Costs:

Section 43 - Commercial Interests

97. Section 43(2) states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.

The BBC's position

98. The BBC contends that disclosure of information relating to in-house programme costs would harm its commercial interests because disclosure of this information may result in a ratchet effect among bids from independent production companies (IPCs) for licence deals in respect of similar programmes. This is because disclosure would allow IPCs to establish the minimum level of funds which were available for a particular programme or type of programme and IPCs will then have an incentive to bid beyond that level. This will prejudice the BBC's commercial interests because it will be forced to increase what it pays for those licence deals or face losing these deals. The BBC has highlighted a number of features of the market for IPCs that substantiate this argument.
99. The BBC operates within a strict commissioning regime. This regime, as detailed in its Agreement with the Department for Culture Media and Sport (see clause 52), requires the BBC to commission at least 25% of programmes through IPCs and to ensure that at least a further 25% of programming is open to competition

between in-house production departments and IPCs (under clause 54 this is known as the Window of Creative Competition – 'WOCC'). Furthermore, under clause 50 of the Agreement the BBC has to ensure that a certain proportion of broadcast content is of particular interest to persons living in that region (e.g. Northern Ireland).

100. The BBC has explained that its commissioning process ensures that bids from in-house and independent producers will always be evaluated side by side to ensure fair decision making, i.e. in-house producers are not given an advantage over external independent producers. Therefore, a competitive market effectively exists between BBC in-house producers and IPCs when bidding for commissions from the BBC. The BBC has also explained that in-house production staff whose role it is to bid for programmes would not be privy to bid information submitted to the BBC by IPCs. Moreover, very few people outside of their own companies will have knowledge of the relevant sums and although staff moving between companies may take knowledge with them, it will be current and of limited value. In addition all information is treated as confidential within the BBC and limited to those with a need to know.
101. For these reasons, the disclosure of information relating to the budget and cost of in-house programmes by the BBC alone would have the effect of creating an informational asymmetry. The BBC has argued that it is well known that the effect of such asymmetry is to change bidding strategies and to provide relative strength to the beneficiaries of the asymmetry. In support of this argument the BBC have cited Paul Klemperer's paper on Bidding Markets (http://www.competition-commission.org.uk/our_role/analysis/bidding_markets.pdf) which illustrates that a change to the relative flow of information between participants in an auction can affect the outcome of that auction. In this case where the information relates to the final cost of an in-house production it enables IPCs to ascertain with certainty what price the BBC is willing to pay in respect of a particular programme. This knowledge would then enable IPCs to increase their bids for licence deals with the BBC in order to provide the same services.
102. In order to demonstrate the likelihood of this prejudice occurring the BBC have highlighted the fiercely competitive nature of the media and entertainment industry which means that margins on programmes are very low. Consequently, a minor adjustment in the cost of an individual programme, as a result of a ratchet effect among bids from IPCs, can have a huge and deleterious effect on the broadcaster. Moreover, the BBC has highlighted the fact that since it is funded by the licence fee and has a corresponding duty to exercise careful stewardship of public money, this places it in a difficult position. In the short-term it may well be unable to afford the increased bids from IPCs. In the long term is that the BBC suffers an outflow of programming from IPCs and a reduction in programming quality.

The Commissioner's position

103. The Commissioner believes that this argument bears some similarity to those put forward in relation to the prejudice in the Information Tribunal case *John Connor Press Associates v Information Commissioner*. In this case, the public authority,

the National Maritime Museum ('NMM'), argued that disclosure of financial information relating to the commission of a piece of art would prejudice the commercial interests of the NMM. The prejudice claim arose from the fact that the NMM's bargaining position would be compromised if other artists were aware of the commission's value in this case. The Tribunal decided that that prejudice might occur in this case but that this would depend on the nature of the information and the degree of similarity between the two transactions.

104. Having considered the circumstances of this request carefully, the Commissioner is of the view that future transactions between the BBC and production companies (either in-house or IPC) would be very similar in nature to the BBC's commissioning of the John Daly Show and that the information in question (i.e. the cost to the BBC of the John Daly Show) is key to the BBC's goal of obtaining value for money. Therefore in the Commissioner's view the argument has merit and he is satisfied that prejudice is likely.
105. A key factor in the Commissioner reaching this conclusion is the fact that the auctions for a specific commission cannot be viewed in isolation; the BBC has previously commissioned five series of the John Daly Show and may commission a further series. If the price that the BBC paid its in-house production company for producing the John Daly show was disclosed then the Commissioner accepts that IPCs would clearly not bid below the price the BBC paid for a previous series of the John Daly Show and therefore the affect of artificially inflating the winning bid as described in paragraph 98 would be created.
106. The Commissioner has also given consideration to as to whether the disclosure of the requested information would prejudice the BBC's commercial interests in the event that it decided not to commission a further series of the John Daly Show. In the Commissioner's opinion, it is likely that the BBC will commission similar productions in the future whether this similarity is based upon content (i.e. light entertainment) or regulatory framework (i.e. quotas for broadcast hours for shows in the regions). For example, the BBC could chose to commission a new prime time entertainment show for BBC NI which although different to the John Daly Show, bears sufficient similarity to make the information about the cost of the John Daly Show useful to IPCs who chose to bid for this new show.

Public interest test

- 107 Section 43 is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that information is exempt information where the public interest, in all circumstances of the case, in maintaining the exemption outweighs the public interest in disclosing the information.
108. 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 license fee. Both these objectives will be threatened if a presumption is*

created in favour of the general disclosure of information relating to licence deals...

- (ii) *...there is little public interest in the disclosure of licence deal information as this information only enables the public to take an informed view of whether the BBC is contracting with indies on a competitive basis if it is in the possession of licence deal 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.'*

109. 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 a topic;
- there is a public interest in facilitating accountability and transparency of public authorities for their decisions;

110. 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.

111. The Commissioner's view is that although there is a strong interest in understanding the way in which public money is spent it is not clear that disclosure in this case would be of significant benefit 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 content. Other PSBs are subject to the Act, specifically Channel 4 and S4C, 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 a particular value within the industry potentially exposing the BBC to commercial prejudice as identified above.

112. 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.
113. 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 about the commissioning process and fees paid by the BBC to production companies (whether in-house or IPCs). Broadly indicative tariffs are published on the BBC's website (see <http://www.bbc.co.uk/commissioning/tv/business/tariffs.shtml>).
114. 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.
115. 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.

Procedural matters

116. The complainant submitted his request on 4 January 2005 and the BBC refused to disclose the information relating to the talent costs and in-house production costs on 17 January 2005. In its refusal the BBC relied on the Schedule 1 derogation and therefore did not specify the exemptions under which it considered the information to be exempt from disclosure under the Act. As the

Commissioner has concluded that the information pertaining to talent costs and in-production costs 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 17 has occurred.

117. Section 17(1) requires that when a public authority refuses access to information it must specify in a notice to the applicant the exemptions on which it is refusing to the request and why, if not clear, those exemptions apply. Therefore a breach of section 17 occurred because the BBC failed to provide the complainant with a refusal notice citing sections 40, 41 and 43 in respect of the talent costs information and section 43 in respect of the in-house programming costs information.

The Decision

118. 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:

- the talent costs information and in-house production costs information is held by the BBC for purposes other than those of journalism, art and literature. Therefore the BBC has not dealt with these aspects of the complainant's request in accordance with Part I of the Act in that it failed to comply with its obligations under section 1(1).
- the BBC breached section 17 of the Act because it failed to provide a refusal notice explaining why it considered the talent costs and in-house production costs information exempt on the basis of the exemptions contained within Part II of the Act.
- the name of the highest earner and the salary band within which the highest earner fell are not exempt from disclosure under the Act.

119. However, the Commissioner has decided that the following aspects of the request were dealt with in accordance with the Act:

- the exact salary of the highest earner at BBC NI is exempt from disclosure under section 40.
- the talent cost information is exempt from disclosure under section 40.
- the in-house production costs information is exempt from disclosure under section 43.

Steps Required

120. The Commissioner requires the BBC to disclose the following information within 35 calendar days:
- the name of the highest earner at BBC NI at the time this request was submitted and the pay band within which this person fell.

Right of Appeal

121. 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 8th day of January 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 40(2) provides 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 (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

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).

Section 44 provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

BBC resources

2006 Royal Charter

http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/royalchartersealed_sept06.pdf

2006 Agreement with Department for Culture Media and Sport

http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/bbcagreement_july06.pdf

1996 Royal Charter

http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/BBCs_royal_charter.pdf

1996 Agreement with the Department of National Heritage

http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/Agreement.pdf

2003 Amended agreement with Department for Media Culture and Sport

http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/Amendment_to_the_Agreement.pdf