

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 September 2011

Public Authority: The British Broadcasting Corporation ('the BBC')

Address: 2252 White City,
201 Wood Lane
London
W12 7TS

Decision (including any steps ordered)

1. The complainant requested the salary details (or those details in £5k bands) for several senior managers at the BBC. The BBC considered that this information was exempt by virtue of section 40(2) [third party personal data]. The Commissioner's decision is that the BBC was correct to withhold this information under section 40(2).
2. The complainant also requested a list of hospitality expenses of those individuals. The BBC provided a partial list, but explained that the residue that related to programme making were covered by the derogation and excluded by the Act. The Commissioner's decision is that this information was held by the BBC genuinely for the purposes of 'journalism, art or literature' and did not fall inside the Act.
3. However, the Commissioner has found that in relation to the request for salary details the BBC breached sections 10(1) and 17(1) of the Act because it did not issue its refusal notice in 20 working days. The Commissioner orders no remedial steps to be taken.

Request and response

4. On 12 September 2010 the complainant requested the following information from the BBC [for 10 named individuals who he believed were senior managers]:
 1. *Their Current Salary;*
 2. *Their Salary earned for financial year 2009/10;*
 3. *Their total hospitality claims paid to date in 2010;*

4. *Their total hospitality claims paid in financial year 2009/10; and*
 5. *The breakdown of their hospitality claims - I.e. what each claim was for.*
5. The BBC responded on 15 October 2010. It stated that:
- For 1 and 2 - it would provide the information for the individuals requested but only in a form against their job titles and in £30k bands. It explained that it does already disclose the exact salaries of its 100 most senior staff, but the relevant members of staff in this case are below them in its hierarchy. It believed that it could not provide more specific detail because to do so would contravene the first data protection principle. Therefore, it explained that section 40(2) was being applied to this information;
 - For 3, 4 and 5 - it confirmed which individuals submitted expense claims and provided those claims that were not submitted in connection with programme making. However, it explained that the hospitality claims that were submitted in connection with programme making fell outside the Act. In its view the information was held for the purposes of 'art, journalism and literature' and therefore it was under no obligation to provide the information and would not do so. It explained that where there was doubt about whether the expense was incurred for programme making it was prepared to disclose the information to the complainant (without prejudice to its position on the residue).
6. Following a request for an internal review the BBC wrote to the complainant on 2 December 2010. It provided more detail about why it believed that it was appropriate to withhold the information for requests 1 and 2 by virtue of section 40(2). It should be noted that the BBC does not offer an internal review when it believes that the information falls outside of the Act and so did not conduct one for requests 3 to 5.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. On 28 May 2011 he agreed that the Commissioner would consider the following four points:

[1] Whether section 40(2) has been applied appropriately to the information held about senior manager salaries (8 of the original 10 named individuals), or whether this information should be disclosed to the public;

[2] Whether the information about hospitality expenses that has not been provided falls inside the Act;

[3] If so, whether the information can be provided to the public; and

[4] To consider any procedural issues in this case – in particular, the delays that were experienced.

8. The complainant explained that for part [1] he would accept the salaries information in salary bands of £5k. The Commissioner has based his analysis on the £5k band information in this case.

Reasons for decision

The operation of section 40(2) to the information requested for parts 1 and 2 (in 5k bands)

9. The Commissioner has considered the operation of section 40(2) to the salary information of 8 named individuals that have the senior manager 2 grade at the BBC in £5k salary bands.

10. Section 40(2) [‘the third party personal data exemption’] of the FOIA states 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 40(1); and

(b) Either the first or the second condition below is satisfied.’

11. In summary, the conditions specified are either that disclosure would contravene one or more data protection principles, or that the information would not be available to the data subject if he made a Subject Access request under the Data Protection Act (‘DPA’) for it.

12. ‘Personal data’ is defined by section 1(1) of the DPA. The information requested in this case consists of an individual’s name against their salary in 5k bands. The information does constitute their personal data because it relates to identifiable living individuals. It also does not constitute the complainant’s own personal data. Section 40(2)(a) is therefore satisfied.

13. In relation to section 40(2)(b) the BBC has argued that the disclosure of this information would contravene the first data protection principle and this is what the Commissioner has focussed on.

14. The first data protection principle has three components. They are that the disclosure of the information to the public must be:
 1. fair to the data subject;
 2. in accordance with one or more conditions in Schedule 2 of the DPA; and
 3. lawful to the data subject.
15. All three conditions must be satisfied for the first data protection principle not to be contravened and the exemption not to apply.

Is the disclosure of the information unfair to the data subjects?

16. It is important to outline what information had been released into the public domain by the BBC to understand the individuals' expectations in this case:
 1. The BBC has disclosed the exact salaries of its 100 most senior staff as part of its public commitment to transparency and accountability of senior management pay (this has now been extended to the most senior 110 staff);
 2. The BBC has also released all of their expenses;
 3. The BBC has released the names of more than 400 individuals who are its next most senior staff and provided an anonymised breakdown of the number of those staff in its departments that earn a certain amount in £5k bands;
 4. The BBC released a less anonymised version of this information to the complainant in its response (as it related to a smaller number of individuals) containing generic post titles and their salaries to £30k bands;
 5. The BBC has released the value of total expense claims and comparable data of earlier years; and
 6. The BBC also released an itemised list of non-programme related expense claims to the complainant as part of its response to this request for information.
17. 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. To do so, he has specifically borne in mind the following factors:

- The individuals' reasonable expectations of what would happen to their personal data – including the individuals' seniority within the BBC;
 - Whether the information relates to the public or private life of the individuals;
 - Whether disclosure would cause any unnecessary or unjustified damage to the individual; and
 - The legitimate interests of the public in knowing the details of the individuals' salaries weighed against the effects of disclosure on those individuals.
18. The BBC has explained that it is important to consider the individuals' expectations within the context of its leadership structure, its policy about disclosure of this sort of information, the Commissioner's previous decisions and the expectations that they engender.
19. The BBC has explained that it has two senior management grades (encompassing over 500 of its employees) – SM1 and SM2. SM1 is also split internally in seniority into three groups. The individuals that are subject to this case therefore are in the fourth tier of management at the BBC and they have the expectations that they will be treated in accordance with the BBC's policy on disclosure of salaries.
20. 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.
21. In this case there is no question that all of the disputed information relates to persons who are in senior roles at the BBC – they are in SM2 [senior management 2] roles. The Commissioner therefore has little doubt that these members of staff 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 their salary band would be disclosed for the purposes of public accountability in accordance with the BBC's drive for accountability in this area.
22. However, this must be considered against the BBC's considered disclosure policy on Senior Staff salaries. The BBC has identified that transparency is important in this area and has made a public commitment to transparency and accountability in its spending on senior manager pay. Its policy was to disclose the information in full for its hundred most senior staff (mostly SM1s, but also the SM2s that earned

more than the Prime Minister) – this took into account the Central Government policy and focussed on those individuals who had the most responsibility for major policy decisions and expenditure. For the other members of staff in SM2 grade, it would release the names of these individuals and separately show the relevant salary information in £5k bands against generic job titles. In this case, it also in the spirit of transparency provided the £30k bands against the generic job titles of specific individuals. The BBC said that the relevant individuals would expect that it would act in accordance with its policy in this situation. They would expect to be treated in line with the individuals of their standing and not the more senior individuals.

23. It explained that this policy was one that had been carefully considered by senior members of staff and had been agreed by its Trust whose role is to act on behalf of licence fee payers. The policy was also informed by a number of decisions made by the Commissioner about the salaries of individuals who were at an equivalent post to the SM1 grade [Case references **FS50067416** and **FS50070465**] (more senior than the SM2 individuals considered in this case). In those cases, the Commissioner found that the information should be disclosed down to £30k bands, but no further and yet the BBC decided to disclose the SM1 information in full. This adds further weight that the expectations of the individuals are reasonable. In addition, the BBC carefully considered the Commissioner's policy on the disclosure of salaries when drawing these lines¹. While the policy is only advisory, the way the BBC has demonstrated it has taken it into account also supports the reasonableness of their expectations in this case.
24. The BBC has also explained that the individuals themselves do not have public facing roles and limited public profile. It explained that this point also supports the reasonableness of their expectations in this case.
25. An individual's salary data is something which concerns both their private and public life. Their private life because it concerns an individual's specific financial situation and enables them to measure themselves against their peers directly. Their public life because obviously it is the remuneration paid for undertaking a public role. The Commissioner considers that as the salary bands are reduced in size, the information becomes inherently more private. This is because it comes closer to revealing the exact private financial standing of an individual to the public at large.

¹http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/salaries_v1.pdf

26. The BBC has explained that in its view the disclosure of information would be likely to cause the specified individuals damage and distress. Firstly, it would erode their trust and confidence in the BBC doing what it said it would with their personal data. Secondly, the situation must be assessed in the climate that the BBC works in. The BBC has a very high profile – due to its status as the UK's largest broadcaster and its unique funding arrangement. The BBC receives commensurate media attention and often the coverage can focus on specific individuals and be negative in tone. It provided an example of such coverage. As the individuals are in editorial roles, they will receive considerable attention. However, the BBC believes that it is appropriate to shield the individual's salaries from this potential negative attention, while simultaneously providing the anonymised information to ensure that it was understood what public money was being paid. It explained that to withdraw that protection without compelling reasons would be likely to 'cause a level of upset... that goes beyond annoyance or irritation' that was specified as the threshold in the ICO's guidance.
27. When assessing the legitimate interests of the public, the Commissioner considers that taxpayers will have a natural, and legitimate, interest in knowing how a publicly funded organisation allocates its funding. This is particularly so for the BBC whose funding arrangements are controversial. This interest will extend to ensuring that the BBC is not paying its staff too much in its work climate.
28. The complainant has also explained that the Commissioner must consider whether the individuals are sufficiently senior that the exact salary (or salary in 5k bands) of their equivalents in the private sector would be included in annual reports for shareholders. While it is difficult to find exact equivalents, the Commissioner has considered this point and considers that these individuals are below the grade of staff whose salaries would be so revealed in the private sector.
29. In this instance, the BBC has disclosed the information requested in anonymised form. The complainant has argued that this was insufficient for the public to assess the value for money. The BBC has explained that the public interest in the disclosure of the more specific information is actually very limited in this case. Firstly, it pointed out that the approximate amount of money that had been spent was already readily apparent from what had been disclosed. Secondly, the BBC pointed out that in previous cases where the Commissioner ordered the disclosure of more specific information, the individuals were in roles where it was possible to assess their pay against the pay of equivalent individuals in the public sector. This is not so in this case, its competitors are privately owned and do not disclose the salaries of this level of staff for their own business reasons. This further mitigates the need for transparency in this case.

30. In the Commissioner's guidance, he specifies that there are some 'exceptional circumstances' where a greater level of disclosure may be warranted. He lists the following five situations:
- There are current controversies or credible allegations;
 - There is a lack of safeguards against corruption;
 - Normal procedures have not been followed;
 - The individual in question is paid significantly more than the usual salary for their post; and
 - The individual/s have significant control over setting their own or others salaries.
31. In this case, there is no suggestion that any of these factors have been satisfied in this case.
32. Overall, the Commissioner is of the view that the BBC has satisfied the legitimate public interest by making the information that it has disclosed available. He considers 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 which, the Commissioner accepts, may potentially have strengthened the case for the release of further details about their salary.
33. When considered together with the reasonable expectations of the staff and the consequences of disclosure, the Commissioner has determined that the release of the 5k bands would amount to an unwarranted intrusion into their personal circumstances and therefore be a disproportionate invasion to their right to privacy.
34. The Commissioner has come to the conclusion that the disclosure of the disputed information would be unfair to the data subjects. It would therefore contravene the first data protection principle and he finds that the BBC has applied section 40(2) appropriately.
35. The Commissioner has not gone on to consider the other requirements of the first data protection principle or the other data protection principles, because this analysis would be merely academic.
36. It follows that the information is exempt from disclosure and does not need to be provided to the public.

The operation of section 40(2) to the information requested for parts 1 and 2 (exact salary data)

37. In the Commissioner's view the exact salary data would be a greater invasion of privacy than the release of the £5k band information and therefore as he has determined that the £5k band information is exempt under section 40(2), it follows that the exact salary data is exempt too.

The operation of the derogation to the remainder of information held for parts 3, 4 and 5

38. Schedule one, Part V1 of the Act provides that the BBC is a public authority for the purposes of the Act but only has to deal with requests for information in some circumstances. The entry relating to the BBC states:

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

39. This means that the BBC has no obligation to comply with Part I to V of the Act where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.
40. The House of Lords in *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has the jurisdiction to issue a Decision Notice to confirm whether or not the information is caught by the derogation. The Commissioner's analysis will now focus on the derogation.
41. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment was made by Lord Neuberger of Abbotsbury MR who stated that:

*" once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes." (paragraph 44), and that
"....provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA." (paragraph 46)*

42. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to the Act.
43. The Commissioner has noted that the complainant has argued that these expenses may not have been essential for the BBC to fulfil their editorial responsibilities and therefore the derogation cannot be applied,

the Commissioner cannot make a judgement on whether the expenses are essential. His role is to consider whether the information was genuinely held for the derogated purposes or not.

44. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.

45. The Court of Appeal adopted the Tribunal's definition of journalism which set out that journalism comprises three elements.

"1. The first is the collecting or gathering, writing and verifying of materials for publication.

2. The second is editorial. This involves the exercise of judgement on issues such as:

** the selection, prioritisation and timing of matters for broadcast or publication,*

** the analysis of, and review of individual programmes,*

** the provision of context and background to such programmes.*

3. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

46. The Commissioner adopts a similar three pronged definition for the other elements of the derogation, in that the information must be used in the production, editorial management and maintenance of standards of those art forms.

47. The information that has been requested in this case is the hospitality expenses that have been attributed to programme making. The Commissioner has received detailed arguments from both sides. He has considered all of the arguments, but for conciseness he has focussed on explaining why he considers that the information requested falls within the derogation.

48. The BBC has explained that it views this information as line items from the production budgets of particular programmes and stations and that the information is therefore held for the derogated purposes and falls outside the Act. As above, it noted that it had provided the borderline information without prejudice to its position. The Commissioner has considered the information itself and finds that in all the remaining cases, the information is held in the format of being line items from programme budgets and recorded against a specific programme charge code. He is also satisfied that the line between information about programming and other expenses have been drawn correctly. He has noted that where there was doubt the BBC opted to disclose the information to the public.
49. The complainant has told the Commissioner that he disputes that hospitality claims can ever be said to be held 'for the purposes of journalism, art and literature'. He believes it would be abhorrent for the head of a radio station to take out a presenter for an expensive lunch and for there to be no scrutiny about what was spent. He said that the public would expect it to be possible to understand what the licence fee is being spent on. He explained that principles of accountability would dictate that this information should be made available.
50. In considering whether the remaining hospitality information is held genuinely for the purposes of journalism or art, the Commissioner has considered the following four factors:
- The purpose for which the information was created;
 - The relationship between the information and the programmes content which covers all types of output that the BBC produces;
 - The users of the information; and
 - The need to ensure a level playing field between the BBC and its commercial rivals.
51. The Commissioner considers that the first three factors are crucial to consider in every case and he will discuss them now.
52. When considering the purposes for which the information was created, the BBC has explained that the expenses were incurred against a programme charge code and that it is evident from the 'details section' that the meetings were to discuss editorial matters and those matters were the reason that the BBC incurred the spend. The BBC explained that for the members of staff to be reimbursed they firstly need to obtain permission from a more senior member of staff (either the Managing Director of a programme or Controller of a radio station) and secondly make a claim for the money back. This process was laid out in

its expenses policy. The information is retained to monitor day to day production costs when assessing the allocation of resources to the given content.

53. When considering the connection between the information itself and the programmes' content, the BBC has explained that there are two main links. The first is that the requested information is connected intimately to the purpose of the meeting (that is the discussion and implementation of editorial input into programming). The second is that the information is used in real time in editorial decision making to decide what further money is required where.
54. The Commissioner has accepted on a number of occasions (such as in case reference **FS50314106**) that the BBC has a fixed resource in the Licence Fee and resource allocation goes right to the heart of creative decision making. The Commissioner is satisfied that the same rationale connects the information to the derogated purposes.
55. When assessing the users of the information, he notes that the information was held at the date of the request within the Divisional Level of the BBC. The Divisional Level of the BBC is involved in programme making and direct support functions. The High Court in the *BBC v the Information Commissioner (Consolidated Appeals)*² judgment explained that the individuals at this level of the BBC were 'engaged in hands-on work within journalism, art or literature'. Therefore, the Commissioner considers that the users of the information offers further support for the information being held for the derogated purposes.
56. Overall, the Commissioner considers that the BBC has evidenced that it genuinely holds the information for the purposes of art and journalism. He is content that the information is held for the purposes outlined in the second point of the definition namely '*for the analysis of, and review of individual programmes [and other creative content]*' and the third point of the definition – *the maintenance and enhancement of editorial standards*. He considers that the information falls within the derogation.
57. To support his analysis the Commissioner has considered the fourth factor and been mindful of the purpose of the derogation, which was articulated by Lord Neuberger of Abbotsbury MR at paragraph 45 of his judgment in *Sugar*:

"The purpose of limiting the extent to which the BBC and other public sector broadcasters were subject to FOIA was 'both to protect freedom

² BBC v Information Commissioner [2009] EWHC 2348 (Admin).

of expression and the rights of the media under article 10 of the European Convention on Human Rights, and to ensure that [FOIA] does not place public sector broadcasters at an unfair disadvantage to their commercial rivals.' This is apparent, to my mind, as a matter of common sense, looking at FOIA on its own, but it was also stated in terms to be the policy in a letter from the Department of Constitutional Affairs in 2003, which was admitted in evidence by the Tribunal – hence the quotation marks."

58. The Commissioner finds in this case that the disclosure of the programme line data would be likely to impinge the BBC's editorial independence. This is because the BBC manages its costs according to editorial decisions and so the independence of editors could be compromised if programme line data - considered as part of their decision making process - were disclosed. It would place the BBC at an unfair disadvantage to its commercial rivals and this supports the Commissioner's conclusions that the information is held for derogated purposes too.
59. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of the Act.
60. In his final arguments, the complainant also asked the Commissioner to consider whether amounts of hospitality can be provided without the programme information, names or subjects discussed. The Commissioner has considered whether the information could be barnadised in a manner that renders it not held for the derogated purposes. As noted, the Commissioner must consider whether the information requested is held for the derogated purposes. Once the information is held for those purposes it is not held for the purpose of the Act. There is no scope for the Commissioner to consider whether the information can be barnadised because he is looking at **how** the information is held and not what information is held.

Procedural matters

61. Section 10(1) of the Act requires a public authority to comply with the Act within 20 working days of receiving the request. The BBC failed to answer the request in 20 working days and breached section 10(1).
62. Section 17(1) of the Act requires that where a public authority issues a refusal notice, it should issue it in 20 working days. The BBC did not do so and also breached section 17(1).

Right of appeal

63. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

64. 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.
65. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

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