

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 August 2012

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

Decision (including any steps ordered)

1. The complainant requested copies of all internal documents that discussed risks associated with the 'Delivering Quality First' project which was set up to achieve the savings required in the 2010 licence fee settlement.
2. The Commissioner's decision is that the public authority was entitled to withhold the information within the scope of the request on the basis of the exemption at section 36(2)(b).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 23 August 2011 the complainant wrote to the public authority and requested information in the following terms:

'.....could you provide me with copies of all internal documents that discuss or lists risks (including but not limited to operational and reputational risks) associated with the Delivering Quality First process..' (DQF).

This could include, but is not limited to, a project risk register.
5. The public authority responded on 21 September 2011. It withheld all the information within the scope of the request above (the disputed information) on the basis of the exemptions at sections 36(2)(b) and 36(2)(c). The public authority however informed the complainant that it

needed time to consider the balance of the public interest. It advised it would have a substantive response ready on 2 November 2011.

6. Having not received a substantive response from the public authority, the complainant requested an internal review on 15 November 2011.
7. The public authority responded on 16 November 2011. It explained that it did not offer internal reviews of decisions to refuse access to information on basis of section 36 of the Act. This was because decisions to withhold information on the basis of section 36 are taken by the Chairman of the BBC Trust and there was no one more senior to review the decision.

Scope of the case

8. On 16 November 2011, the complainant contacted the Commissioner to complain about the way his request for information had been handled including the decision to withhold the information within the scope of his request on the basis of section 36 of the Act. The complainant argued that:

'[He could not] see the logic of not publishing the information given that the BBC has now revealed its DQF cost saving plans and therefore its decision making on the issue cannot be affected. Also, if the BBC is genuine about its public consultation on the issue then surely it is in the public interest to see what risks are associated with the plans. This lack of transparency is against the BBC's own direction of travel on the issue of openness with licence fee payers'

Reasons for decision

Delivering Quality First (DQF)

9. According to the public authority, in January 2011 the BBC Trust asked the BBC management (management) to develop a set of proposals (subsequently known as 'Delivering Quality First') to re-organise it's business and make the savings required by the 2010 Licence fee agreement. It was decided that the new commitments would be funded by making 16% efficiencies over the four years to 2016/17. It's Director-General set the organisation an additional challenge to find extra savings of up to 4%. The total 20% reduction in operating expenditure amounted to £700million in cash terms. It explained that underlying and supporting the process has been a full and frank consideration of risk at every level.

Sections 36(2)(b) and 36(2)(c)

10. As mentioned, the public authority withheld the disputed information on the basis of the exemptions at sections 36(2)(b) and 36(2)(c).
11. Information is exempt from disclosure on the basis of section 36(2)(b) if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank provision of advice (section 36(2)(b)(i)), or the free and frank exchange of views for the purposes of deliberation (section 36(2)(b)(ii)).
12. Information is exempt from disclosure on the basis of section 36(2)(c) if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.
13. The public authority explained that it relied on the section 36 exemptions because it considered disclosure would not only undermine the quality of decision making at the corporation in relation to the policy development process, but also regarding the wider strategic and operational management of the corporation. In short, disclosure would be likely to harm its ability to offer an effective public service as instructed by its Royal Charter and Agreement, that is, to provide programmes and services that inform, educate and entertain whilst at the same time maintaining quality and delivering value for money.
14. The Commissioner first considered whether the disputed information engaged section 36(2)(b).
15. The public authority provided the Commissioner with a copy of the opinion issued by the qualified person. Diane Coyle, Vice Chairman of the BBC Trust made the decision to withhold the disputed information on the basis of sections 36(2)(b) and 36(2)(c). He notes that the opinion was issued on 18 January, during the Commissioner's investigation and after the initial refusal was issued.
16. At the time of the request, the public authority's designated qualified person by virtue of section 36(5)(o)(ii)¹ of the Act was the BBC Trust. In accordance with Protocol A5 issued by the BBC Trust², section 36

¹ A list of qualified persons for public authorities can be found at; <http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/index.htm>

²

http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/protocols/a5_foi_section36_decisions.pdf

decisions are taken by the Chairman of the BBC Trust, the Vice Chairman, or if neither are available, any other Trustee. The Chairman, Vice Chairman, or other relevant Trustee (as applicable) receives advice on each case from the Director - BBC Trust and the General Counsel.

17. The Commissioner finds that at the time of the request, Diane Coyle, Vice Chairman of the BBC Trust was the appropriate qualified person within the meaning of section 36(5)(o)(ii) of the Act. He is satisfied the decision to rely on section 36(2)(b) and (c) was taken at a sufficiently senior level within the organisation that an internal review would have been difficult to conduct. He is therefore satisfied that the internal review process was exhausted.

Was the qualified person's opinion a reasonable one?

18. According to the qualified person, disclosing the disputed information would be likely to result in a lack of candid and free-flowing advice and discussion on risks. Such an outcome would consequently have the following wider effect:
 - Impact upon its ability to deliver the productivity improvements identified by the DQF programme and to keep the organisation running effectively,
 - Hinder its ability to assess fully the implications of its different proposals to change the scope of its services, and
 - Result in inadequate risk assessment, thereby prejudicing the quality of the aforementioned policy proposals, which are fundamental to its future operation.
19. The public authority explained that risk reporting was often undertaken by comparatively junior employees, albeit that a more senior individual would ultimately sign-off on the risk register. Individuals were therefore apprehensive about potentially exposing themselves, their colleagues and the wider corporation to unwarranted level of scrutiny. Disclosing the disputed information while risks remained current was likely to have a chilling effect on the candour of advice. Staff would either not record sensitive risks at all or would describe these in a much more circumspect manner in the future. Given the range and number of risks being assessed across the public authority on a quarterly basis (hundreds at any one time), there was a real danger that significant risks would be overlooked. This would consequently impact on the public authority's ability to deliver the productivity improvements identified by the DQF programme and to keep the organisation running effectively.

20. Disclosure was also likely to undermine the integrity of the public consultation process already in place, not least because the disclosed information was likely to be partial and out-of date.

Disputed Information

21. The disputed information comprises of information (including email exchanges) gathered from a number of teams collecting and using DQF risk information, including those tasked with day-to-day risk management within their individual divisions. It was created and is maintained to support the operational and strategic management of the DQF project which, the public authority was keen to stress, would have a substantial impact on its services and staff numbers. Any and all risks that could hypothetically occur during the life-cycle of the project will be recorded regardless of how likely it is that the risk or event will occur.
22. The public authority submitted that the disputed information was 'live' at the time of the request and that was one of the key factors which influenced the qualified person's opinion. It explained that at the time of the request, proposals on productivity and content scope savings were still being finalised and were therefore under active consideration. Productivity savings relate to changes to the way the public authority operates including the amount that is spent in making programmes and running the organisation. Content scope savings cover changes to programmes and services that the public authority provides.
23. It further argued that risks are by their nature 'live' concerns and are future focussed. A risk register for example offers a snapshot in time of the risk profile of a particular part of the organisation. Once a risk is no longer considered live, it is removed from the register. Similarly, operational management and policy documentation captured by the request also focus on anticipated risks, as opposed to historical ones.

Timing

24. The public authority also argued that although the formal decision to rely on the exemptions was not taken until 18 January 2012, the status of the disputed information and the reasons for withholding it had not materially changed by 18 January to affect the qualified person's opinion in any significant way. The interim findings from the public consultation ongoing at the time of the request were not published until 25 January 2012. It pointed out that the DQF was now only entering the delivery phase where details of the proposals were being finalised and worked into divisional budgets for 2012/2013 and beyond. It therefore strongly argued that as the proposals had not yet been put into operation, it was simply not possible for identified risks to be considered as no longer 'live'.

25. The Commissioner agrees with the public authority that the timing of the request was significant in the circumstances of this case. Proposals were still under active consideration and the disputed information would have therefore been particularly sensitive at that stage. Given the nature of the disputed information, the Commissioner considers it was objectively reasonable to hold the opinion that disclosure against the backdrop of the ongoing DQF project posed a real and significant risk of a chilling effect on free and frank discussions relating to the DQF in particular and to risk assessments in general. Further, in view of how crucial it is for the public authority to achieve the savings target imposed by the licence fee settlement, it was consequently also objectively reasonable to hold the opinion that disclosure would be likely to have a wider effect on the future operation of the organisation.
26. The Commissioner shares the public authority's view that risk registers reflect live concerns. However, in his view, whether or not a risk register and associated risk documents are exempt from disclosure will still depend on the circumstances of each case. The fact that the information reflects live concerns may not in all cases be sufficient to withhold it.
27. The Commissioner accepts that at the time the qualified person issued her opinion in January 2012, the exemption at section 36(2) (b)(i) and (ii) was engaged. There had been no material change to the prevailing circumstances at the time the request was made in August 2011. Therefore, although there was a procedural flaw in the process of issuing the opinion, he finds that it did not materially affect the substance of the opinion. The Commissioner however strongly recommends that in future, if the public authority considers that an exemption at section 36 could be engaged following a request, the appropriate qualified person's opinion is sought and received before the request is actually refused on the basis of the relevant exemption. Section 36 exemptions can only be engaged on the basis of a qualified person's opinion. If future requests to the public authority are denied on the basis of an exemption(s) at section 36 before a qualified person's opinion is provided, there is a real risk that the exemptions would not be engaged.
28. The Commissioner finds that the qualified person's opinion was objectively reasonable and the public authority was therefore entitled to rely on the exemption at section 36(2)(b) to withhold the disputed information.

Public Interest Test

29. Section 36(2)(b) is subject to a public interest test. The Commissioner must therefore decide whether in all the circumstances of the case, the

public interest in maintaining the exemption outweighed the public interest in disclosure.

30. In favour of disclosure, the public authority acknowledged there is a public interest in licence fee payers participating in debates about its future in a sufficiently informed manner. It however submitted that this public interest had been met to a large extent in the following ways:

- It had made a large amount of detailed information public, including via a dedicated page on its website³, press releases at significant milestones⁴, senior executives blogging on various aspects and its media centre. Official DQF announcements were made to staff before the BBC Trust launched its public consultation on the Executive's proposals.
- It had also conducted a number of discussions with industry seeking their views on the proposals. Senior executives also held phone-in question and answer sessions for staff across the organisation on the proposals.
- The BBC Trust had undertaken a public consultation on DQF and also on 'Putting Quality First', its predecessor. Both were launched by the publication of a consultation document which included management's description of their detailed proposals, and the thinking behind them as well as the BBC Trust's consultation, which focused on the impact that the proposals would have on the content of the public authority's services.
- The BBC Trust also consulted with the public via its Audience Councils, which engage directly with audiences and provide the Trust with independent advice on how well the public authority is delivering its public purposes and serving licence fee payers across the UK.

31. The public authority further recognised the public interest in providing assurance that its proposals for productivity and content scope savings are being properly risk managed. It however submitted that this public

³<http://www.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/deliveringqualityfirst.html>

⁴http://www.bbc.co.uk/pressoffice/pressreleases/stories/2011/01_january/13/delivering_quality_first.shtml

interest was being addressed by the following existing accountability mechanisms:

- The BBC Trust's strategic oversight of the public authority, in accordance with Article 24 of the Royal Charter which includes setting the overall strategic direction for the public authority, approving high level strategy and budgets in respect of the BBC's services and activities and approving individual strategic or financial proposals where they stand to have significant implications for the fulfilment of the purpose remits and strategies, or for the overall financial position of the public authority. In particular, its consultation has tested the Executive's proposals with industry and the wider public. It explained that the BBC Trust intends to publish final decisions along with consultation responses in May and minutes of its meetings have been published each month during this process.
 - The BBC Trust has engaged Ernst & Young as independent financial advisors to review the Executive's efficiency targets and has published the outcomes.
 - The BBC Trust has also engaged the research agency, Jigsaw to undertake some targeted research among industry leaders to gather an external perspective on the savings exercise. The outcome of the research will be published in May.
 - The Executive has appointed Deloitte to provide specialist consultancy advice on business transformation and cost reduction in relation to DQF.
 - The BBC Trust Finance Committee and the Executive Audit Committee will both have oversight of and approval of the design and the implementation of initiatives.
32. The public authority further explained that its Audit department has designed a DQF specific assurance plan which includes:
- Quarterly healthcheck of the DQF project (conducted jointly with the Corporate Project Management Office),
 - An annual external healthcheck to be undertaken by a suitably qualified organisation, and
 - Internal audit reviews of key DQF projects, namely Finance Effectiveness and Pan UK Network TV Production
33. The public authority also contracted KPMG, its external auditor, to carry out an annual examination of the savings. KPMG will make sure

there is evidence these are genuine and check that savings achieved in previous years have been sustained

34. It also took into account the findings of the BBC Trust (Ernst & Young) review and prior National Audit Office reports when defining the programme delivery phase and its assurance regime.
35. In favour of maintaining the exemption the public authority submitted that disclosure would actually serve to undermine the operation of the above accountability mechanisms which rely upon full and open communication. It further submitted that there is no suggestion that the proposals are badly designed or that risks are not appreciated or well managed. It argued that whilst the DQF project is undeniably significant and will result in a slimming down of the organisation, DQF did not therefore represent a fundamental overhaul of its Charter obligations such as to attract a considerable or exceptional public interest in disclosure at the expense of the significant public interest in maintaining the exemption.
36. The public authority argued that there is a strong public interest in ensuring there is safe space within which the Executive Board and the BBC Trust are able to take full and proper advice and to openly and candidly discuss the detail of policy proposals for the DQF project. This would ensure that the analysis is thorough and robust and gives the Executive Board and BBC Trust the assurance that the resulting proposals are well designed and will be effective. It argued that safe space argument was particularly strong in this case, given the circumstances and timing of the request.
37. The public authority also argued that there was a public interest in preserving the robust internal audit and assurance mechanism underlying the DQF project. As mentioned, open and honest risk reporting is essential to the ability of the internal auditors to provide quality assurance to the Executive and Trust on the DQF project, including regular healthchecks and reviews of key projects. There was therefore a strong public interest in preserving internal audit mechanism by not disclosing information which would be likely to inhibit free and frank discussions regarding the likely risks of the DQF project.
38. The public authority further argued that there was a public interest in keeping the DQF programme on track and delivering the savings needed. The licence fee funding had been fixed and there was no choice but to reduce its operating expenditure by £700million by 2016/2017. It was imperative that it identified and made savings early to fund new obligations as they come on board. For instance, it will fund the 'World Service' and provide majority of the funding for S4C,

the 'Welsh Language public service broadcaster' from 2013/14 and 2014/15 respectively.

39. They also argued that there is a public interest in ensuring that the Executive is able to carefully and sensitively manage staff through a period of change which will inevitably result in job losses and relocations. Disclosing the disputed information is likely to affect the ability of the Executive to engage constructively with staff and consequently undermine the implementation of the DQF programme and the delivery of the necessary savings.
40. It was also in the public interest to ensure that the Trust is able to perform its role as governing body of the BBC in as effective a manner as possible. A lack of free and frank discussions between the Executive and the Trust on fundamental aspects of its operations would harm the Trust's ability to undertake its primary role under the Charter. Undermining the public consultation exercise would also be likely to impinge upon the relationship between the Trust and licence fee payers and impede the Trust in holding the BBC to account on their behalf.

Balance of Public Interest

41. The Commissioner agrees with the complainant that disclosure would enhance the transparency of the DQF programme and specifically provide details of associated risks to the provision of services. As the public authority itself acknowledged, licence fee payers should be well informed in order to sufficiently participate in debates about its future. The Commissioner finds that the disputed information will significantly enhance the quality of the debates and increase public understanding of the likely impact of the DQF on future programme content. However, the Commissioner does acknowledge the significant amount of information the BBC have put into the public domain and the accountability mechanisms in place. Whilst the Commissioner maintains there is still a strong public interest in disclosure, as this information would further inform the public about an important matter, this is not elevated to a higher level by any evidence about a lack of transparency or accountability in the process.
42. The Commissioner agrees with the public authority that there is significant public interest in ensuring that there is safe space for the Executive Board and BBC Trust to freely and candidly discuss proposals including risks relating to the DQF project. He agrees that this would ensure that the analysis is robust and thorough.
43. A crucial factor is that the disputed information was 'live' at the time of the requests, there was a strong public interest in ensuring that options could be considered and proposals made without fear views expressed could be disclosed prematurely. In the circumstances of this

case there was a real risk that disclosure would result in a chilling effect on future discussions and contributions and such an outcome would not have been in the public interest. However, this risk would be mitigated, to some extent, by the obligation on those conducting the risk assessments to provide free and frank advice.

44. As mentioned, although the public authority does not consider that the DQF project fundamentally alters its Charter obligations, there is considerable public interest in achieving the 20% or at least the agreed 16% reduction to its operating expenditure to meet the expected shortfall in the new licence fee settlement. There is a real risk that the public authority might not be able to meet its Charter obligations in the future if it fails to achieve the 16% savings target. The Commissioner agrees that the risk reporting process is crucial to the success of the DQF project in general and to the internal audit and assurance mechanism in general. The success of the DQF project is equally important to the public authority's ability to continue to provide the services it is obliged to under the Charter.
45. The Commissioner also agrees that sensitivity of the issues related to staff management is a further factor in favour of protecting the safe space. Disclosure could have affected the Executive's ability to engage constructively with staff responsible for implementing the DQF project and consequently undermine the ability to deliver the required savings.
46. The Commissioner notes that while the steps taken by the public authority to ensure that the DQF project is transparent may not have included disclosing a risk register or associated documents, they demonstrate that the public authority is committed to ensuring proper scrutiny of its policies and proposals as far as it is possible without jeopardising the project.
47. Having considered all of the public interest arguments including those he has not specifically mentioned in his assessment above, the Commissioner finds that in all the circumstances of the case, the public interest in maintaining the exemptions at section 36(2)(b)(i) and (ii) are outweighed the public interest in disclosing the disputed information.
48. Having found the disputed information was exempt from disclosure on the basis of section 36(2)(b), the Commissioner did not consider the applicability of the exemptions at section 36(2)(c).

Right of appeal

49. 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

50. 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.
51. 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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