

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 6 June 2011

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

Summary

The complainant requested the compensation for loss of office or termination payments provided to senior managers at the BBC who had been made redundant in each of the previous three years. As part of the request, the BBC was asked to provide the name of the manager, their position and job title and the payment that the manager had received. The BBC responded by releasing the total payments received by each of the 115 managers covered by the scope of the request. However, the BBC refused to provide further details relating to the managers on the basis that this information constituted the managers' personal data and that this data was exempt information for the purposes of section 40(2) (third party personal data) of the Freedom of Information Act 2000 (the "Act"). The Commissioner considers that the BBC has correctly applied section 40(2) of the Act and has therefore not upheld the complaint.

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 1 September 2010 the complainant made the following information request to the BBC:

"Please disclose any compensation for loss of office or termination payments given to senior managers at the corporation who have been made redundant in each of the past three years. Please define senior managers as anyone at the BBC who controls a budget, not solely executives.

In each case please provide the name of the individual, their position and job title at the corporation, and the amount of compensation/termination payment given to them."

3. The BBC responded to the request on 27 September 2010. The BBC informed the complainant that it had interpreted "senior managers" as staff employed within the senior management grades SM1 and SM2. On this interpretation, the BBC considered that 115 managers were covered by the scope of the request. The BBC provided the complainant with the total payments (that is, redundancy payments together with other termination payments including pay-in-lieu of notice) received by each of the 115 managers but refused to provide the additional requested information (the "disputed information") under section 40(2) of the Act.
4. The complainant asked the BBC on 28 September 2010 to review its refusal to provide all of the requested information under section 40(2). On 10 November 2010 the BBC provided the complainant with the outcome of its internal review, which upheld the original decision to apply section 40(2) of the Act to the disputed information.

The Investigation

Scope of the case

5. On 16 November 2010 the complainant contacted the Commissioner to complain about the BBC's application of section 40(2) to elements of the requested information.

Chronology

6. On 16 February 2011 the Commissioner wrote to the complainant to ask for confirmation of the scope of the complaint being pursued. This confirmation was provided on 2 March 2011.
7. Between 16 March 2011 and 20 May 2011 the Commissioner requested, and received, submissions from the BBC in support of its reliance on section 40(2) of the Act.

Analysis

8. The legal provisions relevant to this determination are set out in the Legal Annex appended to the Decision Notice.
9. For the purposes of analysis, the complainant has confirmed that he is satisfied with the BBC's interpretation of "senior managers" as those employees falling within the senior management grades SM1 and SM2. The Commissioner has therefore proceeded on this basis.

Exemptions

Section 40(2) – third party personal data

10. Section 40(2) of the Act provides an exemption to the right to access recorded information where it is the personal data of any third party. In order for a public authority to rely on section 40(2) it would have to be satisfied that:
 - the disputed information constitutes the personal data of the former managers in question; and
 - disclosure of the disputed information would contravene a data protection principle contained in the Data Protection Act 1998 (DPA).
11. The Commissioner addresses each of these points in turn.

Is the requested information personal data?

12. In considering the issue of what is personal data, the Commissioner has drawn a distinction between the following categories of information:

- A. The names of the BBC managers made redundant.
 - B. The job titles / positions of the BBC managers made redundant.
13. In the case of A, there appears little doubt that the provision of a name would lead to the identification of an individual and would therefore represent that individual's personal data.
 14. With respect to B the Commissioner is aware that, in the absence of other descriptive factors such as a name, the release of a job title or position may not necessarily lead to the identification of an individual who had been made redundant by the BBC. The Commissioner also acknowledges that a number of the BBC managers held positions that were fairly generic in their designation or title. This, again, could potentially reduce the possibility that a particular individual could be identified through the disclosure of a job title.
 15. However, the Commissioner is satisfied that the chance of identifying an individual through the release of the category B information is more than a slight hypothetical possibility. This is because each manager would have had a public profile, to a greater or lesser degree, as an inevitable consequence of occupying a senior role at the BBC; an organisation that is subject to a high level of public scrutiny.
 16. The Commissioner therefore considers that it would be a relatively easy process to piece together a job title with the knowledge of the time period in which an individual left the BBC – ie in the past three years – in order to affirm which individual was the subject of the request. The Commissioner has therefore determined that both categories A and B constitute personal data.

Would disclosure contravene a data protection principle?

17. The BBC has argued that the release of the disputed information would breach the first data protection principle. This requires the fair and lawful processing of personal data. The Commissioner's considerations here focus on the general issue of whether the disclosure of the disputed information would be fair.

Fairness

18. The Commissioner has approached the disputed information by way of the following two steps:

- whether it would be fair for the purposes of the first data protection principle to release the names and job titles of the managers made redundant; and if so
 - whether it would be fair to connect the managers with the exact redundancy payment received.
19. For the reasons set out below, the Commissioner has concluded that disclosure of the names and job titles of the former managers would breach the first data protection principle. He has not therefore gone on to consider whether it would be fair to link the former managers in question with the redundancy payments they had received.
20. Section 40 of the Act is an absolute exemption and therefore there is no public interest test attached to the exemption. However, as identified by the Information Tribunal in *Pycroft v Information Commissioner and Stroud District Council* (EA/2010/0165) the application of the first data protection principle involves striking a balance between competing interests.
21. In accordance with his decision issued on FS50286813 (Stroud District Council), the Commissioner has looked to balance the consequences of any release of personal data and the reasonable expectations of the data subjects with general principles of accountability and transparency.
22. Therefore, to guide him when weighing up these competing interests, the Commissioner has specifically borne in mind the following factors:
- (i) The consequences of disclosure.
 - (ii) The data subject's reasonable expectations of what would happen to their personal data.
 - (iii) The balance between the rights and freedoms of the data subject and the legitimate interests of the public.
23. The Commissioner addresses (i) – (iii) separately.
- (i) The consequences of disclosure*
24. The Commissioner does not consider it likely that disclosure of the requested information would cause any of the former managers harm or necessarily subject a former manager to threats of harassment.

25. However, the Commissioner accepts that confirming that an individual had been made redundant would be an intrusion into the personal circumstances of that individual. The Commissioner therefore considers it more than probable that disclosure of information clarifying that a manager had been made redundant – through the release of the name and/or job title in this context - would cause distress to the data subject, irrespective of whether the former manager was also linked to the specific redundancy payment received.

(ii) Reasonable expectations

26. In previous decisions the Commissioner has argued that the more senior a role occupied by a data subject the greater the prospect that disclosing information about that individual's public duties will be warranted or fair. This is based on the understanding that increasing seniority is normally commensurate with an individual's increasing responsibility for making influential policy decisions and decisions that will directly affect the expenditure of significant amounts of public funds.
27. Owing to the scope of the information requested, there is no question that all of the disputed information relates to persons who had previously held senior managerial positions. The Commissioner therefore has little doubt that each of the former managers would have understood that their actions would be subject to a high degree of scrutiny. This expectation would likely include, for example, the knowledge that a manager's exact salary or salary band would be disclosed for the purposes of public accountability.
28. However, the Commissioner agrees with the argument put forward by the BBC that redundancy does not relate to an employee's official functions and responsibilities but instead signals the end of the relationship between the individual and an organisation. Further, the Commissioner considers that information relating to the termination of employment will be inherently sensitive to a data subject, not least because a number of the individuals will have found the redundancy process difficult.
29. To echo the Information Tribunal's findings in *Pycroft*, the Commissioner finds that confirming that an individual had been made redundant goes beyond information directly concerning the individual's public role or decision making process. The Commissioner has therefore concluded that, despite their seniority within the BBC, each of the data subjects would have had an objectively reasonable expectation that the disputed information would be kept confidential.

(iii) The rights of the individual versus the legitimate public interest

30. In seeking to balance the competing interests of the individual's right to privacy against the public interest in disclosure, the Commissioner has weighed up parts (i) and (ii) of the factors referred to above.
31. The Commissioner considers that taxpayers will have a natural, and legitimate, interest in knowing how a publicly funded organisation allocates its funding. This interest will extend to ensuring that a public authority is effectively overseeing the terms of the departure of its employees. This is particularly important in the case of redundancy where a motivating factor for a public authority will likely be to make efficiency savings.
32. In this instance, the BBC has disclosed the exact redundancy payments made, albeit in an anonymised form. Furthermore, the BBC has asserted that each of the redundancy payments accord with the requirements prescribed by the BBC's published policy¹; a claim that the Commissioner has not seen any reason to dispute.
33. The Commissioner is of the view that the BBC has satisfied the legitimate public interest by making this information available. This is because the information is sufficient to allow the public to hold the BBC accountable for the financial decisions it has made. In making this finding, the Commissioner understands there is no suggestion of misconduct or financial impropriety connected with an individual leaving the BBC. Such issues, the Commissioner accepts, may potentially have strengthened the case for the release of further details relating to the payments.
34. When considered together with the reasonable expectations of the former managers and the consequences of disclosure, the Commissioner has determined that the release of the disputed information would be an unwarranted intrusion into the personal circumstances of the former managers and therefore disproportionate to their right to privacy. He has therefore concluded that, to release the names and job titles even in isolation, would be unfair and would not therefore meet the first data protection principle.

¹http://downloads.bbc.co.uk/foi/classes/policies_procedures/reorganisation_and_redundancy_policy.pdf

The Decision

35. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

36. The Commissioner requires no steps to be taken.

Other matters

37. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
38. Part VI of the section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.
39. As he has made clear in his *"Good Practice No 5"*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
40. The Commissioner is not aware of any exceptional circumstances in this case. He is therefore concerned that it took over the 20 day period for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

41. 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: 0300 1234504

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 6th day of June 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution**

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

Legal Annex

Personal Information

Section 40(2) provides that –

Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

The first condition is –

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

The Data Protection Act 1998

Interpretative provisions

Section 1(1) provides –

In this Act, unless the context otherwise requires –

“data” means information which –

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
- (b) is recorded with the intention that it should be processed by means of such equipment,

- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

“data controller” means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

“data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;

“data subject” means an individual who is the subject of personal data;

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

“processing”, in relation to information or data, means obtaining, recording, or holding the information or data or carrying out any operation or set of operations on the information or data, including –

- (a) organisation, adaptation or alteration of the information or data,
- (b) retrieval, consultation or use of the information or data,
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or

“relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

Section 1(2) provides –

In this Act, unless the context otherwise requires –

- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
- (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

Section 1(3) provides –

In determining for the purposes of this Act whether any information is recorded with the intention –

- (a) that it should be processed by means of equipment operation automatically in response to instructions given for that purpose, or
- (b) that it should form part of a relevant filing system,

It is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

Section 1(4) provides –

Where personal data are processed only for the purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

Section 2 provides –

In this Act “sensitive personal data” means personal data consisting of information as to –

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, such as the disposal of such proceedings or the sentence of any court in such proceedings.

Schedule 1

The Data Protection Principles

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4. Personal data shall be accurate and, where necessary, kept up to date.

5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6. Personal data shall be processed in accordance with the rights of data subjects under this Act.

7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data

1. The data subject has given his consent to the processing.

2. The processing is necessary –

- (a) for the performance of a contract to which the data subject is a party, or
- (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by the contract.

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary –

- (a) for the administration of justice,
- (b) for the exercise of any functions conferred on any person by or under any enactment,
- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6. - (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.