

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 December 2010

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

Summary

The complainant sought disclosure of a TV Licensing contract between the BBC and Capita Business Services Ltd ("Capita") agreed in February 2002. The BBC initially relied on section 12 – cost of compliance exceeds the appropriate limit but subsequently relied on section 43(2) – prejudice to commercial interests. Although a redacted copy of the contract between the BBC and Capita was eventually provided to the complainant he remained dissatisfied with the redactions made. The Commissioner has determined that section 43(2) is engaged as disclosure would be likely to be prejudicial to the commercial interests of both Capita and the BBC. However he considers that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. He has therefore ordered that the information which was the subject of the narrowed request and subsequent complaint be disclosed to the complainant. As a consequence the Commissioner finds that the BBC has not met the requirements of sections 1(1)(b), 10(1) and 17(1)(b).

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. On 9 May 2008 the complainant requested,

"...details of all current agreements, contracts and arrangements between the BBC and Capita Business Services Limited or any and all other organisations, companies or contractors contracted by the BBC and using the generic trading name "TV Licensing". Please also provide details of any similar agreements, contracts and arrangements that have expired within the past three years.

I am interested in the terms and nature of these agreements and not in the fees or other remuneration paid by the BBC to the contractors concerned. If such information is deemed to impact the commercial interest of any party, then I have no objection to it being withheld."

3. The BBC provided a response to the complainant on 6 June 2008 in which it refused to disclose the information he had requested on the basis that the cost of compliance would exceed the appropriate limit and therefore section 12(1) of the Act applied. The complainant did not request an internal review of the BBC's decision, but he did agree to narrow his request.

4. The complainant made a second request to the BBC on 13 June 2008 suggesting -

"... that, in the first instance at least, you copy to me your agreements with Capita."

5. On 11 July 2008 the BBC refused to comply with the second narrowed request suggesting that the cost of doing so would still exceed the fees limit as the main contract between the BBC and Capita would have to be looked at clause by clause and redacted. It was also suggested that section 43 might apply but it was not categorically cited.

6. An internal review was requested on 14 July 2008 in which the complainant reiterated his lack of interest in, *"particular sums of money"* though he did stress that he was interested in clauses that related to incentives given to Capita by the BBC.

7. On 28 August 2008 the BBC wrote to the complainant with the details of the result of the internal review it had carried out. The reviewer criticised the length of time the BBC had taken to respond to the complainant's original request though it was just inside the 20 working days. The view of the internal reviewer was that:

"...having looked into the correspondence surrounding the handling of this request, I believe that the BBC have not handled this appropriately under the terms of the Act, and that the fees limit was not correctly applied in this instance.

I therefore overturn the findings of the original request, and advise that the BBC should revisit the original request in order to give the requester a more satisfactory response."

8. In line with the internal review of the complainant's request the BBC ceased relying on section 12.
9. The BBC wrote to him on 17 November 2008 to advise him that it would be relying on section 43(2) and outlined the reasons for this view. It also provided its arguments to the complainant regarding the public interest test.
10. The BBC concluded that, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

The Investigation

Scope of the case

11. On 24 September 2008 the complainant contacted the Commissioner to complain about the way his request of 13 June 2008 had been handled. The complainant specifically asked the Commissioner to consider why the BBC had not provided a further response to his narrowed request as the internal review dated 28 August 2008 suggested it should. Prior to the Commissioner commencing his investigation, the BBC provided a further response on 17 November 2008. Subsequently the complainant asked the Commissioner to consider whether the BBC's refusal to provide information on the basis of section 43(2) was appropriate.
12. As outlined in the chronology section below, during the course of the Commissioner's investigation the BBC provided the complainant with a redacted version of the contract relevant to his 13 June 2008 request. It continued to withhold several clauses on the basis of section 43(2). In addition the BBC introduced several section 31 exemptions in relation to one particular clause.

13. In view of the above, the Commissioner's analysis and decision has focussed on the BBC's reliance on section 43(2) in respect of the outstanding withheld information regarding incentives which was within the scope of the 13 June 2008 request.
14. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.
15. The Commissioner has also considered the BBC's compliance with the requirements of sections 1, 10 and 17 of the Act.

Chronology

16. As mentioned above, following the internal review, the BBC provided its further response to the 13 June 2008 request to the complainant on 17 November 2008. Firstly, the BBC dealt with the reasons for withholding the information relevant to the original request but went on to consider the complainant's narrowed request. The BBC considered the information requested on 13 June 2008 to be exempt under section 43(2) of the Act.
17. In citing section 43(2) the BBC explained why, in its view, release of the requested information, "*would be likely to prejudice the commercial interests of Capita and, in turn, the BBC.*" It also explained how it had reached its decision in relation to the public interest test.
18. On 24 November 2008, having received the aforementioned response, the complainant sought an internal review of the application of section 43(2) to information within the scope of his narrowed request, dated 13 June 2008. When doing so he explained that he wished,

"to understand how the BBC incentivises Capita Business Systems Limited ('Capita') to intimidate those without both a television licence and a television receiver into buying television licences."
19. On 24 December 2008 the Commissioner wrote to the complainant expressing the view that his complaint focussed on the BBC not having provided him with a timely response following the outcome of its internal review on 28 August 2008. However the BBC's letter of 17 November 2008 had provided that response and the Commissioner considered that the complaint had now been resolved. The initial complaint was therefore closed on the same day.
20. The BBC advised the complainant on 30 December 2008 that it

would not be conducting an internal review of its decision to withhold the information on the basis of section 43(2). The complainant contacted the Commissioner again. The complainant advised the Commissioner that he wanted to pursue his complaint on the basis that the BBC had inappropriately refused to provide the withheld information regarding incentives on the basis that it was exempt under section 43(2).

21. On 2 December 2009 the Commissioner wrote to both the complainant and the BBC to explain the scope of his investigation. At that point he intended to focus on whether the BBC had correctly applied section 43(2) in relation to the request of 13 June 2008. He noted the complainant's statement that he was interested in details of any incentives for Capita which were contained in the agreements. The Commissioner asked to see the withheld information and the evidence demonstrating a clear link between disclosure of the withheld information and the prejudice to commercial interests which the BBC claimed was likely to occur. He also asked for clarification concerning whether the BBC was claiming that disclosure of the requested information would, or would be likely to, prejudice commercial interests.
22. The BBC responded on 29 January 2010 explaining that it had given further consideration to the withheld information and was happy to release a redacted version of the contract between Capita and the BBC to the complainant. It explained that it had reached this decision because a redacted version of the contract had been disclosed as a result of a separate FOI request to the BBC from another applicant. The BBC released a redacted copy of the contract to the complainant on 8 February 2010. This disclosure was made in an attempt to informally resolve this complaint, though the Commissioner notes that in fact the complainant had narrowed his complaint to focus on information regarding incentives and therefore, strictly speaking, the other material was no longer required.
23. On 10 February 2010 the complainant confirmed to the Commissioner that he remained unhappy with the response and wished to pursue the outstanding withheld information. The Commissioner asked the BBC for its response to the points raised in his letter of 2 December 2009.
24. On 16 April 2010 the BBC provided its submissions to the Commissioner. It confirmed that it considered that the release of the requested information, "would have a commercially prejudicial effect on the BBC...and Capita", thereby relying on the higher threshold of prejudice contrary to the explanation previously given to the complainant in its internal review. Capita also provided its arguments

- for the withholding of the requested information as part of that submission.
25. A redacted and an unredacted copy of the contract between the BBC and Capita was provided to the Commissioner as part of the BBC's submission. The BBC also provided an Appendix clearly identifying those parts of the contract it considered were caught by the scope of the complainant's request relevant to the subsequent complaint and which it considered remained exempt under section 43(2). This documents was entitled *Appendix 10 - Clauses that are relevant to complaint from [the complainant]*. Capita also provided a more detailed explanation of the prejudice to its commercial interests set against certain redacted clauses within the contract.
 26. On 16 April 2010 the BBC introduced late exemptions as part of its submission. The BBC chose to rely also on sections 31(1)(a),(b),(d) and (g) and (2)(a) of the Act, specifically on the grounds that disclosure would, or would be likely to, prejudice the prevention or detection of crime, the apprehension or prosecution of offenders, the collection of the licence fee and the BBC's ability to discharge its public functions in respect of such matters. The BBC also presented its public interest arguments regarding the application of section 31.
 27. Subsequently the Commissioner asked the BBC to clarify which part of the redacted contract this exemption applied to. The BBC confirmed on 24 June 2010 that it considered the section 31 exemptions to apply to one named clause only which relates to incentives and was identified to the Commissioner. It also confirmed that, in its view, the "would" limb of the prejudice test applied in relation to each subsection of section 31 as opposed to the "would be likely to" limb.

Analysis

28. The full text of the sections of the Act which are referred to can be found in the Legal Annex at the end of this Notice, however the relevant points are summarised below.
29. For the avoidance of doubt the withheld information that remains in dispute and which the Commissioner has considered is specified in the Appendix supplied by the BBC. The BBC's view is that the exemption in section 43(2) applies to all of the withheld information regarding incentives and in addition that the section 31 exemptions also apply to one of those particular clauses.

Exemptions

Section 43(2) – Prejudice to commercial interests

30. The Commissioner first considered whether the information withheld by the BBC was exempt from disclosure under section 43(2).
31. Section 43(2) provides an exemption for information which would, or would be likely to, prejudice the commercial interest of any person (including the public authority holding it).
32. The Commissioner applies a three tier test to ascertain whether the exemption is engaged.
 1. Are the interests which will be prejudiced commercial?
 2. What is the nature of the prejudice in question?
 3. What is the likelihood of the prejudice occurring?
33. Although the BBC has stated that the information “would” prejudice the commercial interest of the BBC and Capita the Commissioner, in the first instance, has looked at “would be likely to” prejudice on the basis that if the Commissioner is not convinced that the information should be withheld on the basis of the “would be likely to prejudice” limb of the test the information would not meet the higher threshold of the “would” prejudice limb.
34. In relation to the first of the three tier test referred to above the Commissioner accepts that the information withheld in this case relates to the commercial activities of the BBC and Capita, namely the buying and selling of services in relation to TV licensing, and therefore he accepts that the interests which would be likely to be prejudiced are commercial and relevant to section 43. He has therefore gone on to consider the nature of the prejudice and whether release of the information would be likely to prejudice the commercial activities of either of the two parties to the contract as the BBC suggested.
35. In the case of *John Connor Press Associates Limited v The Information Commissioner* the Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (paragraph 15)
36. This interpretation follows the judgment of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In that case, the view was expressed 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." In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

Prejudice to the commercial interests of the BBC

37. Disclosure of the requested information would, according to the BBC, lead to a ratchet effect amongst potential future suppliers of these services to the BBC. It stated that the contract with Capita runs until 2012 and the BBC anticipates that the re-tendering for the supply of these services will commence in late 2010. It explained that Capita is not guaranteed the contract in 2012 and will compete alongside other bidders. Since suppliers will assume that a minimum level of funds is available for particular services, they will have an incentive to price their bid beyond that level.
38. In its letter of 16 April 2010 the BBC listed the reasons why it considered the release of the Capita contract to be commercially prejudicial to the BBC:
 - Because much of the contract is bespoke and the result of lengthy negotiations. Any concessions made which enter the public arena would be commercially prejudicial to the BBC's bargaining position.
 - Because the functions carried out by the BBC are integral to the operation of the TV licensing operation. The contract is coming up for renegotiation and were future bidders to be aware of concessions made they would be in a commercially superior position.
 - Because disclosure would prejudice the BBC's ability to secure the best possible terms with potential future suppliers of these services. This could lead to the BBC being unable to attract bids from the widest range of bidders and suffering a drop in quality of the operation of the licence fee or increasing its payments which would affect value for money for the licence payer.
39. The Commissioner is specifically looking at the incentives clauses that are the subject of the complaint. The BBC's argument is that these clauses are bespoke and the result of lengthy negotiations. This would suggest that the terms in the clauses were tailored to Capita and the BBC's requirements and that their bespoke nature means that future terms would have to be similarly tailored, specific and the result of detailed negotiation. The Commissioner also understands that the specification in respect of the new contract is likely to be substantially similar to the existing one.

40. The Commissioner has taken into account the fact that the contract ends in 2012 with the retendering process commencing in 2010 and the fact that the new contract, whoever it is with, will be of a substantially similar nature. Whilst he cannot provide any detail within this Notice regarding the nature of these incentive clauses he accepts that they are bespoke, non-standard negotiated clauses which may not be offered or agreed with other suppliers. As a result the Commissioner accepts that if the present commercial terms regarding incentives and the BBC's approach to risk sharing were disclosed in advance of the retendering process beginning this would be likely to prejudice its negotiating position.
41. The Commissioner recognises that release of the requested information is likely to enable other bidders to review the terms and expect the same or similar in any contract they secure in the future. He agrees that this is something that future bidders are likely to do given the potential commercial benefits to them. This would therefore be likely to reduce the competitiveness of future bids that, in the absence of this knowledge, may have offered the BBC alternative options that in fact represent better value for money for the BBC. He is satisfied that there is a causal relationship between the disputed information and the future tendering of the BBC TV Licensing contract which would create a risk to the competitive environment in this area. He is therefore willing to accept that disclosure of the withheld information would be likely to prejudice the commercial interests of the BBC.
42. However the Commissioner does wish to clarify that he is not persuaded that disclosure of incentive related information would be likely to prejudice the BBC's ability to secure the best possible terms with potential suppliers because of a reduction in the range of bidders prepared to tender for the business. The contract for TV Licensing is both lucrative and unique and as a result he is not convinced that the disclosure of terms agreed with Capita some years previously would be likely to dissuade potential suppliers from tendering for the business because of concern about their own information potentially being released in the future.
43. Whilst the Commissioner has accepted that section 43(2) is engaged on the basis that some prejudice to the BBC is likely, he is not persuaded by the BBC's contention that the disclosure of the requested information "would" prejudice its commercial interests. This is because he has not been presented with any evidence to support the argument that the likelihood of such prejudice occurring is more probable than not.

Prejudice to the commercial interests of Capita

44. The Commissioner has gone on to consider whether the disclosure of the information “would be likely to” cause the prejudice to the commercial interests of Capita described in the paragraphs below.
45. Capita argued in its letter, dated 14 April 2010, the likely detriment to its commercial interests if the redacted elements of the contract were disclosed:
- That if Capita’s rivals had access to its commercial business processes and approach to risk-sharing that approach could be cloned and erode Capita’s commercial advantage. Capita provided an example of the release of certain identified information that it believed would enable one of its competitors (unspecified) to erode Capita’s market advantage.
 - Disclosure of this information would place Capita at a disadvantage when negotiating with existing and potential clients for other, non-BBC work as similar terms might be demanded.

Some of the incentive information that is the subject of this complaint was identified separately by Capita as prejudicial to its commercial interests in line with the bullet points above.

46. Capita argued that the agreement with the BBC was entered into prior to the FOIA coming into force. As the requirements of freedom of information were not considered at the time, it would not have contemplated any disclosure of the redacted sections of the contract. It was also argued that an exemption such as section 43(2) would not have been considered for the same reason.
47. In the 14 April 2010 letter Capita also argued that the TV Licensing contract is one of its most important in terms of value and prestige and the award of the contract had meant an expansion in the Capita organisation. It was argued that any release of the commercial terms of the contract would be detrimental. The Commissioner understands the incentive information to form part of the commercial terms of the contract.
48. Businesses outsource to Capita and its trade secret is its “*commercial mechanisms, such as charges calculation, service level/service credit detail etc., described in the negotiated terms of the contract...*” This could enable competitors to “clone” Capita’s approach. The Commissioner notes Capita’s reference to a trade secret. Section 43(1) provides an exemption in relation to trade secrets. However on the basis of the evidence available it does not appear that section 43(1)

has been relied upon by the BBC as a basis for refusal in this case and therefore the Commissioner has not considered whether the disputed information constitutes a trade secret or whether section 43(1) is applicable in this case.

49. The Commissioner has considered the more detailed arguments that Capita provided and how they relate to the redacted information that has been identified as incentive information by the BBC. There was some emphasis placed on its approach to risk sharing and the risk reward structure as outlined in the contract.
50. The Commissioner does not consider that Capita's argument concerning the fact that the contract between it and the BBC was negotiated before the implementation of the FOIA is relevant in relation to the engagement of the section 43(2) exemption. Capita stated that exemptions such as section 43 were not considered at the time. The Act itself was passed in 2000 and the Commissioner is not convinced that a company of the size of Capita was unaware of the possible implications in 2002 that it might be obliged to disclose information under the terms of the Act at some point subsequently. In *Department of Health v The Information Commissioner (EA/2008/0018)*. The Tribunal noted:

"In 2003 some 3 years after FOIA was enacted it was not reasonable to expect that the entirety of a Contract which would continue into the years when FOIA would apply should remain entirely confidential. (paragraph 47)"¹

51. The Commissioner understands that the BBC Licensing contract is unique and notes that no evidence has been provided that similar considerations would apply in relation to other contracts pursued or secured by Capita. Therefore the Commissioner is not persuaded that sufficiently similar calculations or mechanisms would be relevant in relation to services provided to other clients. Furthermore Capita has not explained why its current clients would expect similarly favourable terms as the BBC or demonstrated how future clients would be able to trade-up on the strength of knowing the terms of a contract currently 8 years old.
52. However, the Commissioner has also taken into account the fact that the retendering process in relation to the BBC TV licensing contract is

¹ Found at

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i272/Dept%20of%20Health%20v%20IC%20\(EA-2008-0018\)%20Decision%2018-11-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i272/Dept%20of%20Health%20v%20IC%20(EA-2008-0018)%20Decision%2018-11-08.pdf)

set to start in 2010 and the fact that it will be of a substantially similar nature when considering the arguments about prejudice to Capita's interests in respect of this particular contract.

53. As he has explained above in relation to his consideration of the likely commercial prejudice to the BBC he accepts the arguments presented by the BBC that a new licence fee contract is unlikely to vary greatly from the present terms and conditions. As stated above, whilst the Commissioner cannot provide any detail within this Notice regarding the nature of these incentive clauses he accepts that these are bespoke, non-standard negotiated clauses specifically agreed for this contract with Capita which may not be offered or agreed with other suppliers. As a result the Commissioner accepts that if this information was disclosed in advance of the retendering process beginning it would be likely to prejudice Capita's commercial interests because it would provide its competitors with details of Capita's approach to incentives without them having to make any of their own investment in developing such mechanisms.
54. Given the content and level of detail present within the disputed clauses he is satisfied that there is a causal relationship between the information and the prejudice to Capita's ability to compete for the future BBC licensing contracts. He is therefore willing to accept that disclosure of the withheld information would be likely to prejudice the commercial interests of Capita in this regard.
55. Although the Commissioner has accepted that some prejudice to Capita's commercial interests is likely to occur he does not consider that the higher threshold of 'would prejudice' has been demonstrated by the evidence supplied by the BBC.
56. Having concluded that the exemption is engaged the Commissioner has gone on to consider the public interest test in this case.

The Public Interest Test

57. In considering the public interest in this matter the Commissioner has taken into account *Hogan & Oxford City Council v IC EA/2005/0026 & 30*. The Tribunal in relation to a different exemption found that when the "would be likely to" prejudice was engaged,

"... the public interest in maintaining the exemption will be more difficult to determine than where the alternative limb of the test has been applied." (paragraph 54)

Public interest arguments in favour of disclosing the requested information

58. The BBC's arguments in favour of disclosing the requested information centred on its public functions and what it owes to the public in terms of accountability.
59. The Commissioner agrees that the BBC needs to be seen to be exercising its Licensing Authority functions appropriately and proportionately and therefore that public money is being used effectively. The BBC points out that its enforcement operations need to be seen to be particularly appropriate and proportionate.
60. There is a public interest in the BBC being transparent about how it is getting value for money in respect of its use of the licence fee when purchasing goods and services.
61. There is a considerable amount of public debate around licence fee collection, which at the time of the request was being generated in response to the BBC Trust's open consultation (available at http://www.bbc.co.uk/bbctrust/consult/open_consultations/tv_licence.html). This can be facilitated by placing as much information as possible in the public domain including material which focuses on the incentives agreed for those contracted to collect the licence fee.
62. In addition to the arguments presented to him by the BBC that he has identified as being relevant in this case, the Commissioner has also taken account of the comments of the Information Tribunal in the case of *Department of Health v The Information Commissioner (EA/2008/0018)*. The Tribunal made its comments in the context of considering the extent to which the public interest favoured disclosing information in an IT contract between the public authority and a contractor.
63. In reaching its decision the Tribunal went on to place significant reliance on the guidance issued by the Office of Government Commerce on the application of the Act to various types of contractual information. It stated that the guidance, *OGC (Civil Procurement) Policy and Guidance version 1.1*, and the DCA working assumptions note accompanying it, was "...a useful approach to dealing with an information request and in broad terms reflects the approach that we have adopted in our consideration of this contract." (paragraph 80)
64. The Tribunal made reference to 12 areas within a contract which the guidance indicated should normally be disclosed by a public authority in the public interest because it would further the public's

understanding of how services bought with public funds would be delivered and how contracts should run. These were:-

- i. Service level agreements
 - ii. Product/service verification procedures
 - iii. Performance measurement procedures
 - iv. Contract performance information
 - v. Incentive mechanisms
 - vi. Criteria for recovering sums
 - vii. Pricing mechanisms and invoicing arrangements
 - viii. Payment mechanisms
 - ix. Dispute resolution procedures
 - x. Contract management arrangements
 - xi. Project management information
 - xii. Exit strategies and break options
65. The Commissioner notes that point v specifically refers to incentives mechanisms which is the same as the information contained in the Capita contract about which the complainant has specifically complained.
66. The Tribunal went on to state that it "*...would expect the DoH [Department of Health] in any future cases of this type to consider the information request by direct reference to these guidelines and in the event that the guidance was not followed in any respect, be able to provide the Commissioner with a clear explanation of why it was departing from the general principles set out.*" (paragraph 87)
67. The Commissioner notes that, although the BBC has provided its arguments to support the application of section 43(2), none of them, nor any of the other information available in this case, in his view suggests why it would be appropriate to deviate from the general principles contained in the guidelines and therefore why the information should be withheld.

Public interest arguments in favour of maintaining the exemption

68. The BBC stated that it would not be in the public interest to disclose sensitive information about a particular company, in this case Capita, if that information would likely be used by its commercial competitors. There is a public interest in preserving the ability of companies to invest in developing particular approaches and incentives mechanisms and to use those approaches when competing fairly for public sector contracts.
69. There is also a public interest in maintaining the exemption to preserve the BBC's ability to negotiate optimal contractual terms in relation to TV Licensing and obtain the best value for money and efficient expenditure of the licence fee income paid by approximately 25 million TV Licence holders.

Balance of the public interest arguments

70. The Commissioner considers that the arguments in favour of maintaining the exemption in this case do have some weight particularly given the relative proximity of the request to the start of the retendering process for the next TV Licensing contract.
71. He considers that preserving the ability of the BBC to negotiate a contract that represents the best possible value for money for licence holders has significant weight given the amount of money involved and the number of people affected.
72. However in the Commissioner's view the value of the contract and the number of people affected also adds weight to the arguments in favour of disclosure which are also in themselves significant.
73. The BBC considers that the general public interest in the transparency and accountability of the BBC in respect of its use of the licence fee is served by the broad range of oversight mechanisms, both internal and external. This includes oversight of the BBC Trust and the Executive Board. These mechanisms also include Ofcom the fair trading regime and competition law in general. The Commissioner does not accept the BBC's arguments in this regard. In his view the simple existence of oversight mechanisms does not necessarily reduce the weight that should attach to the public interest arguments in disclosure in this case and two of the mechanisms mentioned are not independent of the BBC. Furthermore, the BBC mentioned Ofcom as one of the oversight mechanisms but this would not appear to be relevant in this particular case. This is because Ofcom expressly states on its website that it is not responsible for regulating the BBC TV licence fee.

74. It is the BBC's contention that the release of details beyond what is currently available poses considerable harm to the BBC's commercial interests, without offering a proportionate benefit to the public. However, the Commissioner understands that no information about incentives within the relevant contract was available at the date of the request. Having reviewed the content of the withheld information he is of the view that this would add significantly to the public's understanding of the contractual arrangements regarding incentives and would further public confidence that the BBC was obtaining value for money.
75. The Commissioner also considers that the level playing field argument presented by the BBC in relation to competing for contracts operates both ways. The BBC has argued that when the contract is retendered Capita will be at a disadvantage and that other potential contractors will use the requested information to their commercial advantage whilst Capita will not have similar knowledge of its rivals' bids. The Commissioner has recognised this in attributing some weight to this argument in favour of maintaining the exemption.
76. However in *Department of Health v The Information Commissioner (EA/2008/0018)* at paragraph 75 the Information Tribunal observed that:
- "... in long running Contracts a "cosy" relationship can develop with the incumbent Contractor, especially if the Contract appears to be going well. A cosy working relationship can lead to the smooth running of a Contract, however it can also reduce innovation and value for money if all parties are content to keep the status quo. Mr Johnson accepted in his evidence that there is a huge inbuilt advantage given to the incumbent at re-tender as they do know all the commercially sensitive information."*
77. The Commissioner has considered the Tribunal's comments above in relation to this case and as a result has given less weight to the level playing field argument in favour of maintaining the exemption than he may have done in some cases. This is because he recognises that Capita is in a commercially superior position as the existing contractor in possession of full knowledge of the BBC's previous concessions, incentivising tactics and the bespoke elements of the contract. In the Commissioner's view there is a public interest in disclosing the material regarding incentives as this may in fact have the effect of improving the competitiveness of the bids. In reaching this view the Commissioner has again taken into account the fact that the BBC is in

a strong position to push bidders for a good deal given the value and profile of the contract in question.

78. Whilst the Commissioner has given some weight to the arguments in favour of maintaining the exemption in this case, he does not consider that they are sufficient to outweigh the public interest in disclosure in this case. For the reasons given at paragraphs 73-77 above, the Commissioner has concluded that the arguments in favour of disclosure are compelling.

Section 31

79. See paragraph 26 for the BBC's late application of the exemptions at section 31.

80. In the *Department for Business, Enterprise and Regulatory Reform v the Information Commissioner and the Friends of the Earth (EA/2007/0072)* the Tribunal listed five reasons regarding the eligibility of late exemptions:

- *the nature of the information in question which the exemption is designed to protect, taking into consideration risks associated with disclosure;*
- *where some of the disputed information is discovered for the first time during the Commissioner's investigation, and therefore the public authority has not considered whether it is exempt from disclosure;*
- *where the authority has correctly identified the harm likely to arise from disclosure however applies these facts and reasoning to the wrong exemption;*
- *where the public authority had previously failed to identify that a statutory bar prohibited disclosure of the requested information, and therefore ordering disclosure would put the public authority at risk of criminal prosecution; and*
- *where the refusal notice was issued at an early stage of the implementation of the Act when experience was limited, although this factor is likely to become far less relevant in the future.*

81. The Commissioner has decided that he is not prepared to accept the BBC's citing of section 31 at such a late stage because he is not persuaded that the BBC has demonstrated that in this case any of the five reasons for a late exemption to be considered as set out above are met. Moreover, he does not consider there to be any overriding evidence or reason for him to exercise his discretion to accept the late claim of section 31 in this instance.

Procedural Requirements

Section 1(1)(b): duty to provide information

82. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out above the Commissioner is of the view that the information about incentives ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the public authority failed to comply with section 1(1)(b) of the Act.

Section 10(1): time for compliance

83. Section 10 of the Act states that a public authority must comply with section 1(1) promptly and in any event not later than twenty working days after the request has been received.
84. As the Commissioner finds that the public authority wrongly withheld the incentives information from the complainant, it follows that the public authority failed to communicate this information to the complainant within the statutory time limit. Therefore the Commissioner finds that the public authority failed to comply with section 10(1) of the Act.

Section 17(1)(b): refusal of request

85. 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."
86. The Commissioner has considered whether the BBC has complied with section 17(1)(b) of the Act. In failing to specify in its refusal notice an exemption on which it later relied in the course of the Commissioner's investigation the Commissioner considers that the BBC breached section 17(1)(b) in its handling of this request.

The Decision

87. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act by incorrectly concluding that section 43(2) applied and that the public interest favoured maintaining the exemption.

In consequence of the above the BBC breached sections 1(1)(b) and 10(1) of the Act in failing to provide the requested information to the complainant within the statutory time limit. It also breached section 17(1)(b) in failing to cite an exemption, section 31, upon which it later sought to rely in respect of some of the withheld information.

Steps Required

88. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose the clauses identified by the BBC in Appendix 10 - Clauses that are relevant to complaint from [the complainant](p.35 of the submission made to the Commissioner on 16 April 2010).

89. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

90. 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

91. 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 sent.

Dated the 7th day of December 2010

Signed

**Steve Wood
Head of Policy Delivery**

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

Legal Annex

1 General right of access to information held by public authorities

(1) 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.

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

(3) 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.

(4) 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.

(5) 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).

(6) 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”.

10 Time for compliance with request

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and

ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) In this section—

“the date of receipt” means—

(a)

the day on which the public authority receives the request for information, or

(b)

if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

17 Refusal of request

(1) 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.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, 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 authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

43 Commercial interests

(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).