

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 January 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 asked the BBC how much it cost to produce the show 'Ask the Family'. The BBC refused to provide the information on the basis that it was not a public authority in relation to this request because the information was held for the purpose of journalism, art or literature. Having considered the purposes for which this information is held, the Commissioner has concluded that the information was not held for the dominant purpose of journalism, art or literature and therefore the request falls within the scope of the Act. However, the Commissioner has also concluded that the requested information is exempt from disclosure by virtue of section 43 of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 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 7 April 2005, the complainant submitted the following request to the BBC:

'how much it has cost to produce Ask the Family and how much of that comes from the licence fee'.

3. The BBC responded on 12 April 2005 and explained to the complainant that 'your request falls outside the scope of the Act because the BBC, Channel 4, and S4C are covered by the Act only in respect of information held for purposes other than those of journalism, art or literature. We therefore do not supply information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities'.
4. The BBC subsequently informed the complainant that it did not offer an internal review procedure when its position was that the requested information fell outside the scope of the Act. However, the BBC did inform the complainant of his right to contact the Commissioner and ask him to review the BBC's decision.

The Investigation

Scope of the case

5. On 22 April 2005 the complainant contacted the Commissioner in order to complain about the way the BBC had handled his request. The complainant specifically asked the Commissioner to consider whether the information in question was held for purposes other than journalism, art and literature and following this whether it should be provided to him under the Act.

Chronology

6. On 6 January 2006 the Commissioner wrote to the BBC and asked whether it wished to provide any further arguments to support its claim that the requested information is not held for purposes other than journalism, art or literature.
7. The BBC responded on 1 February 2006 and confirmed its position was that the information falling within the scope of the request constituted information about production costs and that such information was covered by the derogation. In support of this position the BBC referred the Commissioner to the arguments it had previously provided in a similar case (FS50067416) which also involved a request for production cost information.
8. On 19 January 2007 the Commissioner contacted the BBC and asked it to provide, without prejudice to their position on the derogation, an explanation of which exemptions it would seek to rely on in the event that the Commissioner decided that the derogation did not apply in this case.
9. The BBC responded on 8 March 2007 and provided the Commissioner with further arguments in support of its position that the requested information fell within the derogation. The BBC also provided detailed arguments, without prejudice to their position on the derogation, which explained why it considered the requested information to be exempt from disclosure by virtue of section 43 of the Act.

Findings of fact

10. Ask the Family is a television quiz show originally broadcast on BBC One between 1967 and 1984. In 2005 the show returned to BBC Two with new presenters and a slightly amended format. This revived version of Ask the Family was only broadcast for one series. The complainant's request only relates to the revived version of the show broadcast on BBC Two in 2005.
11. The Commissioner notes that the complainant's request asked two separate questions; the first was for the total cost of Ask the Family and the second was what proportion of this show was funded by the licence fee. During his investigation into this case the Commissioner has established that Ask the Family was fully funded by the licence fee. The BBC has also confirmed to the Commissioner that it is prepared to confirm this fact to the complainant. Therefore, the Commissioner's investigation has focussed solely on whether the first piece of information requested by the complainant (namely the total cost of Ask the Family) should be disclosed under the Act.

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 (PSBs).
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 requested information that the BBC considers to be covered by the derogation constitutes information about the cost of an in-house production.

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 is not in itself journalism, art or literature, this 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* was 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 or literature and therefore is outside the scope of the Act.

The Commissioner's view

18. The Commissioner has noted 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 requested information supports the creation of the 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 he has not considered it further.
21. However, the Commissioner's view is that the requested information is held by the BBC for operational purposes in addition to 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 comply with legal obligations.

21. 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. At the time of this complaint the 1996 Charter was in force, however, at the time this complaint is to be determined the 2006 Charter is in force. 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
22. 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...”*
23. 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.
24. 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.

25. In the Commissioner's view failure by the BBC to hold information relating to the cost of in-house productions would have a prejudicial effect on the ability of the Governors and Executive Board to performing their respective functions and operational duties under the Charters.
26. 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.
27. 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.
28. 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 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.
29. The Commissioner does not believe that information relating to the costs of in-house productions possesses enough journalistic application to enable it to be held for a dominant journalistic or similar purpose. Rather, the Commissioner considers the requested information to be 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 operations, rather than one of the purposes of Schedule 1.
30. Therefore, the Commissioner considers the BBC to be a public authority with regard to this information.

Exemptions

31. As noted above in paragraph 9, the BBC provided additional arguments, without prejudice to its position on the derogation, as to the exemption which it would seek to rely on, in the event that the Commissioner found that the derogation did not apply to this information. The BBC has argued that disclosure of the requested information is exempt on the basis of section 43(2) of the Act.

Section 43 – Commercial Interests

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

The BBC's position

33. The BBC contends that disclosure of information relating to in-house programme costs would harm its commercial interests because disclosure of this information may result in a ratchet effect among bids from independent production companies (IPCs) for licence deals in respect of similar programmes. This is because disclosure would allow IPCs to establish the minimum level of funds which were available for a particular programme or type of programme and IPCs will then have an incentive to bid beyond that level. This will prejudice the BBC's commercial interests because it will be forced to increase what it pays for those licence deals or face losing these deals. The BBC has highlighted a number of features of the market for IPCs that substantiate this argument.
34. The BBC operates within a strict commissioning regime. This regime, as detailed in its Agreement with the Department for Culture Media and Sport (see clause 52), requires the BBC to commission at least 25% of programmes through IPCs and to ensure that at least a further 25% of programming is open to competition between in-house production departments and IPCs (under clause 54 this is known as the Window of Creative Competition – 'WOCC').
35. The BBC has explained that its commissioning process ensures that bids from in-house and independent producers will always be evaluated side by side to ensure fair decision making, i.e. in-house producers are not given an advantage over external independent producers. Therefore, a competitive market effectively exists between BBC in-house producers and IPCs when bidding for commissions from the BBC. The BBC has also explained that in-house production staff whose role it is to bid for programmes would not be privy to bid information submitted to the BBC by IPCs. Moreover, very few people outside of their own companies will have knowledge of the relevant sums and although staff moving between companies may take knowledge with them, it will be current and of limited value. In addition all information is treated as confidential within the BBC and limited to those with a need to know.
36. For these reasons, the disclosure of information relating to the budget and cost of in-house programmes by the BBC alone would have the effect of creating an informational asymmetry. The BBC has argued that it is well known that the effect of such asymmetry is to change bidding strategies and to provide relative strength to the beneficiaries of the asymmetry. In support of this argument the BBC have cited Paul Klemperer's paper on Bidding Markets (http://www.competition-commission.org.uk/our_role/analysis/bidding_markets.pdf) which illustrates that a change to the relative flow of information between participants in an auction can affect the outcome of that auction. In this case where the information relates to the final cost of an in-house production it enables IPCs to ascertain with certainty what price the BBC is willing to pay in respect of a particular programme. This

knowledge would then enable IPCs to increase their bids for licence deals with the BBC in order to provide the same services.

37. In order to demonstrate the likelihood of this prejudice occurring the BBC have highlighted the fiercely competitive nature of the media and entertainment industry which means that margins on programmes are very low. Consequently, a minor adjustment in the cost of an individual programme, as a result of a ratchet effect among bids from IPCs, can have a huge and deleterious effect on the broadcaster. Moreover, the BBC has highlighted the fact that since it is funded by the licence fee and has a corresponding duty to exercise careful stewardship of public money, this places it in a difficult position. In the short-term it may well be unable to afford the increased bids from IPCs. In the long term it is possible that the BBC suffers an outflow of programming from IPCs and a reduction in programming quality.

The Commissioner's position

38. The Commissioner believes that this argument bears some similarity to those put forward in relation to the prejudice in the Information Tribunal case *John Connor Press Associates v Information Commissioner* (EA/2005/0005). In this case, the public authority, the National Maritime Museum ('NMM'), argued that disclosure of financial information relating to the commission of a piece of art would prejudice the commercial interests of the NMM. The prejudice claim arose from the fact that the NMM's bargaining position would be compromised if other artists were aware of the commission's value in this case. The Tribunal decided that that prejudice might occur in this case but that this would depend on the nature of the information and the degree of similarity between the two transactions.
39. In deciding whether the section 43 exemption is engaged in this case the Commissioner has also considered the previous decision notices he has issued which involved requests submitted to the BBC for the costs of other television shows. In case FS50137791 the complainant submitted a request asking for the amount of money the BBC had paid to an external production company (Flickerpix) to commission an animation series (On the Air). In his decision notice on this case the Commissioner agreed with the BBC that disclosure of the cost of the commission was exempt under section 43 of the Act. Key to the Commissioner's conclusions in this case was his acceptance of the argument that auctions for a specific commission cannot be viewed as a one-off; in this earlier case the Commissioner accepted that prejudice was likely because the BBC may bid for another series of On the Air, and indeed had recently decided to commission a second series.
40. However, in the circumstances of this case the request relates to a programme that the BBC chose not to re-commission following the end of the first series. (Source: <http://www.bbc.co.uk/cult/news/cult/2005/06/08/19857.shtml>). Therefore, it could be argued that the disclosure of the cost of the Ask the Family series broadcast in 2005 would not prejudice the BBC's negotiations for any future series of Ask the Family simply because there are no plans to re-commission the show.

41. However, the Commissioner considers that this view is too simplistic; although the BBC may not commission a further series of Ask the Family, the Commissioner accepts that the BBC may commission another programme which although different to Ask the Family, bears sufficient similarity to make the cost of Ask the Family useful to bidders of future shows. This similarity could be based on content (i.e. another light entertainment quiz based show for early evening) or on regulatory framework (i.e. the BBC's commitment under its Agreement with Department for Culture Media and Sport to creating a WOCC)
42. The Commissioner therefore accepts that disclosure of the requested information could prejudice the commercial interests of the BBC, because it would provide production companies bidding for the commission of similar shows with a clear indication of the amount the BBC would pay for similar shows and consequently the ratchet effect described in paragraph 32 may occur. However, the Commissioner wishes to note that although he believes that the risk of prejudice is significant enough to engage the exemption in this case, he believes that a distinction can be drawn between the likelihood of prejudice in this case and that in cases such as the Flickerpix case where the BBC has a clear commitment to re-commissioning further series of the same show.

Public interest test

43. Section 2(2) of the Act states that information is exempt information where the public interest, in all the circumstances of the case, in maintaining that exemption outweighs the public interest in disclosing that information.
44. The BBC advances three broad public interest arguments in favour of the maintenance of the exemption. These are as follows:
 - (i) *There is a clear public interest in ensuring the BBC is able to provide quality programming and value for money in respect of its use of the licence fee. Both these objectives will be threatened if a presumption is created in favour of the general disclosure of information relating to licence deals...*
 - (ii) *...there is little public interest in the disclosure of licence deal information as this information only enables the public to take an informed view of whether the BBC is contracting with indies [i.e. IPCs] on a competitive basis if it is in the possession of licence deal information relating to commercial broadcasters. Since this information is not publicly available, information relating to the BBC is of little use.*
 - (iii) *...the general public interest in the transparency and accountability of the BBC in respect of its use of the licence fee is served by a broad range of oversight mechanisms, internal and external. These include the oversight of the BBC Trust, the responsibilities of which include commissioning value for money investigations into specific areas of BBC activity (Article 24(2) (i) of the Charter), the Executive Board, the responsibilities of which include conducting the BBC's operational affairs in a manner best designed to ensure value for money (article 38(1)(h) of the Charter), Ofcom and the fair*

trading regime and competition law in general. Indeed ... certain limited information on expenditure is provided in the Annual Report. Disclosure beyond this threatens to pose considerable harm to the BBC's commercial interests, without offering a proportionate benefit to the public.'

45. In the Commissioner's view there are three public interest factors in favour of disclosure:
- there is a general public interest in facilitating accountability and transparency in the way public money is spent;
 - there is a public interest in furthering the public's understanding of, and participation in, public debate on a topic;
 - there is a public interest in facilitating accountability and transparency of public authorities for their decisions;
46. Therefore the Commissioner must balance the factors in favour of disclosure with those against. If the balance lies in favour of maintaining the exemption the information will be exempt from disclosure.
47. The Commissioner's view is that although there is a strong interest in understanding the way in which public money is spent it is not clear that disclosure in this case would be of significant benefit to the public. In order for information of this nature to be of great value to the public they would require access to information about the costs to other broadcasters of commissioning similar content. Other PSBs are subject to the Act, specifically Channel 4 and S4C, but the remainder of the broadcasting industry is not. It is possible for the public to form subjective views about the quality of a programme and therefore whether the money was well spent by, for example, combining it with publicly available information about viewing figures. However without information about other broadcasters' programme costs the requested information is of less value to the public as a whole; however it would have a particular value within the industry potentially exposing the BBC to commercial prejudice as identified above.
48. The cost of programmes broadcast by PSBs, and particularly the BBC, is of interest to the public and would aid their understanding of the industry and the difficulties that PSBs face in winning and retaining quality programming. The increased transparency would reinforce trust in the BBC as an organisation with robust controls on the way that public money is spent. However these controls are evident anyway. The BBC has a variety of mechanisms which seek to ensure value for money and high quality, for example the Window of Creative Competition is a mechanism that ensures 25% of BBC broadcasts are produced by the independent sector, and that a further 25% of broadcasts are opened to competition between the private sector and the BBC's in-house production divisions. The Trust (formerly the Board of Governors) has oversight of the way the BBC seeks to meet its corporate objectives providing a further level of internal scrutiny internally.

49. As regards transparency in the decision-making process, the Commissioner does not consider that, in the circumstances of this case, this factor carries great weight; there is already a significant amount of information in the public domain about the commissioning process and fees paid by the BBC to production companies (whether in-house or IPCs). As noted above broadly indicative tariffs are published on the BBC's website (see <http://www.bbc.co.uk/commissioning/tv/business/tariffs.shtml>).
50. Having weighed these factors the Commissioner's view is that the balance of the public interest favours maintaining the exemption under section 43 and therefore the requested information should not be released. Overall there are real benefits from increased transparency and accountability, however these are outweighed by the damage that disclosure would be likely to cause to the BBC's commercial interests, it being more difficult to maintain quality and more expensive to procure content. Arguably these are similar factors to those affecting other public authorities which procure goods and services in a competitive environment, for example local government and the procurement of waste management services, but such comparisons are superficial. A local authority inviting tenders for waste management services could obtain similar information about other local authorities operations in this area and competitors for services (i.e. other local authorities) would be subject to the same disclosure provisions unlike the BBC.
51. On this basis the Commissioner is satisfied that the requested information is exempt from disclosure under section 43 and that the public interest favours non-disclosure.

Procedural matters

52. The complainant submitted his request on 7 April 2005 and the BBC refused to disclose the information on 12 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 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.
53. 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 section 43.

The Decision

54. The Commissioner's decision is that the BBC failed to deal with the following elements of the complainant's request in accordance with the Act:

- The requested information 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).
- The BBC breached section 17 of the Act because it failed to provide a refusal notice explaining why it considered the requested information exempt on the basis of section 43.

55. However, the Commissioner has decided that the requested information is exempt from disclosure on the basis of section 43.

Steps Required

56. The Commissioner does not require the BBC to take any further steps as a result of this decision.

Right of Appeal

57. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 8th day of January 2008

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Relevant Statutory Obligations and Provisions under the Act

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 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).

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