

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 March 2008

Public Authority: British Broadcasting Corporation ('BBC')
Address: Room 2252
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London
W12 7TS

Summary

The complainant submitted two requests asking for copies of Alan Yentob's charge card statement and an itemised breakdown of his expense claims for the period 2001 to 2004. The BBC provided some information in response to both requests, but withheld details of certain payments on the basis that these payments related to activities falling outside the scope of the Act. The BBC also withheld details of some payments contained on the charge card on the basis of section 40 because they related to Mr Yentob's personal expenditure.

The Commissioner has concluded that all of the information covered by the requests falls within the scope of the Act. However, the Commissioner accepts that the payments concerning Mr Yentob's personal expenditure are exempt on the basis of section 40. The Commissioner has also concluded that names of the third parties included on the expense claims are exempt on the basis of section 40. However, the Commissioner does not accept that disclosure of the other details of each payment (namely the amount of the claim, the date of the claim and a brief description of the claim) are exempt on the basis of section 43 and therefore these must be disclosed to the complainant.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). In the particular circumstances of this case, 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 sent the BBC two letters which asked for similar information about Alan Yentob's expenses.
3. The first letter included the following request:

'I would be grateful if you could inform me whether Alan Yentob has a credit card or cards which is or are paid for directly out of BBC funds.

I would be grateful for a copy of a statement of that card for 2001/02, 2002/03 and 2003/04'.
4. The second letter included the following requests:

'I would be grateful if you would let me know the total expenses claimed by Alan Yentob in each of the years 2001/02, 2002/03 and 2003/04.

I would also be grateful if you could provide me with the total expenses paid to Alan Yentob in each of the years 2001/02, 2002/03 and 2003/04. I would be grateful if you could provide me an itemised breakdown of these expenses.'
5. (For ease of reference the Commissioner has numbered these requests as follows:
 - request 1 - charge card
 - request 2 - expenses claimed
 - request 3 - expenses paid
6. On 3 February 2005 the BBC provided the complainant with a response to his requests.
7. The BBC explained that Mr Yentob's role as Director of Drama, Entertainment and CBBC involved overall responsibility for the programme production and output in his division. In this role he incurred costs that were related to programme production. The BBC explained that Mr Yentob also carried overall responsibility for relationships with talent which includes performers, writers and senior programme makers whether freelance or BBC staff members. The complainant was informed that in the BBC's opinion the Act does not apply to information related to programme output or costs involved in the management of talent.
8. With regard to request 1, the BBC explained that Mr Yentob had been provided with a charge card, not a credit card, paid directly by the BBC since July 2003. Consequently, the BBC provided the complainant with a copy of the statement for the year 2003/04. However, the BBC explained that it redacted any charges incurred in relation to activities that the BBC considered to fall outside the scope of the Act (see previous paragraph). Furthermore, the BBC explained that some

of the information on the card statements related to Mr Yentob's personal expenditure that was not claimed from the BBC. The BBC explained it considered such information exempt from disclosure on the basis of section 40 of the Act and therefore such payments on the card statement had been redacted.

9. With regard to request 2 although the BBC provided the complainant with the total of value of expenses claimed by Mr Yentob for each of the three financial years, these totals excluded any expenses incurred in relation to activities with the BBC considered to fall outside of the Act. Similarly, with regard to request 3 the BBC provided the complainant with the total value of expenses paid in each of the three years, but excluded any expenses incurred in relation to activities which the BBC considered to fall outside the scope of the Act. The BBC also provided a breakdown of the expenses paid which it considered to fall within the scope of the Act.
10. In its response the BBC noted that there were two discrepancies between the expenses claimed and the expenses paid, one in the expenses of 2001/02 and one in the expenses of 2002/03. The BBC explained that both discrepancies related to membership of broadcast industry bodies which it was subsequently clarified were not claimable and therefore not paid.
11. On 5 February 2005 the complainant contacted the BBC and asked it to review its decision to withhold some of the information he had requested.
12. The BBC informed the complainant on 11 March 2005 that it had reviewed its original decision and concluded that it had been correct to refuse to disclose some of the information on the basis of the derogation and that it had also been correct to refuse to disclose some of the information on the basis of section 40.
13. On 17 May 2006 the BBC made an additional disclosure of information to the complainant in relation to the expenses requests. The BBC informed the complainant that although it believed that such information fell outside the scope of the Act, it was prepared to disclose to him the total amount of expenses incurred in relation to activities covered by the derogation. However, the BBC did not provide the complainant with a breakdown of these expenses.

The Investigation

Scope of the case

14. The complainant contacted the Commissioner on 18 March 2005 to complain about the BBC's handling of his request. The complainant asked the Commissioner to review both the BBC's decision on the derogation and its application of section 40 in relation to the information redacted from the charge card statement.

Chronology

15. The Commissioner contacted the BBC on 23 May 2005 and asked for a copy of the information withheld from the complainant. The Commissioner also invited the BBC to provide further arguments to support its position that some of the requested information was covered by the derogation and that some of the information was exempt on the basis of section 40.
16. The BBC provided the Commissioner with a response on 29 June 2005.
17. On 1 November 2006 the Commissioner wrote to the BBC and explained that he believed that some of the expenditure items included on both the charge card statements and expenses statements were not covered by the derogation.
18. With regard to the payments detailed on the expense statements the Commissioner suggested that they could be classified into a number of themed categories, namely:
 - (a) theatre and cinema visits designated as research
 - (b) meeting on potential recruitment
 - (c) meetings on staff issues
 - (d) courier costs
 - (e) gifts to talent
 - (f) meetings on industry issues
 - (g) equipment for office
 - (h) taxi fares.
19. The Commissioner therefore asked the BBC to provide, without prejudice to its position on the derogation, any exemption arguments that it may wish to rely on should the Commissioner conclude that the derogation did not apply to the information contained on the charge card statement and expense claims.
20. The BBC responded to the Commissioner on 6 December 2006 and provided, without prejudice to its position on the derogation, arguments to support its position that information on the charge card statement was exempt from disclosure on the basis of either section 40 or section 43 of the Act.
21. The BBC also explained, with reference to the various categories listed above, why it considered the information contained on the expense sheets to be exempt on the basis of either section 40 or section 43.
22. However, the BBC also informed the Commissioner that it had now concluded that the information falling within the categories (d) – courier costs and (g) – equipment for office fell within the scope of the Act and that it was prepared to disclose this information to the complainant.

Findings of fact

23. As is noted in paragraph 10 above, apart from two discrepancies, the amount of expenses claimed by Mr Yentob equalled the amounts of expenses paid to Mr

Yentob. Therefore, the information falling within the scope of requests 2 and 3 is in essence the same information.

24. Although the BBC informed the Commissioner in its letter of 6 December 2006 that it was prepared to disclose the expenses relating to couriers and office equipment to the complainant, the Commissioner is not sure as to whether this information was in fact disclosed. Therefore, the Commissioner has included in the steps to take section of this notice an order for the BBC to disclose information falling within these two categories.

Analysis

The Schedule 1 derogation

25. 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).
26. 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.
27. In this case the requested information that the BBC believes is covered by the derogation is the information about costs incurred by Mr Yentob in relation to programme expenditure and costs incurred by Mr Yentob in relation to the management of talent. (For ease of reference, the Commissioner will refer to these as 'production costs' and 'talent management costs').

The BBC's view

28. 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 information such as production costs and talent management costs) is not in itself journalism, art or literature, this financial information is part of the production process and therefore has an obvious impact on creativity.
29. 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.’

30. In summary, the BBC’s position is that production cost information and talent management costs 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

31. The Commissioner has noted the arguments put forward by the BBC.
32. 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.
33. The Commissioner accepts that details of production costs and talent management costs support 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.
34. 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.
35. 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 requests 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.

36. 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...”*
37. 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.
38. 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.
39. 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.
40. Production costs and talent management costs both constitute financial information and therefore serve a number of purposes in addition to that accepted

- by both the BBC and the Commissioner, i.e. they support the creation of programme content.
41. 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.
 42. In this case the Commissioner considers that this 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 enabled the BBC to predict with some certainty the future costs of producing programmes in-house.
 - (iv) It contributed to meeting the BBC's obligations to publish annual accounts.
 - (v) 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.
 43. The final factor which the Commissioner has weighed in coming to a decision on whether the derogation applies is whether the decision on the production costs of the programmes and the costs of managing talent constitute creative decisions.
 44. 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.
 45. As such, the Commissioner does not consider that the requested information constitutes a creative decision.
 46. After carefully balancing these competing purposes, the Commissioner finds that the information about production costs and talent management costs 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 this information and the BBC is a public authority with regard to this information.

Exemptions

Request 1 - Charge card statements

Section 40 - Information about Mr Yentob's personal expenditure

47. The Commissioner understands that it is BBC policy to allow personal expenditure to be charged to corporate credit and charge cards when this personal expenditure is associated with business expenditure. This personal expenditure is then repaid by the cardholder. The Commissioner has established

that there are a number of such items on Mr Yentob's charge card statement for 2003/04. The BBC has argued that this information is exempt on the basis of section 40 because disclosure would be unfair and therefore breach the first data protection principle.

48. 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.'*

49. The Commissioner accepts that the payments accrued on the charge card relating to personal expenditure fall within the description of the personal data as defined by DPA because it is information which relates directly to a living individual, i.e. Mr Yentob.

50. 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.

51. In considering whether disclosure of personal expenditure items on the charge card statement would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken into account the following factors:

- Mr Yentob's reasonable expectations of what would happen to his personal data;
- Mr Yentob's seniority within the BBC;
- Whether disclosure would cause any unnecessary or unjustified damage to Mr Yentob; and
- The legitimate interests of the public in knowing the details of Mr Yentob's personal expenditure on his charge card weighed against the effects of disclosure on Mr Yentob.

52. Furthermore, the Commissioner's guidance suggests that when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the third party.

53. With regard to the specifics of this case, the Commissioner considers the point in the previous paragraph to be particularly relevant. As has been established above, although the charge card is a company one registered to the BBC, and is

primarily designed to be used for paying for goods and services Mr Yentob procures in his official role at the BBC, Mr Yentob is also entitled to use the card for items of personal expenditure. In the Commissioner's opinion the first use of the card can be correctly classed as relating to Mr Yentob's public life and the second use of the card can correctly classed as relating to Mr Yentob's private live. In effect, for the items relating to personal expenditure, Mr Yentob used the charge card as if it is was his own personal debit or credit card.

54. Consequently, the Commissioner accepts that Mr Yentob would have a reasonable expectation that details of personal payments on the BBC charge card would not be disclosed.
55. The Commissioner's guidance on section 40 makes it clear that a distinction should be drawn between the types of personal data released about senior employees compared to more junior officials. 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. With regards to the specifics of this case, it is clear that Mr Yentob held a very senior role within the BBC; for the period covered the request he was a Director with overall responsibility for programme making in three areas, Drama, Entertainment and CBBC. However, as the Commissioner has discussed above, the payments relating to Mr Yentob's personal expenditure concern his private rather than his public life and therefore in the circumstances of this case the Commissioner does not consider Mr Yentob's seniority to be a significant factor when assessing fairness.
56. As is outlined above, for third party personal data to be disclosed under the Act, disclosure not only has to be fair and lawful but also has to meet one of the conditions for processing in schedule 2 of the DPA. In this case the Commissioner believes 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.'

57. The Information Tribunal in *House of Commons v Information Commissioner and Norman Baker MP* (EA/2006/0015 and 0016) 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).

58. 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.
59. The Tribunal’s approach to condition 6 has influenced the Commissioner’s view in this case. The Commissioner accepts that there is a legitimate interest in licence fee payers being reassured that senior employees at the BBC are using the expenses privileges awarded to them appropriately.
60. However, the Commissioner believes that these issues must be weighed against the following factors: As the Commissioner has noted above he is satisfied that this information can be correctly described as relating more to Mr Yentob’s private, rather than public life, and that he has reasonable expectation that such information would not be disclosed. Consequently, if this information was disclosed it would have a similar infringement into Mr Yentob’s privacy as if statement relating to his personal bank cards had been disclosed.
61. On the basis of the above the Commissioner is satisfied that disclosure would be unfair and breach the first data protection principle. Furthermore, in this case the Commissioner believes that the interests of those to whom the data would be disclosed (i.e. the general public) do not outweigh those of Mr Yentob and therefore a condition in schedule 2 of the DPA is not met.

Section 43 - Non-personal expenditure that the BBC also considers to be exempt

62. The BBC believes that the information contained on the charge card statement that relates to specific programmes costs is exempt on the basis of section 43. In order to support this position the BBC has provided the Commissioner with a very brief explanation of how disclosure would harm the BBC’s commercial interests and why the public interest favoured withholding this information:

‘Disclosure of the information about the cost of programmes would put the BBC at a disadvantage to its commercial rivals. The existence of a competitive broadcasting market is in the public interest. The BBC’s commercial activities are supportive of and consistent with its public service broadcasting functions and are ultimately regulated through the Competition Act. If the FOI Act allowed commercial broadcasters access to financial information about programmes, this would be likely to have an unacceptable impact on the competitive broadcasting market’.

63. In the Commissioner’s opinion this explanation fails to demonstrate exactly how the BBC’s commercial interests will be prejudiced if the information contained on the charge card statement was disclosed; basically, what is the ‘unacceptable impact’ that the BBC argues will occur? Furthermore, in the Commissioner’s opinion, the BBC has also failed to clearly explain or offer any evidence to demonstrate how likely it is that this prejudice will occur.

64. The Commissioner acknowledges that in similar cases where the BBC has relied upon the derogation and cited section 43 as an alternative argument to withhold production costs information, the reasoning provided by the BBC to support its application of section 43 is more detailed (see case FS50067416, paragraphs 98 to 102). In summary these arguments focus on what the BBC describes as a ratchet effect that will occur if the BBC discloses information about its programmes costs and programme budgets. This argument suggests that if independent production companies ('IPC's) who submit bids to the BBC to produce programmes were aware of the minimum level of funding available for certain programmes, then these IPCs will have an incentive to increase the price of their future bids and therefore the BBC will be forced to be an increase amount to secure these programmes.
65. The Commissioner has considered these arguments at length in earlier decision notices. In these decision notices, the Commissioner has, in general, tended to accept that disclosure of information about the total cost or budget of a particular programme may prejudice the BBC's commercial interests. However, in these decision notices, the Commissioner has also suggested that, in general, he does not believe that disclosure of costs of the component parts of a particular programme would, or would be likely to, prejudice the BBC's commercial interests.
66. The Commissioner has taken into account his findings in these earlier cases in assessing the BBC's application of section 43 in this case. The costs detailed on the charge card statements are relatively very small compared to the overall cost of a programme's total cost. Consequently, the Commissioner does not accept that independent production companies or rival commercial broadcasters would be able to infer with any accuracy, the total cost or budget for a particular type of programme if these the payments on the charge card statement were disclosed.
67. Therefore, the Commissioner does not believe that the BBC has managed to provide sufficient evidence to demonstrate that their commercial interests would, or would be likely to be, harmed by disclosure of this information. Consequently, the Commissioner does not accept that information contained on the charge card statements detailing the costs incurred in relation to programme costs are exempt by section 43(2).
68. In summary then, the Commissioner believes that the charge card statements should be disclosed in full with the only information being redacted being details of those payments which relate to Mr Yentob's use of the card for personal expenditure.

Request 2 and 3 – Expenses statements

(a) Expenses related to theatre and cinema visits designated as research

(h) Taxi fares

69. The BBC has explained that the costs incurred in relation to these two categories form part of programme budgets and are therefore exempt from disclosure on the basis of section 43(2) because disclosure would prejudice the BBC's commercial

interests. In order to support this position, the BBC referred the Commissioner to the arguments it had relied upon to support its position that payments contained on the charge card which formed part of programmes budgets were exempt from disclosure (see paragraph 62 above).

70. As the Commissioner has explained above at paragraphs 63 to 67, he does not accept that the BBC has provided sufficient evidence to demonstrate that the disclosure of information relating to programme budgets on the charge card statements would, or would be likely to, prejudice the BBC's commercial interests. For the reasons discussed above he does not accept that disclosure of the payments falling within categories (a) and (h) would, or would be likely to, prejudice the BBC's commercial interests and therefore these payments are not exempt on the basis of section 43(2).

(b) Meetings on potential recruitment

71. The expenses statements contain a number of costs incurred by Mr Yentob in relation to meetings with individuals who may be involved with the BBC's future programmes or strategy. The BBC has argued that disclosure of this information would reveal important information about the BBC's potential recruitment strategy putting the BBC at a disadvantage to its rivals. It could also enable competitors to headhunt staff that the BBC is interested in recruiting ultimately resulting in the BBC finding it difficult to attract the best individuals in this field. The BBC therefore believes that disclosure of this information is exempt under section 43(2).
72. The BBC has also argued that the names of these individuals who met Mr Yentob are exempt under section 40(2) of the Act because these individuals would not expect to have details of their meetings with Mr Yentob disclosed to the public and to do so would be unfair and breach the first data protection principle. The BBC suggested that disclosure could also lead to an individual's current employer becoming aware, against the individual's wishes, that the individual has met BBC staff in relation to recruitment at the BBC.
73. With regard to the names of the individuals Mr Yentob met, the Commissioner accepts that these individuals would have a reasonable expectation that the fact they met with Mr Yentob would not be placed in the public domain. At the time of these meetings they were obviously not employed by the BBC (the nature of the meetings being discussions with *potential* employees) and therefore they would not have expected information about them, and decisions they took, would be disclosed as employees of public authorities would do. Therefore the Commissioner accepts that disclosure of these individuals' names would constitute an unfair infringement of these individual's private lives and therefore disclosure would be unfair. Consequently, the Commissioner is satisfied that the names of the individuals are exempt on the basis of section 40(2).
74. The remaining information relating to these payments consists of the date of the expense claim, a brief description of the claim (e.g. whether the expense related to a meal, meeting room, hospitality costs etc), and the amount of the claim. The Commissioner recognises that the BBC's commercial interests could be

prejudiced if information was disclosed that revealed key details of such a strategy. However, the Commissioner fails to see how disclosure of this information would reveal key details of the BBC's recruitment strategy, particularly because as explained in the previous paragraph, the Commissioner is satisfied that the names of the individuals that Mr Yentob met should be withheld. Disclosure of the remaining information would simply provide a list of costs involved in a recruitment strategy and very brief description of how these costs were incurred.

75. Therefore, the Commissioner is not satisfied that this information is exempt on the basis of section 43(2).

(c) Meetings on staff issues

76. In recent correspondence with the Commissioner, the BBC maintained its position that expenses incurred in relation to staff issues fell within the scope of the derogation and did not advance any arguments in the alternative to support a position that this information was exempt from disclosure on the basis of the exemptions contained in Part II of the Act.

(e) Gifts to talent

77. The BBC has argued that this information related to gifts provided to external individuals (i.e. not BBC employees) who appeared in BBC productions. In line with the arguments advanced under section (b), the BBC has also argued that disclosure of the individuals' names would breach section 40(2) of the Act because the individuals involved would not expect to have details of the gifts they had received disclosed under the Act.
78. The BBC has also argued that disclosure of this information would be exempt on the basis of section 43(2). In support of this position the BBC has explained that although the amounts involved are relatively small, the purchases of such gifts for talent is an integral part of industry practice to attract the best ideas and people, and it would significantly disadvantage the BBC if it was unable to offer discretionary small gifts to talent in confidence. This, the BBC argue, would impact its ability to attract the best talent and therefore produce the best output and value for money for the licence fee payer.
79. As with the BBC's application of section 40 to information falling within category (b), the Commissioner accepts, for reasons discussed in paragraph 74, disclosure of the names of the recipients of the gifts is exempt under section 40(2) of the Act.
80. The Commissioner does accept the logic of the BBC's argument that if it was not able to give such gifts in confidence its commercial interests may be harmed. However, given that the Commissioner is satisfied the names of the recipients of such gifts should not be disclosed the Commissioner does not accept that disclosure of the remainder of the information would impinge on any confidence. The remaining information simply consists of the date of the expense, the amount of the expenses and a very brief description of the expense. It would not be

possible for the public to establish who these individuals were who received these gifts and therefore no confidence would be undermined by disclosure of this information.

81. Therefore, the Commissioner does not accept that the remainder of the information relating to the gifts expenses (i.e. the amount spent, the date of the transaction and a very brief description of the expense) is exempt from disclosure on the basis of section 43(2).

(f) Meetings on industry issues

82. The BBC has explained that meetings listed under this heading were at a more strategic level than those listed under (c). The BBC argued that disclosure of the details of these meetings is exempt under section 43(2) because this information would reveal important information about the BBC's potential programme schedule, strategy and direction to commercial competitors, putting the BBC at a disadvantage to its rivals. It would also discourage industry figures from outside of the BBC from meeting with BBC staff as the disclosure of information about these meetings could also put the organisation of those industry figures at a competitive disadvantage.
83. The BBC also argued that disclosure of the names of the individuals with whom Mr Yentob met are exempt under section 40(2) because these individuals would not expect to have details of their meeting with Mr Yentob disclosed, including the fact they met him at all.
84. With regard to the names of the individuals, for the reasons the Commissioner has discussed above (paragraph 73), he accepts that these names are exempt from disclosure on the basis of section 40(2).
85. With regard to the application of section 43(2) the Commissioner does not accept that disclosure of remaining information contained on the expense sheets would reveal anything significant about the BBC's potential programme schedule, strategy and direction to commercial competitors. The withheld information simply details the amount of the transaction, the date of the transaction and an indication of how the expense was incurred (e.g. meeting room, drinks, meal etc). The Commissioner does not accept that disclosure of such would reveal important details of any future strategy as the BBC has argued and therefore the information is not exempt from disclosure on the basis of section 43(2).
86. In summary, the Commissioner accepts that the names of the individuals that Mr Yentob met to discuss recruitment issues, the names of the individuals who received gifts and the names of the individuals that Mr Yentob met to discuss industry issues are all exempt on the basis of section 40(2) of the Act.
87. However, the Commissioner is not satisfied that the remaining information contained on the expense statement, namely the date of each claim, a very brief description of each claim and the amount of each claim is exempt on the basis of section 43(2).

Procedural matters

88. The complainant submitted his requests on 4 January 2005 and the BBC refused to disclose the information it considered to be covered by the derogation on 3 February 2005. As the BBC relied on the derogation to withhold this information, it 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 this information is not covered by the Schedule I derogation and therefore falls within the scope of the Act, he must conclude that technically a breach of section 17 has occurred.
89. Section 17(1) requires that when a public authority refuses access to information it must specify in a notice to the applicant the exemptions upon which it is relying to refuse to answer 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 section 40 and 43.

The Decision

90. The Commissioner's decision is that the public authority failed to deal with the following elements of the complainant's request in accordance with the Act:
- The requested information, which the BBC initially considered to be covered by the derogation, is held by the BBC for a dominant purpose other than that of journalism, art or literature. Therefore, the BBC has not dealt with the complainant's request in accordance with Part I of the Act in that it failed to comply with its obligations under section 1(1) of the Act.
 - The BBC breached section 17 of the Act because it failed to provide the complainant with a refusal notice explaining that it considered some of the requested information to be exempt on the basis of section 40 or section 43 of the Act.
 - The BBC was incorrect to withhold details of payments contained on the charge card statements relating to programme costs on the basis of section 43.
 - The BBC was incorrect to withhold the dates, amounts and descriptions of the payments contained on the expenses statement on the basis of section 43.
91. However, the Commissioner has also decided that the following elements of the request were dealt with in accordance with the Act:
- The BBC was correct to withhold on the basis of section 40(2) details of the payments contained on the charge card statement relating to Mr Yentob's personal expenditure.

- The BBC was correct to withhold the names of the various third parties mentioned on Mr Yentob's expenses statement on the basis of section 40(2).

Steps Required

92. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The BBC should disclose to the complainant details of the payments listed on the charge card statement not previously disclosed (except for payments relating to Mr Yentob's personal expenditure). The Commissioner believes that the BBC should also redact the overall total of expenses incurred on the charge card; if this is not removed it would be possible to establish the total Mr Yentob spent on the personal expenditure.
 - The BBC should disclose to the complainant complete copies of the expenses statements with the only information redacted being the names of third parties.

Failure to comply

93. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

94. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 10th day of March 2008

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

The Freedom of Information Act 2000

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 17(1) provides that -

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

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

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 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).

The Data Protection Act 1998

Part I

- 1) In this Act, unless the context otherwise requires—

“personal data” means 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 intentions of the data controller or any other person in respect of the individual;

Schedule 1

The first principle states that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.
2. The processing is necessary— (a) for the performance of a contract to which the data subject is a party, or (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the data subject.
5. The processing is necessary—
 - (a) for the administration of justice
 - (b) for the exercise of any functions conferred on any person by or under any enactment
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. — (1) 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.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

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