

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 30 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

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The complainant requested the amount the BBC had paid for the rights to cover the 2006 Winter Olympics in Turin. The BBC refused to provide 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 has misapplied the Schedule 1 derogation and that this information falls within the Act. During the Commissioner's investigation the BBC argued, without prejudice to its position on the derogation that the requested information was exempt on the basis of section 43 of the Act. The Commissioner has concluded that the requested information is not exempt from disclosure on the basis of section 43 and has therefore ordered the BBC to disclose both the amount it paid for the rights to cover the Turin Olympics and also the total production costs the BBC incurred in producing its coverage of the games.

### The Commissioner's Role

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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 and, if the BBC is deemed to be a public authority, whether other exemptions claimed are engaged. This Notice sets out his decision.

## The Request

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2. On 28 February 2006 the complainant submitted a request to the BBC for the following information:

*'how much the BBC paid for the rights and to cover the recent winter Olympics in Turin, Italy'.*

3. The BBC responded on 1 March 2006 and informed the complainant that the information he had requested fell outside the scope of the Act because the BBC was only covered by the Act only in respect of information held for purposes 'other than those of journalism, art or literature' and as the requested information was held for the purposes of creating the BBC's output or information that supports and is closely associated with its creative activities.

## The Investigation

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### Scope of the case

4. On 3 March 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant argued that in his opinion the information he requested fell within the scope of the Act.

### Chronology

5. The Commissioner wrote to the BBC on 22 August 2006 and asked to be provided with a copy of the requested information and further arguments to support the BBC's position that the requested information fell within the scope of the derogation.
6. Having received no response from the BBC the Commissioner contacted the BBC again on 18 January 2007 and repeated his request to be provided with a copy of the requested information and clarification on the BBC's position on the derogation. The Commissioner also asked the BBC to provide, without prejudice to its position on the derogation, details of exemptions it would rely on should the Commissioner conclude that the requested information fell within the scope of the Act.
7. The BBC provided the Commissioner with a response on 12 March 2007. This response included detailed arguments to support the BBC's application of the derogation and details of the exemption it considered to apply to the information requested by the complainant. The Commissioner also received a copy of the requested information.

### Findings of fact

8. The requested information consists of two different types of information:

- (i) Rights costs which covers the monies paid by the BBC for the rights to cover the Turin Winter Olympics; and
  - (ii) Programme costs which consist of the cost incurred by the BBC in covering the event.
9. With regard to the information falling within the first category, the Commissioner has established that the rights package for the Turin Winter Olympics was not bought by the BBC directly from International Olympic Committee ('IOC') but rather from the European Broadcasting Union ('EBU'). The EBU purchased the rights for the Turin games on behalf of its members and as such the fee paid by the BBC was part of the global rights fee paid by the EBU to the IOC. The EBU is an association of public sector broadcasters across Europe and the BBC, along with the ITV companies and Channel 4 are members of the EBU.

## Analysis

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### The Schedule 1 derogation

10. 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).
11. 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.
12. In this case the requested information that the BBC believes is covered by the derogation is the total cost to the BBC of covering the Turin Winter Olympics including both rights costs and production costs.

### The BBC's view

13. 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 rights costs and production 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.
14. 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.’

15. In summary, the BBC’s position is that both types of 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**

16. The Commissioner has noted the arguments put forward by the BBC.
17. 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.
18. The Commissioner accepts that details of rights costs and production 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.
19. 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.
20. In the particular circumstances of this case, the Commissioner has found it useful to understand the Royal Charter which constitutes the BBC when considering these purposes. It should be noted that the Royal Charter in existence on the date of the complainant’s request for information (19 April 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.

21. 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...”*
22. 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.
23. 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.
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. Rights costs and production costs constitute financial information and therefore serve a number of purposes in addition to that accepted by both the BBC and the Commissioner, i.e. that it supports the creation of programme content.

26. 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.
27. 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.
28. The final factor which the Commissioner has weighed in coming to a decision on whether the derogation applies is whether the decision on the cost of in-house programmes and the cost of acquiring the rights for the Turin Olympics constitute a creative decision.
29. 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.
30. As such, the Commissioner does not consider that the requested information constitutes a creative decision.
31. After carefully balancing these competing purposes, the Commissioner finds that the information about rights costs and in-house production 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 in this case and the BBC is a public authority with regard to requested information.

## **Exemption**

32. As noted above, 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**

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

## Rights costs

### *The BBC's position*

34. The BBC contends that disclosure of the rights costs information would, or would be likely to, prejudice its commercial interests in two ways:

#### Argument 1

35. Disclosure of the rights costs information would effectively provide the BBC's competitors with valuable price information about the costs of these particular rights. The BBC would not in return be likely to receive equivalent price information from the vast majority of its competitors because they are not subject to the equivalent disclosure obligations under the Act. This would result in an information asymmetry which would have the effect of distorting the market for rights and increasing the likelihood of the BBC's competitors outbidding the BBC for the rights.
36. In order to support this argument the BBC has highlighted a number of features of the market for broadcasting rights:
37. Firstly, despite the BBC's position as a public corporation, in the context of rights markets it operates wholly within the commercial market place and therefore in essence competes with commercial organisations. The BBC has suggested that these competitors include subscription funded broadcasters such as Sky and Sentanta; advertising funded broadcasters such as ITV, Channels 4 and 5, commercial radio companies such as Wireless Group, and new emerging competitors such as BT, Yahoo and Google. In respect of rights to sporting events, the BBC also competes with third party agencies such as TWI and Infront who also buy and sell broadcast rights to sporting events.
38. Secondly, the BBC has explained that information regarding sports rights deals is not widely known in the media industry. In fact very few people outside of the relevant individuals in the contracting companies are privy to the details of sales and within the BBC Sport Department information about rights payments is treated as confidential with access restricted to those with a need to know. The BBC has also highlighted the fact that the high value sports contracts are preceded by non-disclosure agreements and sports rights contracts themselves subject to confidentiality clauses. In the context of the lack of information available about rights sales, the disclosure of the requested information would, in the BBC's opinion, clearly result in the creation of an information asymmetry as suggested above.
39. Thirdly, the BBC has highlighted the fiercely competitive nature of the media industry where financial resources for some participants are stretched, a minor adjustment in the cost of rights, as a result of a higher offer from a competitor, can have a large and deleterious effect on the broadcaster. Further, given the unique privilege which the BBC possesses in being funded by the licence fee payer, and the corresponding duty it is under to exercise careful stewardship of that money, the consequence of such a fee increase may well be that at least in the short-term, the BBC is unable to rise to the challenge of meeting the increase.

The ultimate result will then be that the BBC suffers reduced ability to offer sports coverage on its services.

## Argument 2

40. Disclosure of the costs of rights in a particular case is likely to result in a ratchet effect among offers from rights sellers. This is because rights sellers will know the minimum level of funds that are available for particular rights and they will therefore have an incentive to refuse lower bids that may be offered by the BBC as a part of normal commercial negotiations.
41. In the BBC's opinion the result of both of these arguments is likely to be that the BBC faces a choice between losing programmes and suffering an attendant drop in the quality of its programming. Alternatively, it could be forced to increase its payments to rights sellers in order to retain programmes and suffering an attendant drop in value for money to the licence payer.

## *The Commissioner's position*

42. The Commissioner recognises that in theory the two prejudice arguments advanced by the BBC are logical. However, the Commissioner notes the similarity between these arguments and those advanced by the BBC to support its application of section 43 in previous decision notices where the requested information has not comprised rights costs information but information relating to talent costs and production costs (see DNs FS50085710 and FS50067416). The Commissioner must consider whether the arguments advanced by the BBC are sustainable based on the facts of this case, i.e. likelihood of prejudice to the BBC's commercial interests in relation to future rights sales of Olympic events.
43. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* 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). This interpretation followed the judgment of Mr Justice Mundy in *R (on the application of Lord) v Secretary of State for the Home Office [2003]*. In this case the Court concluded that 'likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not'. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The information Commissioner* commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

## Argument 1

44. The Commissioner believes that there are a number of weaknesses to the first prejudice argument advanced by the BBC. As is noted above, the BBC has suggested that when bidding for the rights to cover the Olympics, it has to



- compete with a range of different broadcasters, including subscription funded and advertising funded broadcasters, new media broadcasters and even third party agencies. However, the Commissioner has established that under the Broadcasting Act 1996, the Olympics are in fact one of 12 events that the Government has decreed must be shown on a terrestrial television channel. Therefore, the only other broadcasters in the UK who can actually compete for the broadcast rights to future Olympics are the BBC, ITV and Channels 4 and 5
45. However, the Commissioner understands that last Olympics that ITV covered were the summer games in 1988 and furthermore in reality the commercial channels have little appetite for showing the Olympic Games because they do not want to give up sufficient airtime to cover the various events. (Source: <http://www.guardian.co.uk/media/2004/jun/18/olympicsandthemedia.bbc>) If the commercial channels were to broadcast the Olympics this would result in them having to substantially revise their schedules which would be likely to result in a negative impact on their advertising revenue.
  46. Therefore, although the Commissioner accepts that the BBC may have some rivals in any auction for the bidding rights to broadcast future Olympic Games, the number of rivals is far fewer than BBC has suggested. Furthermore, in the Commissioner's opinion the likelihood of these potential commercial competitors actually bidding for future rights is low.
  47. In considering the likelihood of harm to commercial interests the Commissioner believes that it is also vital to take account of the timing of the disclosure; market conditions can change over time and information relating to costs may very quickly become out of date.
  48. With regard to the specifics of this case, the Commissioner believes that it is important to note that at the time of the complainant's request in February 2006 the BBC had already secured (via a contract with EBU) the rights to the 2008 summer games in Beijing, the 2010 winter games in Vancouver and the 2012 summer games (which have now been awarded to London). Therefore, if one of the other terrestrial channels were to use the requested information to inform a future bid for the rights to broadcast future Olympic Games the next set of rights that will be available are for the 2014 winter games in Sochi.
  49. The cost of the broadcast rights to the Olympics has increased considerably in recent rounds of bidding with the IOC bundling the rights for the winter games together with the summer games in an effort to increase revenues. For example, the EBU has paid the IOC \$578m for the rights for the 2006 and 2008 games and subsequently paid \$750m for the rights to the 2010 and 2012 games. In fact the IOC has predicted that the total broadcast revenues for the 2012 games will exceed \$3.5bn, a total which would represent a 40% increase on the total for the Beijing games.
  50. Therefore, in the Commissioner's opinion given this significant change in market conditions the information about how much the BBC paid EBU for the rights to the 2006 Turin games would be unlikely to be of direct relevance to its terrestrial competitors who may consider bidding for the 2014 games.

51. On the basis of the evidence outlined above the Commissioner is not satisfied that the likelihood of the BBC's commercial interests being harmed by the process outlined in argument 1 is one that can be correctly described as 'real and significant'.

## Argument 2

52. In the Commissioner's opinion this argument relies on the fact that a number of sellers' behaviour will be influenced by the disclosure of the amount the BBC paid for the rights to cover the 2006 Turin Olympics. However, the Commissioner understands that the IOC has a tradition of selling the rights to broadcast the Olympics in Europe to the EBU who have then sold the rights to the public sector broadcasters in the individual countries. The IOC has always resisted selling the rights to the highest bidder in each country for broadcast on a pay-per-view basis or to a broadcaster who could only reach a limited part of population. Indeed the IOC website suggests that such an approach would be against the Olympic Broadcast Policy and contradictory to the doctrine of the Olympic Charter. ([http://www.olympic.org/uk/organisation/facts/broadcasting/index\\_uk.asp](http://www.olympic.org/uk/organisation/facts/broadcasting/index_uk.asp)). Instead, the IOC is committed to ensuring that the Olympics are broadcast on free-to-air channels.
53. Therefore in reality the only body that the BBC can buy the rights for future games from is the EBU. Obviously, as the EBU has been the historical seller of the rights to the BBC, they will already have knowledge of the amount the BBC has paid for the rights for previous games.
54. Consequently, in the Commissioner's opinion disclosure of the information will not result in various sellers inflating the price which they will sell rights at on the basis that they know the minimum level of funds the BBC is prepared to pay for the rights to broadcast the Olympics. This is because the market for the sale of such rights is a monopoly and the single seller, EBU, already has full knowledge of the BBC's past bidding behaviour. Therefore, the Commissioner is not satisfied that second prejudice argument advanced by the BBC is sustainable.
55. On the basis of the above the Commissioner does not accept that section 43(2) is engaged in respect of the rights information.

## Production costs

### *The BBC's position*

56. In the BBC's opinion disclosure of the production costs involved in the broadcasting Turin games would also be likely to prejudice its commercial interests. In order to support this position the BBC had advanced a number of arguments, many of which are very similar to the arguments advanced to support the BBC's position on the rights costs. For ease of reference, the Commissioner has set out these arguments again below.
57. 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.
58. Firstly, 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').
  59. Secondly, the BBC has highlighted the fact within the media and entertainment industry there is a premium on high quality and original ideas and that the supply of such ideas is scarce. Programme proposals that contain these ideas can therefore be categorised as scarce and heterogeneous goods and as a result both IPCs and in-house production departments have bargaining power and purchasing production operates like an auction. Consequently, those in possession of desirable idea are able to bid up the price at which they offer an idea to the BBC and if the BBC wants that idea, the BBC may have to pay the price sought. In the BBC's opinion this argument is relevant to this case because there is a great deal of creative variety in the way that sporting events are broadcast, e.g. ideas about talent and pundits used on the programmes greatly influence the quality of the programme and the reactions of the audience.
  60. The BBC has also highlighted the fact that as with rights costs, information about budgets and final cost of in-house sports programmes is not generally known. Therefore in the BBC's opinion the disclosure of the information about in-house production costs information would have the effect of creating an informational asymmetry. As the BBC has noted above, it is well known that the effect of such an asymmetry in an auction is to change differing strategies and to provide relative market strength to the beneficiaries of that asymmetry. Where the information asymmetry pertains to the budget or 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 type of sports programme. This information would enable IPC's to increase their bids for licence deals with the BBC in order to provide the same services.
  61. 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 may be that the

BBC suffers an outflow of programming from IPCs and a reduction in programming quality.

### *The Commissioner's position*

62. 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.
63. 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 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.
64. Similarly in decision notice FS50067416 in which the complainant's request asked for the cost of an in-house BBC production, namely the John Daley Show broadcast on BBC Northern Ireland. As with the case FS50137791 the Commissioner accepted that prejudice was likely to occur because the BBC had previously commissioned five series of the John Daley Show and that if it commissioned another show the requested information could lead to IPCs artificially inflating their bid for producing the show thus harming the BBC's commercial interests. Central to the Commissioner decision in the John Daley Show case was the fact that he accepted that disclosure of the cost of the production would be likely to harm the BBC's commercial interests even if the BBC did not commission a further series. This was because the Commissioner was satisfied that the BBC would commission sufficiently similar shows whether this similarity was based upon content (i.e. light entertainment) or regulatory framework (i.e. quotas for broadcast hours for shows in the regions). For example, the BBC could choose to commission a new prime time entertainment show for BBC NI which although different to the John Daley Show, bears sufficient similarity to make the information about the cost of the John Daley Show useful to IPCs who chose to bid for this new show.
65. However, with regard to this case the Commissioner has identified a number of factors which in his opinion, mean that the likelihood of the BBC's commercial

interests being harmed following disclosure of the total production cost of the Turin Olympics is not one that can be accurately described as 'real and significant'.

66. Firstly, the Commissioner believes that there are insufficient similarities between the broadcasting of the Turin games in 2006 and the next winter games in Vancouver 2010 to make the BBC's arguments sustainable. Given the different locations of each of the games, not only in different countries but on different continents, the Commissioner considers it reasonable to suggest that the costs associated with producing coverage of Vancouver games will differ from those of producing the Turin games. Furthermore, the platforms which the BBC may choose to broadcast the 2010 games on may well be different given the developments in technology since 2006, e.g. more use of digital channels, broadcasting more events on the internet and delivering content to mobile phones. Similarly, the BBC may choose to cover the games in a different way; e.g. using different presenters or focusing its coverage on different events, therefore making the coverage of Vancouver games distinct from the coverage of the Turin games.
67. Secondly, although the Commissioner recognises that the BBC is bound by requirements in the Agreement with the DCMS in relation to the WOCC, under the terms of this agreement, the BBC is still free to commission a significant proportion of its broadcasting from in-house production companies rather than from IPCs. Therefore, if the information was disclosed and this led to increased bids by IPCs to produce the BBC's Olympic coverage the BBC, the Commissioner understands, is not committed to accepting these bids as long as it still commissions sufficient levels of other content from IPCs in order to meet its commitment under the WOCC.
68. Thirdly, the Commissioner believes that the BBC's argument on production costs bears some similarity to its argument in relation to rights costs to the extent that harm can only occur if there actually are IPCs who may submit a bid to produce coverage of the Vancouver games for the BBC. If there are in fact no alternative bidders then the market will not be distorted by the creation of an information asymmetry simply because there are no alternative sellers to submit higher bids. In relation to this point, the Commissioner has established that the BBC has contracted out the production of some key sporting events to IPCs (e.g. the company Sunset+Vine produces the BBC's coverage of both the Grand National and the Derby). However, the Commissioner would envisage that production of an entire Olympics games would represent a far larger undertaking than either of these events. Significantly, the Commissioner notes that the BBC has not identified exactly who these IPCs are who may be in a position to submit a bid to the BBC to produce its coverage of the Olympic Games.
69. Fourthly, the Commissioner has considered the nature of the requested information, namely the total cost to the BBC of producing the coverage of the Turin games. That is to say, the requested information does not consist of a breakdown of the cost of producing certain events, or the total costs incurred in respect of one aspect of the broadcast (e.g. talent costs). Therefore, as the requested information is simply the total headline cost of the production such information would be of limited use to any IPC who may consider submitting a bid

to produce the Vancouver games. Arguably, such limited information would only be of use if an IPC was considering a bid to produce all of the BBC's coverage. If an IPC was to submit a bid to produce just some of the coverage of the Vancouver games (e.g. only the skiing events) then knowledge of the BBC's previous overall budget for the Turin games is very unlikely to allow the IPC to infer with any accuracy at what level the BBC would be prepared to pay for coverage of certain events.

70. Based on the combination of these weaknesses in the BBC's argument the Commissioner has concluded that the likelihood of the BBC's commercial interests being harmed following disclosure of the total cost of producing the Turin Olympics is not one that can be described as 'more than hypothetical'. Consequently, the Commissioner does not accept that section 43(2) is engaged in respect of the production cost information.

### **Procedural matters**

71. The complainant submitted his request on 28 February 2006 and the BBC refused to disclose the requested information on 1 March 2006. 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.
72. 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**

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73. 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 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 section 43 of the Act.
  - The requested information is not exempt under section 43 of the Act.

## Steps Required

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74. The Commissioner requires the BBC to disclose the following information within 35 calendar days:
- The amount the BBC spent securing the rights to cover the 2006 Winter Olympics.
  - The total production costs incurred by the BBC in producing its coverage of the 2006 Winter Olympics.

## Failure to comply

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75. 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

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76. 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  
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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 30 day of January 2007**

**Signed .....**

**Jane Durkin  
Deputy Commissioner**

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



## Legal Annexe

### Relevant Statutory Obligations and Provisions under the Act.

**Section (1)** states that –

“Any person making a request for information to the 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 the information communicated to him.

**Section 3(1)** states that –

“in this Act “public authority” means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
  - (i) is listed in Schedule 1, or
  - (ii) is designated by order under section 5, or
- (b) a publicly-owned company as defined by section 6”

**Section 3(2)** states that –

“For the purposes of this Act, information is held by a public authority if –

- (a) it is held by the authority, otherwise than on behalf of another person,  
or
- (b) it is held by another person on behalf of the authority.”

**Section 7(1)** states that –

“Where a public authority is listed in schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority.”

**Section 43** states that:

- a. Information is exempt information if it constitutes a trade secret.
- b. 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](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](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](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](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](http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/Amendment_to_the_Agreement.pdf)