

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 February 2010

Public Authority: British Broadcasting Corporation
Address: 2252 White City
201 Wood Lane
London
W12 7TS

Summary

The complainant submitted a request to the BBC for information concerning a meeting between the Director-General Mark Thompson and David Cameron, MP. The BBC refused to provide some of the information on the basis that it fell outside the scope of the Act because it was held for the purposes of 'journalism, art or literature'. The BBC concluded that the remainder of the information was within the scope of the Act but it refused to disclose it on the basis that it was exempt under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the Act.

The Commissioner has investigated and concluded that the BBC was correct to refuse access to some of the withheld information on the basis that it was outside the scope of the Act because it was held for the purposes of 'journalism, art or literature'. He has also concluded that where the requested material fell within the scope of the Act, the BBC was correct to refuse to supply it on the basis that it was exempt under section 36(2)(b)(ii) and the public interest favoured maintaining the exemption. The Commissioner requires no further steps to be taken in this matter.

The Commissioner's Role

1. The Commissioner's duty is to decide whether the BBC has complied with its duties under the Freedom of Information Act 2000 (the Act).

The Request

2. On 5 February 2008, the complainant submitted the following request to the British Broadcasting Corporation (the BBC):

“Has the BBC Director-General Mark Thompson held any meetings with the Leader of the Opposition, David Cameron, since 27 June 2007?”

If the answer to the above question is yes, please state on how many occasions Mr Thompson and Mr Cameron have met, where each meeting took place, who else – if anyone – was present, whether transcripts of their meetings exist, or whether any memos were written by either the BBC or Conservative Campaign Headquarters (or Mr Cameron’s office) subsequent to any meetings. Please also state whether it was Mr Cameron or Mr Thompson who initially requested each meeting.

3. The BBC replied to the complainant on 4 March 2008, advising that Mark Thompson had not held any meetings with David Cameron between 27 June 2007 and the date of his request.
4. The BBC also advised the complainant that Mark Thompson, Caroline Thomson (Chief Operating Officer) and John Tate (Director of BBC Policy & Strategy) met with David Cameron and members of his office on 28 February 2008. The meeting took place at David Cameron’s office. The BBC advised the complainant that no transcripts, notes or other documentation relating to the meeting were recorded.
5. On 26 March 2008, the complainant contacted the BBC and asked the following:

“Further to your statement in RFI 20080128 in which it was stated: -

“However the BBC can voluntarily confirm that Mark Thompson, Caroline Thomson (Chief Operating Officer) and John Tate (Director of BBC Policy & Strategy) met with David Cameron and members of his office on 28 February 2008. The meeting took place at David Cameron’s office. No transcripts, notes or other documentation relating to the meeting were recorded.”

Please will the BBC explain what was discussed at this meeting, giving whatever details are available?”

6. On 29 April 2008, the BBC contacted the complainant to inform him that, upon receiving his request of 26 March 2008, a fresh search for information had been undertaken. The BBC advised that a note of the meeting between the Director-General and Mr Cameron had in fact been created and located. It informed the complainant that additional time was required to consider the application of section 36 and the public interest test in relation to the information requested but a response would be forwarded to the complainant in due course.
7. On 1 July 2008, the BBC provided the complainant with a copy of an email containing details of who attended the meeting which related to the request. However the BBC provided a refusal notice in respect of the actual details of what was discussed at the meeting stating that the information was being withheld under section 36 of the Act, (prejudice to the effective conduct of public affairs). The BBC advised that that sections 36(2)(b)(i), (2)(b)(ii) and 2(c) of the Act

applied to the withheld information. The BBC considered that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

8. The BBC also considered that some of the information withheld fell outside the scope of the Act by virtue of Schedule 1 of the Act as it was held for purposes of 'journalism, art or literature'.
9. The BBC advised that it did not offer internal reviews of decisions to refuse access to information where that material was deemed to fall outside of the scope of the Act. It also explained that it did not offer internal reviews for decisions considered under section 36 of the Act. This was because section 36 decisions were taken by the Chairman of the BBC and there was no one more senior to review the decision. The BBC did advise the complainant of his right to appeal to the Commissioner if he was dissatisfied with its decision.

The Investigation

Scope of the case

10. On 1 July 2008 the complainant contacted the Commissioner to complain about the way his request for information of 26 March 2008 had been handled. The complainant asked the Commissioner to consider the refusal by the BBC to release the information requested on the basis that it fell outside the scope of the Act or was exempt by virtue of section 36. The Commissioner has therefore investigated and made a decision about these issues in relation to the request of 26 March 2008.

Chronology

11. Regrettably there was a delay of 13 months before the Commissioner was able to begin his formal investigation. The Commissioner wrote to the BBC on 20 August 2009 and asked it to provide him with a copy of all the withheld information. The Commissioner subsequently requested further details in relation to the BBC's handling of the request.
12. On 21 August 2009 the BBC provided the Commissioner with some information relating to the application of the section 36 exemption. The BBC advised the Commissioner that a formal submission answering his queries would be provided in due course.
13. The Commissioner did not receive the information he required in relation to the BBC's handling of the request, despite a number of reminders being sent to the BBC. On 19 October 2009 the Commissioner advised the BBC that he was now considering issuing an Information Notice under section 51 of the Act. This would compel the BBC to provide a full response to his queries.

14. On 20 October 2009 the BBC responded to the Commissioner and confirmed its view that some of the withheld information was held for the purposes of 'journalism, art or literature' and was therefore outside the scope of the Act.
15. The BBC considered that the remainder of the information requested was exempt under section 36 of the Act. It also explained that if the Commissioner disagreed that the material identified as falling outside of the scope of the Act was held for the purposes of journalism, art or literature then that information would also be exempt under section 36. The BBC expressed the view that there was a significant cross-over in respect of the reasons for applying section 36 and the Schedule 1. This was particularly evident in terms of allowing for private space to consider views or opinions, which is fundamental to journalistic creativity.

Analysis

Jurisdiction

16. Section 3 of the Act states: -

“3. – (1) In this Act “public authority” means –
(b) ... any body ... which
(i) is listed in Schedule 1

The entry in relation to the BBC at Schedule 1, Part VI reads:

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

Section 7 of the Act states: -

“7. – (1) 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”.

The BBC has argued that the construction of sections 3 and 7 and Schedule 1 mean that the BBC is not a public authority where it holds the requested information for the purposes of journalism, art or literature. Consequently, the Commissioner would not have jurisdiction to issue a decision notice given the wording of section 50.

17. This issue has been considered by the House of Lords in the case of *Sugar v BBC*¹. By a majority of 3:2, the Lords found in favour of the Appellant, Mr Sugar, in concluding that the Commissioner does have jurisdiction to issue decision notices regardless of whether the information has been requested is derogated. The Commissioner adopts the reasoning set out by Lord Hope at paragraphs 54 and 55 where he said: -

¹ *Sugar v BBC* [2009] UKHL 9

“54. Section 7(1) says 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 the Act applies to any other information held by the authority. What it does say is that, in that case, the authority is a hybrid – a “public authority” within the meaning of the Act for some of the information that it holds and not a “public authority” for the rest. The technique which it uses is a different one. Taking the words of the subsection exactly as one finds them, what it says is that nothing in Parts I to V of the Act applies to any other “information” held by “the authority”. This approach indicates that despite the qualification that appears against its name in Schedule 1, the body is a public authority within the meaning of the Act for all of its purposes. That, in effect, is what section 3(1) of the Act provides when it says what “public authority” means “in this Act”. The exception in section 7(1) does not qualify the meaning of “public authority” in section 3(1). It is directed to the information that the authority holds on the assumption that, but for its provisions, Parts I to V would apply because the holder of the information is a public authority”.

55. ... The question whether or not Parts I to V apply to the information to which the person making the request under section 1(1) seeks access depends on the way the public authority is listed. If its listing is unqualified, Parts I to V apply to all the information that it holds. If it is listed only in relation to information of a specified description, only information that falls within the specified description is subject to the right of access that Part I provides. But it is nevertheless, for all the purposes of the Act, a public authority”.

18. Therefore, the Commissioner has jurisdiction to issue a decision notice on the grounds that the BBC remains a public authority. Where the information is derogated, the Commissioner considers that the BBC has no obligations to comply with Parts I to V in respect of that information.
19. The Commissioner will first determine whether the request is for information held for the purposes of journalism, art or literature and if therefore the BBC is required to comply with Parts I to V in respect of the request.

Derogation

20. The scope of the derogation has been considered by the High Court in the cases of the *BBC v Steven Sugar and the Information Commissioner [EW2349]*² and the *BBC v the Information Commissioner [EW2348]*³. In both decisions Mr Justice Irwin stated:

“My conclusion is that the words in the Schedule mean the BBC has no obligation to disclose information which they hold to any significant extent for the purposes of journalism, art or literature, whether or not the

² *BBC v Steven Sugar & The Information Commissioner* [2009] EWHC 2349 (Admin)

³ *BBC v The Information Commissioner* [2009] EWHC 2348 (Admin)

information is also held for any other purposes. The words do not mean that the information is disclosable if it is held for purposes distinct from journalism, art or literature, whilst it is also held to any significant extent for those purposes. If the information is held for mixed purposes, including to any significant extent the purposes listed in the Schedule or one of them, then the information is not disclosable.” (para 65 EA2349 and para 73 EW2348)

21. The Commissioner interprets the phrase “to any significant extent”, when taken in the contents of the judgment as a whole, to mean that where the requested information is held to a more than trivial or insignificant extent for journalistic, artistic or literary purposes, the BBC will not be obliged to comply with Parts I to V of the Act. This is the case even if the information is also held for other purposes.
22. For completeness, the Commissioner considers that where information is held for non-journalistic/artistic/literary purposes and is only held to a trivial or insignificant extent for the purposes listed in Schedule 1, then the BBC will be obliged to comply with its obligations under Parts I to V of the Act.
23. Thus, provided there is a relationship between the information and one of the purposes listed in Schedule 1, then the information is derogated. This approach is supported by Mr Justice Irwin’s comments on the relationship between operational information, such as programme costs and budgets, and creative output:

“It seems to be difficult to say that information held for ‘operational’ purposes is not held for the ‘purposes of journalism, art or literature.’” (para 87 EW2348)
24. The information relevant to the request need not be journalistic, artistic or literary material itself. As explained above, all that needs to be established is whether the requested information is held to any significant extent for one or more of the derogated purposes of art, literature or journalism.
25. The two High Court decisions referred to above related to information falling within the following categories:
 - Salaries of presenters/talent
 - Total staff costs of programmes
 - Programme budgets
 - Programme costs
 - Payments to other production companies for programmes
 - Payments to secure coverage of sporting events and other events
 - Content of programme/coverage of issues within programmes

In relation to all of the above Mr Justice Irwin found that the information was held for operational purposes relating to programme content and therefore to a significant extent for the purposes of journalism, art or literature.

26. The Commissioner recognises that the High Court cases did not specifically consider information related to meetings between the BBC and members of Parliament. Nevertheless, the Commissioner considers the comments made by Mr Justice Irwin regarding the need for a relationship between the requested information and the derogated purposes are relevant and therefore he has considered them here.
27. The information requested in this case relates to a meeting held between the Director-General of the BBC and the Leader of the Opposition. The withheld information is a minute of the meeting consisting of 8 individual bullet-points. The BBC has asserted that the information at points 2, 5 and 6 is outside the scope of the Act because the focus of that information is the BBC's journalistic output. The Commissioner has reviewed those sections of the withheld information and accepts that they do deal with the content and coverage of issues within BBC programmes. Having reviewed the material and the BBC's submissions he is also of the view that the information at point 7 relates to BBC programme content. All of the information constitutes feedback on the BBC's creative output that is used to inform editorial decisions about future programming. Therefore there is a relationship between the specified information and the derogated purposes.
28. In view of the above, the Commissioner has found that the information at points 2, 5, 6 and 7 is held to a significant for the purposes of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of the Act.
29. Having concluded that some of the material is derogated as the BBC suggested the Commissioner has gone on to consider whether the remaining information at points 1, 3, 4 and 8 was appropriately refused on the basis that it fell within the scope of the Act but was exempt by virtue of section 36.

Exemptions

Section 36

30. In its refusal notice dated 1 July 2008 the BBC cited sections 36(2)(b)(i), (2)(b)(ii) and (2)(c) to the information that it did not consider derogated. However in its representations to the Commissioner and the evidence it has provided section 36(2)(b)(i) has not in fact been referred to by the BBC and therefore the Commissioner has not considered it further. He has however considered the BBC's application of section 36(2)(b)(ii) in the first instance. This provides that, information is exempt only, if in the reasonable opinion of the qualified person, disclosure of the information would, or would be likely to inhibit, the free and frank exchange of views for the purposes of deliberation.

The engagement of the section 36

31. When investigating cases involving the application of section 36, in order to establish whether the exemption has been correctly applied, the Commissioner has:
 - Ascertained who is the qualified person or persons for the public authority in question;

- Established that an opinion was given;
- Ascertained when the opinion was given; and
- Considered whether the opinion given was reasonable in substance and reasonably arrived at.

32. The BBC's qualified person at the time of the request, authorised by the Secretary of State under section 36(5)(o)(ii) of the Act, was the BBC Trust. In accordance with Protocol A5 issued by the BBC Trust, section 36 decisions are taken by the Chairman of the BBC Trust, the Vice Chairman, or if neither are available, any other Trustee. The Chairman, Vice Chairman, or other relevant Trustee (as applicable) receives advice on each case from the Director-BBC Trust and the General Counsel. In this case, the BBC has confirmed that the Chairman of the BBC Trust, Sir Michael Lyons gave his opinion that the exemptions in sections 36(2)(b)(ii) applied.

33. With regard to the fourth criterion, in deciding whether the opinion was 'reasonable' the Commissioner has been led by the Information Tribunal's decision in the case of *Guardian Newspapers & Brooke v Information Commissioner & BBC*⁴ in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. It concluded that:

"...in order to satisfy the sub-section, the opinion must be both reasonable in substance and reasonably arrived at." (para 64).

In relation to the issue of reasonable substance, the Tribunal indicated that:

"...the opinion must be objectively reasonable." (para 60).

34. The Commissioner has also been guided by the Tribunal's findings in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus:

"does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant" (para 91).

Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, the Commissioner is restricted to focus on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure which is relevant when considering the public interest test.

35. With regard to the degrees of likelihood of prejudice, the Commissioner has been guided on the interpretation of the phrase, 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The information Commissioner (EA/2005/0005)* confirmed that,

⁴ EA/2006/0011 & EA/2006/0013, paras 64 and 60 respectively.

“the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and ‘significant risk’ (para 15).

36. In relation to the alternative limb of ‘would prejudice’, the Tribunal in *Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026&0030)* commented that,

“clearly this second limb of the test places a stronger evidential burden on the public authority to discharge” (para.36).

37. The Commissioner has first considered whether the opinion was reasonably arrived at. To assist the Commissioner in reaching a decision, the BBC supplied a copy of the submission provided to the Chairman by the Director of the Trust and the Group General Counsel to inform his decision about the application of section 36. The submission set out in detail the reasons why the particular subsections cited were deemed to be relevant and specified that the limb of the likelihood test that should be relied upon was the ‘would be likely’ one. The submission also detailed the evidence that had been gathered and considered when reaching the decision to recommend the application of section 36.
38. The BBC also provided a second copy of the submission signed by Sir Michael Lyons indicating that he agreed with the recommendations. This opinion was provided on 23 June 2008.
39. In view of the above the Commissioner accepts that the qualified person’s opinion was reasonably arrived at. The submission he received included detailed arguments and appears to have taken into account relevant considerations and does not appear to have been influenced by irrelevant ones. He was also supplied with a copy of the withheld information and advised which sections were to be released to the complainant. The opinion was also provided prior to the BBC issuing the refusal notice on 1 July 2008.
40. The Commissioner is also satisfied that it was objectively reasonable for the qualified person to conclude that the disclosure of the withheld information would have been likely to inhibit the free and frank exchange of views for the purposes of deliberation. The opinion is based on the premise that disclosure of information used as part of a deliberative process could inhibit those who engage in such discussions in the future. In this case the Commissioner accepts that the BBC engages in discussions with senior politicians to understand how policy decisions will affect it and to enable it to make decisions about how it operates. The discussions also allow the BBC to make informed decisions about how best to provide input to politicians about issues that affect it and the wider media industry. Politicians also use information gathered during such discussions to inform their decisions about future policy developments. The withheld information in this case is free and frank in nature and the Commissioner is satisfied that it was reasonable for the qualified person to have concluded that, if it were released, future discussions would be less candid which in turn would harm the deliberations and decisions made by the BBC in the areas outlined previously.

41. In view of the above the Commissioner is satisfied that section 36(2)(b)(ii) is engaged in relation to the information that has been withheld. He has therefore gone on to consider the public interest test.

Public interest test

42. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
43. The Tribunal in *Guardian & Brooke* commented upon the distinction between consideration of the public interest under section 36 and consideration of the public interest test under the other qualified exemptions contained within the Act:

“The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice”⁵.

44. As noted previously, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus does not address the severity or extent of any inhibition or how frequently it is likely to occur. Therefore, in the Commissioner’s opinion this means that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the free and frank exchange of views in order to form the balancing judgment required by s2(2)(b).

Public interest arguments in favour of disclosing the information in relation to sections 36(2)(b)(ii)

45. The BBC indicated that there is a strong and real public interest in assuring licence fee payers that decisions taken have only been made after appropriate discussion and deliberation and on the best information available.
46. The BBC also recognised that there is a public interest in demonstrating that it is not politically biased and that it is truly an independent Corporation, properly separate from Government and the various political parties.
47. The BBC recognised that there is a clear public interest in openness and accountability in relation to how policy decisions are reached in relation to publicly funded organisations. The Commissioner also considers that disclosure would inform public debate about the issues and policies that affect the BBC and the

⁵ EA/2006/0011 & EA/2006/0013, para 88.

wider media industry and the decisions the BBC makes about when and how to contribute to and respond to those policies.

Public interest arguments in favour of maintaining the exemption in section 36(2)(b)(ii)

48. The BBC was of the view that releasing this information would likely inhibit the free and frank exchange of views between the BBC and senior politicians and peers. It is important that senior politicians are able to discuss their views and those of their party candidly with the BBC in confidence. This ensures that the BBC is able to make decisions about how to use its resources and to present its views and negotiate on legislative and regulatory issues that impact upon it on the basis of the fullest information possible. If these minutes were to be released, it is argued that senior politicians may not be able to discuss matters with the BBC so candidly in the future and therefore the relationship of trust between the BBC and senior politicians of all parties would be undermined and ultimately poorer decisions would be made by the BBC.
49. The BBC also argued that there was a public interest in preserving a safe space in which it could consider its exchanges with senior politicians and then make decisions about how to use its resources and fulfil its obligations as a public broadcaster.

Balance of public interest arguments

50. The BBC's arguments in favour of maintaining the exemption focus primarily on the concept of the chilling effect. The chilling effect arguments are concerned with the argued loss of frankness and candour in debate and discussion which would flow from the disclosure of information. This could result in poorer quality advice and less well formulated policy and decisions. The chilling effect can encompass a number of related scenarios:
- Disclosing information about a given policy or decision making process, whilst that particular process is ongoing, will affect the frankness and candour with which relevant parties will make future contributions to that policy/decision making;
 - The idea that disclosing information about a given policy or decision making process, whilst that process is ongoing, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes; and
 - Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy or decision making process (even after the process is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates and decision making processes.
51. In this case the BBC has primarily put forward arguments relevant to the first and second points above. The withheld information contains references to policies

that were under development at the time of the request and which had a substantial impact upon the BBC and wider media industry. The BBC was still discussing those policies and their potential implications and disclosure would likely have inhibited those exchanges. Furthermore disclosing the detail of discussions about live issues was likely to inhibit relevant parties, in some cases the same individuals, from contributing fully to future discussions about similar policies and issues. Ultimately this would hinder the BBC's decisions about how to respond to and make operation decisions flowing from policy changes.

52. In considering the weight that should be attributed to the chilling effect arguments the Commissioner has taken into account the scepticism with which the Tribunal has treated the chilling effect arguments when they have been advanced by other public authorities in relation to their application under section 35 (formulation or development of government policy). The following quote from the Tribunal in *Foreign and Commonwealth Office v Information Commissioner (EA/2007/0047)* accurately summarises the position of various Tribunal decisions:

“we adopt two points of general principle which were expressed in the decision in HM Treasury v the Information Commissioner EA/2007/0001. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity.” (para 26).

53. However, the Commissioner has also considered the comments of Mr Justice Mitting when hearing a Tribunal decision which was appealed to the High Court. Whilst supporting the view of various Tribunals that each case needed to be considered on its merits, Mr Justice Mitting disagreed that arguments about the chilling effect should be dismissed out of hand as ulterior considerations. In his view chilling effect arguments were likely to be relevant in many cases. He stated that:

“the reference to the principled statements of Lord Turnbull and Mr Britton as “ulterior considerations” was at least unfortunate. The considerations [chilling effects] are not ulterior; they are at the heart of the debate which these cases raise. There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between.”

54. In light of the various pieces of case law, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments have to be considered on the particular

circumstances of each case and specifically on the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence as to how disclosure of the information in question would result in the effects suggested.

55. The Commissioner has considered the chilling effect arguments advanced by the BBC very carefully and in this case has concluded that they do deserve to be given weight. In reaching this view he has considered the content of the withheld information and accepts that it is of a genuinely free and frank nature. He also accepts that the parties had a genuine and legitimate expectation that the content of the discussion would not be made public. Finally, as noted previously, he recognises that decisions were being made by the BBC about how to contribute to and deal with policies that were being actively formulated and which affected it.
56. In this case the Commissioner considers that the severity and frequency of harm that would be likely to occur would be significant. This is on the basis that the BBC frequently obtains valuable information from discussions with senior politicians of all political parties on a range of issues to inform its decision making. The Commissioner accepts that if the withheld information were released it would likely inhibit the candour of such discussions with all parties in the future. He further accepts the BBC's suggestion that policies affecting it and the wider media industry are regularly under review and require discussion. The BBC has highlighted how important the information it obtains from senior politicians is to the decisions it makes about how to make best use of its resources and fulfil its obligations as a public service broadcaster.
57. The Commissioner also considers that the safe space argument deserves weight in this case. As mentioned above the information relates to policies that were still under development and to decisions that the BBC was making about how to contribute to and influence those policies. The Commissioner accepts that the BBC required a safe space in which to consider its options and make decisions about how best to use its resources and carry out its role as a public sector broadcaster bearing in mind the potential operational implications of the policies under discussion.
58. With regard to attributing weight to the public interest arguments in favour of disclosing the information, the Commissioner believes that inherent and general arguments surrounding accountability and transparency should not be dismissed lightly; nor should the public interest in assuring licence fee payers that decisions taken have only been made after appropriate discussion and deliberation and on the best information available.
59. However, having looked at the content of the withheld information the Commissioner believes that although it is of a free and frank nature, the extent to which disclosure would actually inform the public about how the BBC has made decisions is relatively limited. Whilst he also accepts that disclosure would inform public debate about issues affecting the BBC and the media industry more widely, he is of the view that this would be to a very limited degree having considered its content.

60. On the basis of the above, the Commissioner has concluded that the public interest in maintaining the exemption at section 36(2)(b)(ii) outweighs that in disclosing the information. In view of this it has not been necessary to go on to consider the BBC's application of section 36(2)(c) in this case.

Procedural issues

61. The BBC explained that it required additional time to consider the public interest test and that this was in accordance with section 10(3) of the Act. The Commissioner would point out that whilst section 10(3) does provide for public authorities to extend the time for complying with sections 1(1)(a) and (b) of the Act, it does not affect the time by which any notice under section 17(1) must be given. The effect of this is that a public authority must reach a decision about whether or not a qualified exemption is engaged within twenty working days. If it determines that an exception is engaged then a refusal notice compliant with section 17(1) must be issued within twenty working days. The public authority is only permitted to extend the time for compliance in order to consider the public interest test.
62. In this case the BBC did not issue a refusal notice explaining that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) were engaged until 1 July 2008. In failing to issue a valid refusal notice within twenty working days the BBC breached section 17(1).

The Decision

63. The Commissioner's decision is that as parts 2, 5, 6 and 7 of the information requested is held for the purposes of journalism, art or literature, the BBC was not obliged to comply with Parts I to V of the Act in respect of this part of the request.
64. The Commissioner's decision is that the BBC was correct to withhold parts 1, 3, 4 and 8 of the information on the basis that it was exempt from disclosure on the grounds of section 36(2)(b)(ii).
65. However the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act.
66. The Commissioner has found that the BBC breached section 17(1) in failing to issue a refusal notice citing sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) within twenty working days.

Steps Required

67. The Commissioner requires no steps to be taken.

Right of Appeal

68. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 25th day of February 2010

Signed

**Jo Pedder
Senior Policy Manager**

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

Legal Annex

General right of Access

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 1(2) provides that: -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14”.

Section 1(3) provides that: -

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that: -

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Prejudice to effective conduct of public affairs

Section 36(2) provides that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

- (a) would, or would be likely to, prejudice -
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to inhibit -
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise, prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.