

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 17th June 2008

Public Authority: British Broadcasting Corporation
Address: MC3 D1
Media Centre
Media Village
201 Wood Lane
London
W12 7TQ

Summary

The complainant requested the number of staff in certain categories engaged to work on Eastenders, the annual staff costs of Eastenders and the range of contract values. The BBC provided to the complainant the number of staff engaged but refused to provide the remaining information on the basis that it was held for the purpose of journalism, art or literature. During the course of the investigation the BBC also sought to rely on exemptions under the Act to withhold the information.

The Commissioner has investigated and concluded that the BBC misapplied the Schedule 1 derogation and that the information requested falls within the scope of the Act. The Commissioner investigated the BBC's application of the exemptions and found that the range of contract values is exempt under section 12 as to provide the information would exceed the cost limit. However the Commissioner found that the annual staff costs of Eastenders is not exempt under section 43 and should therefore be provided to the complainant within 35 calendar days of this notice.

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"). This Notice sets out his decision.

The Request

2. The complaint had advised that on 28 March 2006 he made the following request for information to the British Broadcasting Corporation (BBC):

"In respect of your successful soap Eastenders.

1. Number of performers currently engaged and the maximum and minimum number of performers from inception to the present at any given time.

2. Number of script writers currently engaged on the programme

3. Average number of production staff currently engaged on the programme.

4. Total annual staff costs (performers, writers and production staff) of the programme.

5. Average value of performers contracts (currently engaged) and the range of contract values (excluding extras) from minimum to maximum.

6. Annual total BBC licence fee income.

3. The BBC responded on 29 March 2006. It advised that the request '*fell outside the scope of the Act because the BBC, Channel 4 and S4C are covered by the Act only in respect of information held for purposes other than journalism, art or literature*'. This is known as the 'derogation'. Consequently, the complainant was informed that the BBC is not obliged to supply this information as it is held for the purposes of creating its output (i.e. its programmes) or information that supports and is closely associated with these creative activities. The BBC explained that with respect to question 6 it was not clear whether the complainant wished to know the total licence fee income or the amount of the licence fee going towards producing Eastenders. The BBC informed the complainant of the total amount of income from the licence fee, but explained that the amount going towards Eastenders was also not covered by the scope of the Act. The BBC informed the complainant that it does not offer an internal review when the information requested is not covered by the Act. It explained that if the complainant was not happy with the decision he could appeal to the Information Commissioner.

The Investigation

Scope of the case

4. On 18 April 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider that the information requested is purely financial and should be open to public scrutiny.

Chronology

5. The Commissioner began his investigation by writing to the BBC on 23 August 2006. The Commissioner asked the BBC to provide further arguments to support its application of the derogation to the withheld information.
6. Having received no response the Commissioner wrote again to the BBC on 18 January 2007. The Commissioner again requested further arguments to support its application of the derogation to the withheld information, and without prejudice, details to the exemptions it would seek to rely on in the alternative.
7. The Commissioner wrote again on 23 February 2007 chasing the BBC's response.
8. The BBC responded on 12 March 2007 providing the Commissioner with further explanation to support its application of the derogation. The BBC also provided the Commissioner with alternative arguments to withhold the information under sections 12, 40 and 43 of the Act.
9. The Commissioner wrote again on 17 August 2007 asking further questions about the application of the derogation and in the alternative the exemptions to the withheld information.
10. The BBC responded on 25 February 2008 providing the Commissioner with a detailed explanation regarding the application of the derogation and the exemptions.
11. In response the Commissioner wrote to the BBC on 9 April 2008 to clarify a number of points with the BBC regarding the first three elements of the request.
12. On 9 April 2008 in response to the Commissioner's letter the BBC wrote to the complainant providing the information requested in parts 1 to 3 of his request.

Findings of fact

13. The information being withheld is that requested in parts four and five of the request. The complainant was satisfied with the information disclosed in relation to parts 1, 2, 3, and six of his request. The information withheld in part four of the request is being withheld as the BBC maintains that this information is covered by the derogation, in the alternative the BBC have applied section 43 of the Act.
14. The information requested in part five of the request can be separated into two parts: (i) average value of performers' contracts and (ii) the range of contract values from maximum to minimum. The BBC maintain that this information is covered by the derogation however in the alternative the BBC have argued that 5(i) is not held and (ii) is exempt by virtue of sections 12 and 40.

Analysis

Procedural matters

15. In the Commissioner's view, for reasons communicated to the parties separately, the information requested in part five (i) is not held. As the BBC is a public authority only for information **held** for purposes other than journalism, art and literature. The way the derogation is worded means that if the information is not held, the BBC is not a public authority. Schedule 1 of the Act lists all public authorities who are subject to the Act; the BBC is included in Part VI but the wording states:

“The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature”.

Therefore, if no information is held, regardless of the purpose it could, or would have been held for, the BBC is not covered by the Act. The Commissioner has investigated if the information held in part five (i) of the request is held and has concluded that it is not. As such it falls outside the scope of the Act and will therefore not be considered any further in this notice, as the Commissioner has no jurisdiction to rule on these matters in a Decision Notice. However, he has explained in detail his findings on this matter to both parties in a separate letter.

16. In contrast, the Commissioner believes that the information requested in parts four and five (ii) is held for purposes other than journalism, art and literature and is therefore caught by the Act. The remainder of this notice will therefore investigate the BBC's decision to withhold this information only.

The Schedule 1 derogation

17. 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).
18. 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.
19. In this case the requested information that the BBC considers to be covered by the derogation is the total annual staff costs of Eastenders and the range of contract values from maximum to minimum.

The BBC's view

20. 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 the programme costs and staffing costs information. The BBC considers that the dominant purpose for holding information is the critical factor in making a determination on whether information is held for the purposes of journalism, art and literature, or some other purpose.

21. The BBC maintains that the information regarding the annual staff costs and the value of contacts is held to support the production of programme content and as such is held for the dominant purpose of journalism, art or literature

22. It further states that:

'The dominant purpose for holding the personal interests information is to support BBC content and output; therefore such information was not held for a dominant purpose other than the purposes of journalism, art or literature and as such is outside the scope of the Act.'

23. In support of this view the BBC cites 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.'

24. In summary, the BBC's position is that the 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

25. The Commissioner has noted the arguments put forward by the BBC.
26. 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.
27. The Commissioner accepts that the requested information 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.
28. 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.
29. Financial information serves a number of operational purposes, for example, it is used to budget, monitor expenditure, identify opportunities to improve efficiency and comply with legal obligations.
30. 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 operational purposes.
31. The Royal Charter states that the BBC shall be funded by the public through the licence fee revenue; accordingly the BBC is accountable to the public that funds it. This public funding entails Royal Charter obligations which are peculiar to it and not imposed on its commercial rivals who are ultimately responsible to their own shareholders.
32. It should be noted that the Royal Charter in existence on the date of the complainant's request for information (14 November 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.
33. 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...*"

34. 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.
35. 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 Trust 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.
36. Therefore the Commissioner believes that, as a result of the Charter, 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.
37. The annual staff costs and the information on contract values serve a number of purposes in addition to that accepted by both the BBC and the Commissioner, i.e. that they support the creation of programme content.
38. 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.
39. In this case annual staff costs and contract value maxima and minima serve the following purposes:
 - (i) They supported the delivery of programme content;
 - (ii) They enabled the BBC to monitor its expenditure against its agreed budget for that year;
 - (iii) They enable the BBC to predict with some certainty the future costs of sending staff overseas.
 - (iv) They contributed to meeting the BBC's obligations to publish annual accounts.
 - (v) They 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.

40. The final factor which the Commissioner has weighed, in coming to a decision on whether the derogation applies, is whether the information held constitutes part of the creative process.
41. 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.
42. In the context of this complaint, the decision to engage certain staff would constitute a creative decision, however, the total annual staffing costs and range of contract values would not.
43. After carefully balancing these competing purposes, the Commissioner finds that the requested information was, or was more likely to have been, held by the BBC for predominantly operational purposes (including financial, management and administrative purposes) and not for journalism, literature or art. As a result, Schedule 1 is not applicable to the information withheld in part 4 and the second part of five and the BBC is a public authority with regard to this information.

Exemption: Section 12 'Cost Limit'

44. The BBC explained that in order to determine if it could comply with this part of the request it sought clarification from the complainant in relation to this part of his request for the 'range of contract values from minimum to maximum'. The complainant confirmed that he was seeking the 'annual cost of the performers irrespective of the way in which they are engaged'.
45. In light of this the BBC explained that to provide this information would exceed the appropriate cost limit. Section 12 of the Act does not oblige a public authority to comply with a request if the authority estimates the cost of complying with the request would exceed the appropriate limit. The BBC states that it is likely to take more than two and a half days to retrieve the information requested and therefore complying with the request would exceed the appropriate limit as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations"). These regulations set a limit of £450 to the cost of complying with a request for all public authorities subject to the Act not listed in Schedule 1 part I. This equates to 18 hours work. In estimating the cost of complying a public authority can take the following into account:
 - determining whether it holds the information requested,
 - locating the information or documents containing the information,
 - retrieving such information or documents, and
 - extracting the information from the document containing it.

The Regulations state: *'any of the costs which a public authority takes into*

account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour'.

46. The BBC explained that there were 331 performers engaged by the BBC on Eastenders at the time of the request. Information about payments made to performers is stored on the BBC's ACON ("Artists Contracts") database. Each performer has an electronic record card on this system, which contains details of payments made to them. Performers are not staff members and do not have an annual "contract value" as such; rather they are engaged and paid in various ways and for various periods.
47. The BBC stated that it would be necessary to check each individual's record card and retrieve the information relating to each payment made to them. Each payment is separately recorded on ACON and is not searchable by programme (e.g. Eastenders or Doctors) or by type (episode fee or repeat fee). Therefore each payment must be checked separately to ascertain the type and programme. The majority of the performers, particularly the supporting artists, would have worked on numerous other productions during the year. It is not possible to automatically extract information about payments to an individual which relate to a particular programme. It would therefore be necessary to check the entire record card to retrieve payments for Eastenders only.
48. The BBC explained that all appearances in Eastenders attract a repeat fee for the omnibus episode. Repeat fees are also recorded as a separate payment so it would be necessary to check the entire record card to retrieve each of these payments too.
49. The number of payments which need to be totalled for each individual would be a minimum of two, if a performer had appeared in only one episode plus its repeat. However, it would, the BBC stated, be most unusual for a performer to appear in only one episode in an entire year. A regular cast member might appear in 60-70 episodes per year, and so would have a payment for each of these, plus a repeat payment. In addition to this, many of the walk-ons and stand ins are regulars (for example, stall holders) and also appear in a significant number of episodes each year, for which they too would receive an episode and a repeat payment
50. Because the BBC has no business need to collate these figures, the ACON system has not been designed to do so and it is therefore not possible to make these calculations on ACON. Instead, it would be necessary to retype all the information into Excel to calculate the total for each individual, or manually collate the total using a calculator.
51. The BBC emphasised that there are 331 individuals whose information would need to be retrieved in order to find the full range of values from maximum to minimum as requested. In order to comply with the appropriate limit, it would need to locate and extract the relevant set of records for each individual as well as make the required calculations in less than three and a half minutes for each individual. To support its assertion that to do so would exceed the cost limit the

BBC explained that an artist's agent had recently contacted the BBC to ask for this type of information on behalf of his artist, for a period of just over one year. A BBC member of staff who is trained and experienced in the use of the ACON system took approximately four hours to retrieve this information for a single individual.

52. The Commissioner is satisfied, from the explanation provided by the BBC, that to comply with the complainants request (as clarified by the complainant) for the range of annual contract values from maximum to minimum, would exceed the appropriate limit. The Commissioner has not investigated the application of section 40 as the BBC is not obliged to supply the information under section 12(1).

Section 43 – Commercial Interests

53. 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 stated that disclosure of the total annual staff costs for Eastenders would, or would be likely to prejudice its commercial interests.
54. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to prejudice' by a number of Information Tribunal decisions. With regard to 'would be likely to prejudice', the Tribunal in *John Connor Press Associates Limited v The Information Commissioner EA/2005/005* 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 EA/2005/0026* commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
55. The BBC has not specified which limb of the prejudice test it has applied. In the Tribunal Case *McIntyre vs Ministry of Defence EA/2007/0068* the Tribunal found that where a public authority has not specified which limb it is applying the Commissioner should apply the lower test. The Commissioner has therefore considered if disclosure would be likely to prejudice the commercial interests of any person.

The BBC's position

56. As discussed above in relation to the derogation, the BBC considers the annual staff costs of Eastenders to relate to in-house production costs. In order to support its position that the information in this case is exempt on the basis of section 43(2), the BBC provided the Commissioner with the following more

detailed explanation of how its commercial interests would be harmed by disclosure of the requested information:

57. Disclosure of the information may result in a ratchet effect among bids from independent production companies (IPCs) in respect of licence deals for similar line items for different types of programmes (eg make-up costs, budget available to pay for programme contributors). Indeed, disclosure of any of these elements of a programme budget could be the basis for incurring this prejudice. If further requests were made for other elements of programme costs it is directly foreseeable that entire budgets would be disclosed. In the BBC's opinion this could lead to the position that IPCs will know that a minimum level of funds are available for a particular type of programme or similar programme, such as a serial drama in this case, and they will have an incentive to bid beyond that level. This will prejudice the commercial interests of the BBC because it will be forced to increase what it pays IPCs for those licence deals, or face losing the deals.
58. The BBC has highlighted a number of features of in-house productions and the market for IPCs which support this argument:
59. Firstly, information about the cost of in-house productions is not widely known. Very few people have knowledge of deals outside their own company; those in the BBC responsible for commissioning programmes will have knowledge of the relevant sums and staff moving between companies may take knowledge with them, although it will be current and of value for a limited period only. All such information is treated as confidential within the BBC and access is limited to those with a need to know.
60. Therefore, the disclosure of information relating to in-house production costs 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 which illustrates that a change to the relative flow of information between participants in an auction can affect the outcome of that auction.¹ 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.
61. Furthermore, the BBC has highlighted its purchasing obligations under its Agreement with the Department for Culture Media and Sport. Under this Agreement the BBC has to produce a specific quota of programmes through IPCs, currently 25%. A further 25% of output must be produced as a result of competition between IPCs and in-house production departments (known as the Window of Creative Competition). As a result competition between IPCs and in-house production departments is placed on an even contractual footing.

¹ This paper can be viewed at http://www.competition-commission.org.uk/our_role/analysis/bidding_markets.pdf

62. In order to demonstrate the likelihood of this prejudice occurring the BBC has 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 (i.e. fewer IPCs would be willing to contract with the BBC) and a reduction in programming quality.

The Commissioner's Position

63. The Commissioner would first like to note that the information requested in this case bears similarities to that requested in other cases where the BBC advanced the same arguments relating to in-house production costs and section 43(2) (FS50072937 & FS50067416). In these cases the Commissioner accepted the BBC's arguments relating to the application of section 43(2) and in-house production costs. Whilst the Commissioner accepts that the information requested in this case is of similar nature as that in the earlier cases to the extent it is information relating to the an elements or total budget of in-house production, he does not accept that this therefore means that the information in this case must also be exempt. Such a suggestion does not fit with the Commissioner's approach of investigating the application of exemptions on a case by case basis; simply because information is exempt in one case it does not necessarily follow that similar information will be exempt on the same basis in the next case. Rather, the Commissioner has to consider the application of the exemptions in each case on their merits on the basis of the arguments advanced by public authorities.
64. The Commissioner notes that the request in this case is for a specific element of the in-house production cost of Eastenders, the total annual staff cost. The BBC have argued that disclosure would or would be likely to prejudice its commercial interests in two ways; that disclosure of this element relates to the disclosure of 'talent costs' and that disclosure of a single element of an in-house production would lead to further requests for the other costs of the programme and thus, over time, it is possible that the entire budget of a programme would be disclosed.
65. The Commissioner does not accept that the requested information relates to the disclosure of talent costs. He accepts that within the annual staff costs of Eastenders there are payments made to 'talent' however the headline figure will also include production staff, payments to script writers etc. Whilst the Commissioner notes that the BBC has disclosed to the complainant the number of performers, script writers and production staff engaged at the time of the request, this does not detail the average or total number engaged through the year. He also notes that the payments to performers include repeat fees and so is more complicated than a simple annual figure. The Commissioner does not agree that it would be possible to work out the payments to 'talent' from the total annual figure.

66. The BBC has also argued that disclosure of one element of an in-house production cost could lead to further requests for the other costs of the programme. In the Commissioner's opinion for this argument to be sustained the BBC has to be able to demonstrate that disclosure of the information covered by request would lead to further requests for costs of the component parts of a production; that the information covered by these requests will always be disclosed; and that it will be practical to combine the cost of the component parts into a useable format. If these circumstances occur, then it is possible that the total cost of a production will essentially be placed in the public domain and the prejudice outlined above may occur.
67. The Commissioner does accept that disclosure of the requested information in this case could encourage others to submit requests for details of the costs of other elements of an in-house production. This request in itself demonstrates that the public are interested in how much the BBC spends on various different aspects of a production. However, as discussed above, each request for information is considered on its own merits and in the Commissioner's opinion it is likely that there may be particular factors which preclude the disclosure of cost information about certain elements of an in-house production. Therefore, in the Commissioner's opinion it is unlikely that *all* of the separate cost elements of an in-house production will be disclosed under the Act. Therefore, in the Commissioner's opinion the BBC's argument that disclosure of certain cost elements of an in-house production would in time lead effectively lead to the disclosure of the total cost of an in-house production is flawed.
68. Even if the Commissioner were to accept that disclosure would, in time lead to the disclosure of the total cost of Eastenders he does not accept that disclosure of the total cost of Eastenders would be likely to prejudice the BBC's commercial interests. The Commissioner understands that the prejudice to the BBC's commercial interests may occur if the total cost is disclosed because IPCs will alter their behaviour with regard to auctions for licence deals for similar programmes. This will result in the BBC having to pay a higher price to commission a similar programme in the future. The Commissioner accepts that such a suggestion is, in theory, logical.
69. In its submissions to the Commissioner the BBC made no attempt to highlight which programmes it considered similar to those which the complainant requested, e.g. disclosure of the staff costs for Eastenders will affect the auction for programme x or y. Without knowing which these programmes are, and indeed when the auctions for these licence deals are to occur, the Commissioner does not accept that the likelihood of prejudice can be accurately described as real and significant.
70. Obviously, the Commissioner could speculate on the likelihood of prejudice occurring following disclosure of the total cost of Eastenders. However, as he has made clear on a number of occasions, the onus is on public authorities to provide clear evidence to demonstrate why information is exempt from disclosure under the Act. Having reviewed the BBC's submissions on this case, the Commissioner does not accept that the BBC has provided sufficient evidence to demonstrate

that disclosure of this information would be likely to prejudice its commercial interests. Rather the BBC has simply asked the Commissioner to accept a generic argument in relation to the in-house production costs which fails to take account of the different type of information actually being requested in this case. The Commissioner also notes that this supports the position taken in case reference FS50140478 in which the request was for the budget of certain shows including Eastenders. In this case the Commissioner found that the BBC had provided insufficient evidence to support its application of section 43(2) and ordered disclosure of the requested information.

- 71 The Commissioner has also considered whether disclosure of isolated information covered by the request would, in itself, be likely to prejudice the commercial interests of the BBC. In the Commissioner's opinion disclosure of this information would not provide IPCs with sufficient information to allow them to formulate an alternative bid. Therefore, the ratchet effect described earlier would be unlikely to occur because disclosure of information covered by requests is simply not sufficient to allow IPCs to establish the price the BBC pays for certain programmes.
72. On the basis of the above, the Commissioner has concluded that the BBC has failed to provide sufficient evidence to demonstrate that the information requested in part four of the request would be likely to prejudice its commercial interests and therefore the Commissioner is not satisfied that section 43(2) is engaged. As the Commissioner has found that section 43 is not engaged there is no requirement to go on to consider the public interest test.

Procedural matters

73. The complainant submitted his request on 28 March 2006 and the BBC refused to disclose the information on 29 March 2006. In its refusal letter the BBC relied on the Schedule I 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 I derogation and therefore falls within the scope of the Act, he must conclude that technically breaches of section 17 have occurred when the BBC refused both of these requests.
74. 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. Section 17(3) requires a public authority to explain why, if relying on a qualified exemption, it has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. Section 17(5) requires the public authority to give the applicant a notice stating that it is not obliged to comply with a request under section 12(1).
75. With regard to the request of 28 March 2006 the BBC failed to provide the complainant with a refusal notice citing section 43(2) and section 12 (1) and therefore breached sections 17(1), 17(3) and 17(5).

The Decision

76. 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 covered by the scope of requests four and five 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 sections 17(1)(a) (b) and (c) for failing to state that the information was exempt, which exemption applied and why.
 - The BBC breached section 17(3)(b) for failing to explain the public interest test and 17(5) of the Act by failing to explain its reliance on section 12(1).
 - The information requested in part 4 of the complainant's request is not exempt from disclosure on the basis of section 43(2).
77. However, the Commissioner is satisfied that the BBC dealt with the following element of the complainant's request in accordance with the Act:
- The BBC was correct to withhold the information falling with the scope part 5 of the request on the basis that it is exempt from disclosure on the basis of section 12(1).

Steps Required

78. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- (i) Disclosure of the information withheld under section 43(2) in part 4 of the complainant's request.
79. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

80. 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

81. 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 June 2008

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Relevant Statutory Obligations and Provisions under the Act.

Section (1) 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 2(1) states that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

- (a) the provision confers absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 2(2) states 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 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 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 12(1) states that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Section 17(1) states that -

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

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

Section 43(2) 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

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