

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17 March 2008

Public Authority: British Broadcasting Corporation ('BBC')
Address: Room 2252
2nd Floor
BBC White City
201 Wood Lane
White City
London
W12 7TS

Summary

The complainant requested details of the BBC's financial agreements with both Graham Norton and Malcolm Young. The BBC refused to disclose this information on the basis that it was held for the purposes of journalism, art or literature. Having considered the circumstances of this case the Commissioner has concluded that the BBC misapplied the Schedule 1 derogation and that this information falls within the Act. However, the Commissioner has concluded that details of Mr Norton's agreement are exempt from disclosure on the basis of section 40 of the Act. Furthermore, the Commissioner has also concluded that details of Mr Young's agreement with the BBC are exempt from disclosure on the basis of section 40, the only exception being the salary band within which Mr Young's salary fell.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). In the particular circumstances of this complaint, this duty also includes making a formal decision on whether the BBC is a public authority with regard to the information requested by the complainant. This Notice sets out his decision.

The Request

2. On 1 March 2005 the complainant submitted the following request to the BBC:

'I would be grateful if you could send me details of Malcolm Young's pay package for three years prior to his resignation, announced on the 28 September 2004, from his position as Controller of Continuing Drama Series.

I would be grateful if you could send me a copy of his contract, including terms and conditions of pay increases or bonuses'.

3. On the same day the complainant also submitted a similar request in relation to Graham Norton:

'I would be grateful if you could send me details of the financial agreement between the BBC and Graham Norton.

I would be grateful if you could send me a copy of Mr Norton's contract, including the terms and conditions of payments'.

4. On 4 April 2005 the BBC informed the complainant that both of his requests fell outside the scope of the Act because information about BBC programmes, content and their production is not covered by the Act:

'Schedule 1 of the Act says that the BBC, Channel 4 and S4C are covered in respect of information held for purposes other than those of journalism, art or literature. This derogation effectively excludes information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities.'

The Investigation

Scope of the case

5. On 5 April 2005 the complainant contacted the Commissioner to complain about the BBC's handling of his request. The complainant argued that the BBC had incorrectly concluded that the information he had requested fell within the scope of the derogation.

Chronology

6. On 4 October 2005 the Commissioner contacted the BBC and asked it to provide further arguments to support its position that the requested information did not fall within the scope of the Act.
7. The BBC responded to this letter on 3 November 2005 and provided further arguments to support its position that the requested information was derogated, i.e. it was held not held for purposes other than journalism, art and literature. The BBC suggested to the Commissioner that if he concluded that the information fell within the scope of the Act, it believed that the information would be exempt on

- the basis of section 43 because disclosure would prejudice the BBC's commercial interests.
8. On 3 January 2007 the Commissioner contacted the BBC again and asked to be provided with a more detailed explanation as to the exemptions it would seek to rely on should the Commissioner conclude that the requested information fell within the scope of the Act.
 9. The Commissioner received a response from the BBC on 14 February 2007. In this letter the BBC explained, without prejudice to its position that the requested information was derogated, that it also considered the requested information to be exempt from disclosure on the basis of section 40 and section 43 of the Act.
 10. On 17 September 2007 the Commissioner asked the BBC to clarify a number of issues in relation to the exemptions the BBC considered to apply to the request about Mr Young.
 11. The BBC provided the Commissioner with a response on 21 February 2007.

Analysis

The Schedule 1 Derogation

12. 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.
13. 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.
14. In this case the complainant's request was for information which the BBC refers to as 'talent costs', i.e. the amount of money paid by the BBC to Mr Norton and 'creative leadership costs'. i.e. the amount of money paid by the BBC to Mr Young.

The BBC's view

15. 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 and creative leadership 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.

16. 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*, FS50133791 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 of the *Sugar* decision notice to the Information Tribunal (EA/2005/0032). 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.'

17. In summary, the BBC's position is that the requested 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

18. The Commissioner has noted and considered the arguments advanced by the BBC.

19. 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.

20. The Commissioner accepts that the amount of money paid to both Mr Norton and Mr Young 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.

21. 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.

22. 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 (1 March 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. Therefore, the Commissioner has considered both Charters in order to determine for what purpose the requested information is held by the BBC.
23. The Commissioner has noted the following provisions in the 1996 Charter:
- (a) Article 7 (1) 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..."
 - (b) Article 16 (1) states that the BBC is authorised, empowered and required to "collect the Licence Revenue and to receive all funds which may be paid by [the] Secretary for State...and to apply and administer such funds in accordance with the terms and conditions...attached to the grant"
 - (c) 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..."
24. 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 functions include the operational management of the BBC and the conduct of the BBC's operational financial affairs. Furthermore, the Commissioner also understands that under the 2006 Charter the role of the BBC Trust includes:
- (i) assessing the performance of the Executive Board in delivering the BBC's services and activities and holding the Executive Board to account for its performance;
 - (ii) representing the interests of licence fee payers and exercising rigorous stewardship of public money; and
 - (iii) ensuring that the Executive Board conducts the BBC's operational financial affairs in a manner best designed to ensure value for money.

25. 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.
26. In the Commissioner's view, failure by the BBC to hold talent and creative leadership cost information would have a prejudicial effect on the ability of the Governors and Executive Board to perform their respective functions and operational duties under the Charters.
27. The Commissioner also considers that if the BBC failed to hold information related to business costs this practice would also be incompatible with the most basic business and accounting practices and would adversely affect the administrative, business and financial operations of the BBC.
28. The Commissioner is therefore satisfied that the requested information is held by the BBC for multiple purposes. 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.
29. The Commissioner considers that the ultimate purpose of the derogation is to protect journalistic, artistic and literary integrity by carving out a creative and journalistic space for programme makers to produce programmes free from the interference and scrutiny of the public. While he acknowledges the BBC's view that the information required for the purposes of Schedule 1 does not necessarily need to be journalistic, artistic or literary in nature, it is his view that such information should have the necessary journalistic, artistic or literary application to justify its status as being held for the dominant purpose of Schedule 1.
30. The Commissioner does not believe that talent and creative management cost information possesses enough journalistic application to enable it to be held for a dominant journalistic purpose. Although he acknowledges that the requested information was generated by the need to hire a presenter for BBC shows, and a senior manager to help develop future shows, and that these are creative purposes, the Commissioner considers that the reasons that the information continued to be held by the BBC are essentially ones of financial management. The Commissioner believes that such information is central to the operational heart of the BBC's policies, strategies and allocation of resources and the prejudicial consequences of not holding this information support the view that the requested information is held for the dominant purpose of the BBC's operations, rather than one of the purposes of Schedule 1.
31. Therefore, the Commissioner considers the BBC to be a public authority with regard to this information.

Exemptions

32. As noted in paragraph 9, the BBC provided additional arguments, without prejudice to its view that the derogation was engaged, as to the exemptions which it would seek to rely on, in the event that the Commissioner found that the derogation did not apply in this case. These were:
- Section 40 – Personal data.
 - Section 43 – Commercial interests.
33. The Commissioner has considered in turn how these arguments apply to each of complainant's requests.

Graham Norton request

Section 40

34. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA). (The relevant sections of section 40 are included in the legal annex attached to this notice).
35. 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 intentions of the data controller or any persons in respect of the individual”
36. The Commissioner is satisfied that the requested information consists of personal data as defined by the DPA. This is because the financial agreement that Mr Norton entered into with the BBC is clearly data which relates directly to him and includes indications of the BBC's intentions in respect of Mr Norton, e.g. payment of x pounds for presenting particular shows.

The first data protection principle

37. The first data protection principle requires that the processing of personal data should be fair and lawful and that personal data should not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.
38. In correspondence with the Commissioner, the BBC has argued that disclosure of the information would breach the first data protection principle because disclosure

would be both unfair and unlawful and furthermore, none of the conditions in Schedule 2 of the DPA can be met.

39. In order to make a decision as to the applicability of section 40 in this case the Commissioner has focused on whether disclosure of the information would be unfair.
40. The Commissioner's guidance on section 40 notes that the concept of fairness is not easy to define. However, the guidance suggests that the sort of issues which should be considered when establishing whether it would be unfair to pass on information without the consent of the data subject would include:
 - Would the disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
 - Would the third party expect that his or her information might be disclosed to others?
 - Has the person been led to believe that his or her information would be kept secret?
41. The BBC has explained that the agreement between the BBC and Mr Norton contains an express confidentiality provision whereby the BBC undertakes not to disclose any information relating to the terms of the contract.
42. The BBC has acknowledged that, strictly speaking, individuals with knowledge of talent deals are free to disclose that information, e.g. Mr Norton could publicly announce the details of his financial agreement with the BBC. However, the Commissioner understands that in this case Mr Norton has not 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 that 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 particular circumstances in which this agreement was negotiated, the BBC believes that Mr Norton would have an expectation that details of the agreement would not be disclosed.
43. On the basis of the above, the Commissioner accepts that Mr Norton would have had an expectation that information pertaining to his financial agreement 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 the contract contained express confidentiality obligations.
44. However, simply because an individual has an expectation that information held about them by a public authority will not be disclosed, this does not necessarily mean that the expectation is a **reasonable** one. The Commissioner's guidance notes suggest that when considering what information third parties should expect

to be disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. The guidance accepts that although there are no 'hard and fast rules':

'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.'

45. On the basis of this guidance the Commissioner considers that senior public sector employees should expect information about their roles and the decisions they take to be disclosed under the Act. The Commissioner also considers that senior officials in public authorities should expect details of their salary bands to be disclosed because senior officials are paid out of public funds commensurate with their level of responsibility.
46. 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).

47. In the BBC's view however payments made to talent are not analogous to the salaries paid to senior employees in public sector organisations. This is because 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.
48. The Commissioner is persuaded by the BBC's argument that a direct comparison between the amounts paid to talent and the salaries paid to senior employees of public authorities is flawed. The Commissioner accepts that talent, in this case Mr Norton, is not in a position to make influential policy decisions or take decisions related to the expenditure of public funds. Therefore, the Commissioner accepts that Mr Norton will have different expectations as to what information will be disclosed about his financial agreement with the BBC than senior salaried employees at the BBC. Consequently, the Commissioner accepts that it was reasonable for Mr Norton to expect that details of his financial arrangement 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.

49. In conclusion, the Commissioner is satisfied that Mr Norton had a reasonable expectation that the BBC would not disclose details of his financial agreement 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.
50. Although the BBC applied more than one exemption to the requested information, as the Commissioner has found that the section 40 exemption has been correctly applied he has not considered the application of section 43.

Malcolm Young request

Section 40

51. The BBC has also argued that disclosure of information about Mr Young's financial agreement with the BBC would be unfair and therefore breach the first data protection principle and therefore is exempt from disclosure on the basis of section 40(2). In order to support this position the BBC has advanced similar arguments to those it relied upon to argue that details of Mr Norton's financial details were exempt under section 40(2).
52. In order to consider the BBC's application of section 40 to this request, the Commissioner has sought clarification from the BBC as to Mr Young's role at the BBC.
53. The BBC has explained that despite an extensive search it was unable to locate a job description for Mr Young and therefore it seems likely that a formal job description did not exist for his position as Controller of Continuing Drama. However, the BBC was able to explain that Mr Young's role was a creative and editorial post, with the emphasis placed upon audience and critical response to the BBC's drama series. In particular he was responsible for "Eastenders" and "Casualty" and took the creative lead in "Holby City" and "Doctors".
54. The BBC has explained that Mr Young did have line management responsibilities for the producers of these programmes and for some administrative staff along with responsibility for the distribution of the budget between programmes falling within his 'Continuing Drama' mandate. However, the BBC has noted that the various Channel Controllers had the final say on the level of the overall budget for continuing drama programmes and Mr Young would have had to argue for any additional monies. Finally, the BBC has explained that Mr Young's role was one which was solely creative and did not involve making public policy decisions.
55. The Commissioner notes that this request specifically asked for details of Mr Young's exact salary. However, in the analysis below the Commissioner has also given consideration to whether disclosure of the salary band within which Mr Young fell would be exempt by virtue of section 40. Therefore, the Commissioner is essentially making two decisions; firstly, is disclosure of Mr Young's exact salary exempt on the basis of section 40 and secondly, is disclosure of the BBC salary band within which Mr Young's salary fell exempt on the basis of section 40.

56. In relation to this point, the BBC has explained that Mr Young's salary was individually negotiated; however, his remuneration did fall within a specific senior manager pay band.
57. In the Commissioner's opinion a distinction can be drawn between the application of section 40 to Mr Norton's financial agreement and that of Mr Young. Mr Young, unlike Mr Norton, was a salaried employee of the BBC, albeit one whose salary was individually negotiated.
58. As the Commissioner has noted above in paragraph 45, his guidance on section 40 suggests that senior public sector employees should expect information about their roles and the decisions they take to be disclosed under the Act. Therefore, in the Commissioner's opinion, senior employees at the BBC should have the expectation that some information about their salary may be placed in the public domain.
59. The BBC has explained that members of the BBC management board do have details of their salaries disclosed. However, the Commissioner understands that the BBC employs around 22,000 people. Within this body of employees are a number of senior managers who whilst they are responsible for making influential policy decisions and/or 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.
60. The Commissioner considers Mr Young to be such a person. This is because although he was not in a position to make influential policy decisions, Mr Young was in control of significant amounts of public money. Moreover, although his role was a creative, rather than operational, one the creative decisions he took had significant implications for the BBC, e.g. the decision to launch programmes such as "Holby City" and "Doctors".
61. Therefore, whilst the Commissioner accepts that it may be reasonable for Mr Young to expect details of his exact salary and financial agreement with the BBC not to be disclosed, he does not accept that it is reasonable for Mr Young to expect that details of the salary band within which he fell would not be disclosed.
62. On the basis of the above the Commissioner is satisfied that the disclosure of the BBC salary band within which Mr Young's salary fell would not be unfair.
63. 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.'

64. 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).
65. 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.
66. The BBC has not provided the Commissioner with any specific arguments as to how the disclosure of Mr Young’s salary details may prejudice his legitimate interests beyond suggesting that this would constitute an unfair infringement because he would not be expected to have this information to be disclosed. (This is in contrast, for example, to decision notice FS50085710 in which the BBC cited specific newspaper articles containing negative comments about the salaries paid to leading presenters at BBC NI. The BBC suggested that this was clear evidence that disclosure of information about its financial agreements with talent could lead to unwarranted and unwelcome press coverage which may include potentially personal and attacking material about the talent in question.)
67. In the Commissioner’s opinion licence fee payers 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 they pay their employees, in particular their 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 and responsibility for taking major creative and editorial decisions, such as Mr Young.
68. 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 Mr Young with regard to disclosure of the BBC salary band within which

his salary fell. Therefore, he believes that, in this case, condition 6(1) of schedule 2 of the DPA is satisfied. Consequently disclosure of this salary band would not breach the first principle in DPA. However, the Commissioner does accept that disclosure of the Mr Young's exact salary and other details of his financial arrangement with the BBC would lead to a greater infringement of his legitimate right to privacy that is not outweighed by the legitimate interests of the licence fee payers.

Section 43

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

70. The BBC believes that disclosure of details of Mr Young's financial agreement would, or would be likely to prejudice its commercial interests in three ways:

Market distortion and increased bids from competitors

71. Firstly, disclosure of this information would provide the BBC's competitors with valuable pricing information about the cost of Mr Young's employment. The BBC would not receive the equivalent pricing information from the vast majority of these competitors since they are not subject to disclosure obligations under the Act. This disclosure will create an information asymmetry which will have the effect of distorting the market for talent, increasing the likelihood of the BBC's competitors outbidding the BBC for the services of creative leaders such as Mr Young.

72. The BBC has identified a number of features of the market for creative leaders that substantiate the fact that disclosure of what the BBC pays such individuals is likely to prejudice its ability to retain these leaders.

73. The market for creative leaders is different from the typical market for employees, evidenced by the fact the BBC agrees upon individual, separately negotiated contracts with such leaders rather than contracting on a standard employer-employee basis, using standard form employment contracts. The basis for this distinction is that such creative leaders are scarce and heterogeneous; one such leader is usually an imperfect substitute for another.

74. The consequence of these leaders having such characteristics is that there is fierce competition for particular types of leaders, and therefore particular individuals have bargaining power. Competition between broadcasters for creative leaders therefore operates like an auction. Therefore, broadcasters are willing to enter into a bidding war to attract the services of a particular creative leader from another broadcaster and the broadcaster that loses that individual may have considerable difficulty (and incur significant expense) in obtaining a replacement.

75. Moreover, in spite of the BBC's status as a public corporation, in the context of hiring creative leaders it operates within a wholly competitive marketplace, competing directly with commercial broadcasters. For example, the BBC

competes with traditional broadcasters such as Sky and ITV, independent production companies such as Hat Trick and Endemol, and new and emerging competitors such as BT, Yahoo and Google.

76. The information on creative leaders that is commercially useful relates not only to gross remuneration figures, but also to the terms and conditions of that remuneration. This is because the BBC competes for the acquisition of creative leaders by offering them a variety of terms and conditions and not just a one-off salary figure.
77. Information about individual creative leadership deals is not widely known in the media and entertainment industry. As noted above, such leaders are not engaged on publicly available pay scales like other staff and disclosure of salaries is very much the exception rather than the norm. Within the BBC, information about individual deals is treated as confidential and access is limited to those with a need to know. Although strictly speaking individuals are entitled to disclose this information, in practice this is not widely done. In any event, the uncertainty involved in whether or not a person will disclose such details or not is fundamentally distinct from the presumption in favour of disclosure that would be created in favour of an institutional process for disclosure that would be created by a Commissioner decision on the application of section 43 to talent costs.
78. For these reasons, disclosure of information relating to creative leadership deals by the BBC alone would have the effect of creating an informational asymmetry. It is well known that the effect of such an asymmetry in an auction is to change bidding strategies and to provide relative market strength to the beneficiaries of that asymmetry. The BBC cited Paul Klemperer's paper on Bidding Markets¹, which illustrates that a change to the relative flow of information between participants in an auction can affect the outcome of that auction.

Market Distortion and Increased Bids from Creative Leaders

79. Secondly, disclosure of the amount of money paid to Mr Young is likely to result in a ratchet effect among bids from other creative leaders. Since these leaders will know the minimum level of funds that are available for a particular individual, they will have an incentive to bid up to that level when previously they may have bid below it.

Talent Drain

80. Thirdly, disclosing the cost of creative leaders to the BBC is likely to discourage such leaders from contracting with the BBC, compared to its commercial rivals, because of the increased risk of publicity regarding their earnings.
81. The BBC believe that as a consequence of these three effects it will face a choice between losing creative leaders and suffering an attendant drop in the quality of

¹ http://www.competitioncommission.org.uk/our_role/analysis/bidding_markets.pdf

its programming, or increasing its payments to talent in order to retain it thereby increasing its programme costs, resulting in the BBC having less money available for other programmes.

The Commissioner's opinion

82. The Commissioner has already decided that the only details of Mr Young's financial agreement with the BBC which are not exempt by virtue of the exemption contained at section 40 of the Act is the BBC salary band within which he fell. Therefore, the only question for the Commissioner to consider with regard to section 43 is whether disclosure simply of this salary band would, or would be likely to prejudice the BBC's commercial interests.
83. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' be a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030)* commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
84. In the Commissioner's opinion, the arguments outlined by the BBC rely on the fact that there will be similarities between the financial package agreed with Mr Young and any arrangements the BBC may make with creative leaders in the future. Clearly if a future transaction that the BBC is going to enter into is to be prejudiced by disclosure of information about a previous transaction, there will have to be a number of similarities between the two transactions for a useful and valid comparison to be drawn.
85. On this point, the Commissioner notes that the BBC itself has highlighted the fact that creative leaders should be viewed as a heterogeneous good and therefore one particular leader is not a perfect substitute for another leader. It could therefore be argued that an auction for one particular leader, e.g. Mr Young, would be substantially different from a future auction for the services of another creative leader. If each creative leader is considered to be so individual and different from his or her rival competitor leaders, it is possible that no valid comparison could be drawn between the price paid for one leader and the price paid for the next.
86. With regard to the first argument advanced by the BBC, the Commissioner does not accept that disclosure of just a salary band will result in an informational asymmetry being created. Moreover, the BBC has explained the terms and conditions which it agrees with the creative leaders can be just as important in securing the services of these leaders as the agreement of a one-off salary figure. Obviously, by simply disclosing the salary band, the BBC would not be disclosing any information about the terms and conditions it agreed with Mr Young. Consequently, the Commissioner does not believe that he has been provided with

real and significant evidence to suggest that disclosure simply of the salary band will result in market distortion leading to increased bids from competitors for the BBC's competitive leaders.

87. With regard to the second argument, although disclosure of the salary band will give other leaders some insight into the amount the BBC paid Mr Young, it will only be an indication of the level of his remuneration rather than confirmation of an exact figure. As noted in the previous paragraph, the salary offered to a creative leader is just one of the key terms and conditions the BBC uses to negotiate these deals with creative leaders. In the Commissioner's opinion if the BBC were to receive increased bids from creative leaders following disclosure of Mr Young's salary band, it would be in a strong position to refuse to meet the demands of these leaders because it could rely on the fact that the salary offered to Mr Young had to be seen in the context the other terms and conditions. Furthermore, as the BBC has emphasised each creative leader is different and therefore the BBC could argue that it is illogical to suggest that simply because Mr Young's salary fell within a certain range then it other creative leaders must expect similar levels of remuneration.
88. With regard to the third argument, the BBC has failed to provide the Commissioner with any examples of where the disclosure of information, or even the possibility of disclosure, has led directly to individuals contracting with the BBC's commercial rivals rather than with the BBC.
89. The Commissioner has therefore concluded that disclosure of the salary band within which Mr Young's salary fell is not exempt by virtue of section 43(2) of the Act and therefore there is no need for the Commissioner to consider the public interest.

Procedural matters

90. The complainant submitted his request on 1 March 2005 and the BBC refused to disclose the requested information on 4 April 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 requested information 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.
91. 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 and 43(2).

The Decision

92. The Commissioner's decision is that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act:
- The requested information is held by the BBC for purposes other than those of journalism, art and literature. Therefore the BBC has not dealt 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 believed the requested information to be exempt on the basis of sections 40 and 43(2) of the Act.
 - The BBC was incorrect to withhold details of the salary band within which Malcolm Young's salary fell on the basis of section 40 and section 43(2) of the Act.
93. 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 details of Graham Norton's financial agreement with the BBC on the basis of section 40.
 - The BBC was correct to withhold details of Malcolm Young's financial agreement with the BBC on the basis of section 40 of the Act (with the exception of salary band within which his salary fell).

Steps Required

94. The Commissioner requires the BBC to disclose the following information to the complainant within 35 calendar days:
- The BBC salary band within which Mr Young's salary fell.

Failure to comply

95. 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

96. 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 17th day of March 2008

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Relevant Statutory Obligations and Provisions

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 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