

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 July 2015

Public Authority: British Broadcasting Corporation (BBC)

Address: White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information about particular BBC teams that had responded to a staff survey in 2012. The BBC refused to disclose the information and cited the FOIA exemptions under sections 21 (information reasonably accessible to the requester by other means) and 40(2) of the FOIA (third person personal data) as its basis for doing so.
2. The Commissioner's decision is as follows:
 - The BBC correctly applied the exemption under section 21 to part of the request.
 - The BBC correctly applied the exemption under section 40(2) to the remainder of the information as it is the personal data of third persons. The public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any further steps.

Background

4. On 6 May 2013 an applicant had submitted an identical request to the BBC and submitted a complaint to the Commissioner about the BBC's response. This resulted in the Commissioner's decision in [FS50534038](#), which found in favour of the requester. The BBC's appeal to the Information Tribunal was subsequently set aside as it was found that the

applicant had used a pseudonym when they submitted their request. This meant that their request had not been a valid request under the terms of the FOIA.

Request and response

5. On 26 July 2014, the complainant wrote to the BBC and requested information in the following terms:

"I understand that the former head of HR at the BBC, Lucy Adams, requested the results for the 30 departments/teams with the worst results in the BBC's 2012 Staff Survey, so that the reasons could be investigated.

Would you please identify the 30 departments/teams she was referring to, and say in which divisions they are located."

6. The BBC responded on 26 July. Because it had received an identical request the previous year by an applicant using a pseudonym, it asked the applicant of this request to confirm that they are not a BBC employee using a pseudonym, and asked that they provide the BBC with their full name. The BBC confirmed on 8 September that it was satisfied that the applicant was not using a pseudonym.
7. In its response of 8 September, the BBC said it is withholding the information the complainant has requested because it is the personal data of third persons.
8. Following an internal review the BBC wrote to the complainant on 27 October. It upheld its position with regard to part 1 of the request – the 30 departments/teams in question. It said that the information requested in the second part of the request – the divisions in which the 30 teams are located – is exempt under section 21 as this information is already accessible to the complainant, as a result of the earlier request that had been submitted. The BBC provided a link to this information on the *WhatDoTheyKnow* website.

Scope of the case

9. The complainant contacted the Commissioner on 31 March 2015 to complain about the way his request for information had been handled. He is not satisfied that the BBC is withholding information and that the BBC suspected he might be using a pseudonym.

10. The Commissioner has investigated the BBC's application of the exemptions under section 21 and section 40(2) to the information it is withholding. He has also considered the BBC's actions with regard to the possible use of a pseudonym.

Reasons for decision

Section 21

11. Section 21 of the FOIA says that information is exempt from disclosure if it is reasonably accessible to the applicant by other means. The information that the BBC is withholding under this exemption is the names of the divisions in which the 30 teams with the worst results in a 2012 staff survey are located.
12. The BBC's response to the identical 2013 request disclosed the number of relevant teams in each BBC division and identified each division by name. The applicant in that case made this information publicly available in the *WhatDoTheyKnow* website on 18 November 2013. At the date of this notice, the information is still available there.¹
13. In his guidance on section 21, the Commissioner explains that subsection (1) describes the fundamental principle underlying this exemption. This is that, in order to be exempt, information must be reasonably accessible '*to the applicant*'. Unlike consideration of most other exemptions in the FOIA, this allows a public authority to take the individual circumstances of the applicant into account. In effect a distinction is being made between information that is reasonably accessible to the particular applicant and information that is available to the general public. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA.
14. An assessment of whether the section 21 exemption can be successfully applied will be dependent on whether or not requested information is reasonably accessible to the particular applicant who requested it. Information is only reasonably accessible to the applicant if the public authority:

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<https://www.whatdotheyknow.com/request/160387/response/450888/attach/html/2/RFI20130693%20FINAL%20response.pdf.htm>

- knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 in this context, the key point is that the authority must be able to provide directions to the information.
15. In this case, the information is available on the *WhatDoTheyKnow* website as a result of the earlier request of 6 May 2013. The BBC provided the complainant with a link to the information in its internal review. The BBC has told the Commissioner that the complainant has communicated to it using an email address generated by *WhatDoTheyKnow*, which suggests that the complainant has reasonable access to the internet, and this website specifically. In correspondence to the BBC, the complainant has also commented that he is aware that the earlier request is on the *WhatDoTheyKnow* website and that he has been following the progress of this request "with interest".
16. In these circumstances, the Commissioner is satisfied that this element of the requested information is already reasonably accessible to the complainant by other means and that the BBC is correct to withhold it under section 21 of the FOIA.

Section 40(2)

17. The BBC has explained that the Health and Safety Executive (HSE) developed guidance for employers to manage the causes of work-related stress. The HSE identified seven factors that, in its view, had to be managed in order to control the sources of pressure in the workplace. To identify staff views in these seven areas, the BBC included 27 questions within the 69 questions that comprised its 2012 staff survey. It used the answers to these questions to provide a Workplace Pressure Index (WPI).
18. The BBC says that the results of the WPI were not broadly published and have not been made publicly available. Individual teams were not identified and line managers were not given a copy of the specific WPI results for their teams. The information was used only by senior HR staff to enable high level discussions about areas of work pressure.
19. The BBC is withholding the names of the 30 teams/departments scoring least highly in the 2012 staff survey under section 40(2) because it says this information is the personal data of third persons.

Is the requested information the personal data of third persons?

20. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of a third person (ie someone other

than the requester) and the condition under either section 40(3) or 40(4) is satisfied. The Commissioner therefore first considered whether this element of the requested information is, as the BBC maintains, the personal data of a third party.

21. Personal data is defined in the Data Protection Act (DPA) as:

"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."

Does the information 'relate to a living individual'?

22. Information can be said to 'relate to' an individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

23. As recorded in FS50534038, it is difficult for the Commissioner to see how the name of a team could be said to be the personal data of particular individuals. Someone with a degree of prior knowledge about the BBC may know the names of particular individuals who work in particular teams. However, the name of a team alone is not 'about' any individual in it. Nor, unless it is a team of one, does it have any individuals as its main focus, or link directly to any specific individual. On the face of it, the Commissioner does not consider a team name meets the criteria of being biographically significant because, theoretically, it would not go beyond simply 'recording' an individual's involvement in it.

24. The BBC argues that the requested information *does* go beyond merely 'recording' an individual's involvement in a workplace team. It says that the context in which the 30 teams are placed (having the lowest WPI scores in the BBC) together with the information itself is biographical in the sense that it strongly indicates the personal feelings of stress and work place pressure suffered by the individuals who responded to the survey in 2012. The Commissioner accepts that this would be the case if there was a sufficiently direct link between the requested information – the team names – and any particular individual in that team. He is not convinced that such a direct link exists, for the reasons discussed below.

25. The BBC has referred to an alternative definition of 'personal data' provided in the Commissioner's guidance on determining what is personal data (referencing its citation in *Edem*²), namely that:

"... data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider 'biographical significance' only where the information is not 'obviously about an individual or clearly 'linked to' him."

26. The *Edem* case centred on whether the Financial Services Authority was correct to withhold the names of three specific employees under section 40(2), as it was their personal data. The Commissioner decided that it had been correctly withheld; a decision upheld on appeal. The Commissioner considers, however, that while an individual's name clearly links to that individual, there is a less clear direct link from the name of a team, as in this case, to any one, specific individual in that team.

Is the individual identifiable from the information?

27. The information in question will not be classed as personal data if it is effectively anonymised, and therefore the section 40(2) exemption will not apply. This approach was confirmed in the High Court judgment *Department of Health, R (on the application of) v Information Commissioner*³
28. The Commissioner issued a Data Protection Code of Practice on anonymisation⁴ in 2012 and the BBC has referred to this in its submission to the Commissioner. The BBC has considered the 'motivated intruder' test detailed in pages 22 – 24 of the Code. It has also applied the test of whether it is *reasonably likely* that an individual data subject can be identified – from the data and other information.

² *Edem v IC & Financial Services Authority* [2014] EWCA Civ 92.

³ *Department of Health, R (on the application of) v Information Commissioner* [2011] EWHC 1430 (Admin) (20 April 2011)

⁴ [Anonymisation: managing data protection risk code of practice \(ICO, 2012\)](#)

29. The BBC has acknowledged that the requested information is not part of an anonymised data set. It considers the motivated intruder test is nonetheless helpful in establishing whether an individual may be able to identify the names of particular individuals from disclosure of the names of BBC teams in combination with other information. The test is whether an 'intruder' would be able to achieve re-identification of individuals if 'motivated' to do this – ie any determined person with a reason to want to identify relevant individuals.
30. In FS50534038, the requester had said they were a BBC employee. In that case, the Commissioner had recognised that the requester may consequently have had a degree of prior knowledge about the organisation but was not convinced that the requester – or any member of the public – would be able to identify the names of specific individuals from the requested information: the name of particular teams.
31. The BBC argues that BBC employees (at least) will be in a position to identify the relevant individuals in the 30 teams in question through a prior knowledge of the recent make-up of those teams, the name of the team and information accessible from the BBC's internal directories (GAL and PeopleView). Further information about the teams in question is discussed in a confidential annex to this notice.
32. In response, the Commissioner argues that the requester in this case has asked *only* for the names of teams. They have not asked for the number of people in those teams who responded to the survey. The Commissioner considers it may be possible to identify individuals if the requester had also asked for this information, for the following reason. Theoretically, someone may have prior knowledge of the headcount and make up of a particular team at 2012. If, for example, the headcount in a team was 15 individuals, and if the name of that team was disclosed along with the information that all 15 people from that team had responded to the survey, the requester would be in a position to identify those 15 individuals. The requested information in that case – the name of the team *and* the number of respondents – would therefore comprise those individuals' personal data (see paragraph 36) and be exempt under section 40(2).
33. The Commissioner comes back to his position in FS50534038; that from the name of a team alone it would not be possible to identify specific individuals. Nor would it be possible to form an opinion on who may have responded to the survey, or what any of the respondents' individual views were.
34. The Commissioner recognises that the BBC needs to be cautious in the way that it handles information that could be people's personal data. In its comprehensive submission to the Commissioner, the BBC provided

additional arguments as to why it would be reasonably likely that particular individuals could be identified if the requested information is disclosed. These are summarised below:

- An explanation of how a 'motivated intruder' –such as a BBC employee - could use GAL and PeopleView to easily find out the names of people in, or managing, particular teams.
 - Further arguments that the number of people in each team may lead to particular members of it being identified – this is discussed in the confidential annex, and at paragraph 31 above.
 - 'Spencer Count' (who the BBC says is a current BBC employee using a pseudonym) made the identical request that resulted in FS50534038), and posted the Commissioner's decision in that case on the 'WhatDoTheyKnow' (WDTK) website. The BBC says that 'Spencer Count' has made 62 requests via WDTK, is very active on WDTK and appears to have a keen interest in the BBC and the matter that is the subject of this notice. The BBC says that because disclosure, through WDTK, under the FOIA is publication to the world at large, the disputed information in this case would consequently also be readily available to 'Spencer Count' and other BBC employees. 'Spencer Count', amongst other BBC employees, would have the prior knowledge and access to BBC directories needed to identify the names of those individuals in the named teams.
35. In the Commissioner's view, these arguments again depend on the motivated intruder also having information on the number of people within each team that responded to the staff survey. As discussed at paragraph 32, with both the name of the teams, and the number of people within in each team who responded to the survey, it may theoretically be possible to identify at least some of the individuals concerned. Without both these elements, the Commissioner does not consider that identification of particular individuals is reasonably likely.
36. However, returning to the idea of 'biographical significance', the BBC also now argues that releasing the names of the 30 teams with the lowest scores in the survey (and therefore the most highly stressed teams) will lead to the identification of the line managers of those teams. The BBC says that the requested information therefore is biographically significant to those managers. This is because, in addition to simply recording that they were managers of particular teams in 2012, the nature of the information may also indicate their performance as line managers at that time. They may (or may not) have contributed to creating an environment of heightened employee stress and workplace pressure.

37. The BBC has told the Commissioner that 22 of the line managers concerned are still employed by the BBC and 21 remain in post in the same sub-division of the organisation. The Commissioner agrees with the BBC when it says that a motivated intruder or someone with prior knowledge or access to the BBC's directories may be able to identify the line managers concerned if the requested information – the names of teams only – was to be released. On this point alone, therefore, the Commissioner is prepared to accept that the information that has been requested is personal data. This is because it has biographical significance to particular individuals (the line managers of the teams in question) and so relates to them. It would also be possible to identify these individuals from the requested information.

Is a condition under either 40(3) or 40(4) satisfied?

38. Having decided that the requested information is personal data, the Commissioner then considered whether the condition under 40(3) or 40(4) is satisfied. The condition under 40(3)(a)(i) says that personal data must not be released if to do so would breach any of the principles set out in Schedule 1 of the Data Protection Act. The BBC says that disclosing the requested information would breach the first data protection principle: that personal data 'shall be processed fairly and lawfully...' The BBC argues that disclosing this information to the public at large would be unfair, and so contravene this principle.

39. When considering whether disclosure would be unfair, and so breach the first principle, the Commissioner took three factors into account:

- Have the individuals concerned (ie the data subjects) given their consent to disclosure?
- What reasonable expectation do the individuals have about what will happen to their personal data?
- What might be the likely consequences resulting from disclosure?

40. Assessing fairness however, also involves balancing the individuals' rights and freedoms against the legitimate interest in disclosure to the public. It may still be fair to disclose the information if there is an overriding legitimate interest in doing so (condition 6 in Schedule 2 of the Data Protection Act). The Commissioner therefore also finally considered these interests.

Have the individuals given their consent to disclosure?

41. The BBC has told the Commissioner that, because of confidentiality issues, it did not consider it reasonable to approach the employees who sit within the relevant teams to seek their consent to disclose the

requested information. The Commissioner considers it likely that the BBC will not have sought the consent of line managers for the same reason.

What reasonable expectations do the individuals have about what will happen to their personal data?

42. The BBC has told the Commissioner that the individuals who submitted responses to the staff survey in question, including line managers, did so anonymously, in the reasonable expectation that the BBC would attach the utmost confidentiality to their responses. It therefore argues that these individuals would not expect the name of the team in which they sit (having been identified as one of the 30 lowest WPI scoring teams in the BBC's 2012 staff survey) to be disclosed to the public at large.
43. The BBC also says that the line managers of the teams concerned were not given a copy of the specific WPI results for their team. The information was used only by senior HR staff to enable high level discussions about areas of pressure to inform Divisional action plans. Further information on this point is given in the confidential annex.
44. In the circumstances that the BBC describes, and as also discussed at paragraph 18, the Commissioner is prepared to accept that the individuals concerned would reasonably expect that the information in question would be treated confidentially and would not be made available to the wider public.

What might be the likely consequences resulting from disclosure?

45. In its submission to the Commissioner, the BBC has discussed the likely consequences with regard to both the team members and the line managers. As discussed in this notice, the Commissioner does not consider that the requested information is the personal data of the team members. He has consequently disregarded the BBC's arguments with regard to these individuals and focused on the possible consequences for the line managers.
46. He notes that the BBC says that disclosing the information would be likely to have a detrimental effect on the line managers. Being a manager in one of the 30 lowest scoring teams may lead to perceptions of managerial failure. The BBC argues that this is particularly significant when over two thirds of the relevant line managers in post at the time of the survey are still employed by the BBC, within the same sub-division. Releasing the information could jeopardise their future employment prospects in the wider market and have a detrimental impact on their private lives.

47. The BBC also says that it could potentially erode relations, trust and confidence within teams were line managers to discover that, due to their team being one of the 30 lowest performing, some or all of their team must have submitted negative results to the survey.
48. The Commissioner considers that the likely consequences that the BBC has outlined are credible. He is prepared to accept that disclosing the information may have a detrimental effect on the wellbeing and private and professional lives of those individuals whose personal data would be, in effect, released to the wider world. He also agrees with the BBC that confidence in staff surveys is important as they can act as tools for improving performance and morale within organisations.
49. Having considered the arguments that the BBC has provided, the Commissioner has come to the conclusion that releasing the disputed information would be unfair and so breach the first Data Protection principle. The information is the personal data of particular individuals; they could reasonably expect their personal data to be treated confidentiality and releasing it may cause them a degree of distress. Since the Commissioner is satisfied that a condition under section 40(3) has been met, he has not gone on to consider the conditions under section 40(4).

Balancing the individuals' rights and freedoms against the legitimate interest in disclosure

50. Despite the factors above, the requested information may still be disclosed if there is a compelling public interest in doing so.
51. The BBC recognises that there is a legitimate public interest in understanding that divisions and teams with the BBC are operating at an effective level and in an efficient way. The public can then be reassured that the BBC is obtaining value for money for the licence fee and that it complies with its obligations to treat its staff appropriately. The BBC recognises too that there is a legitimate public interest in making sure that its managers are accountable when failings are present and have been identified.
52. The BBC has described the actions it has taken to address the interests outlined above. One of these actions is given in the confidential annex. The BBC has also told the Commissioner that all BBC managers go through an appraisal once a year, in which performance, achievements, strengths, weaknesses and future targets are discussed. The BBC says that if performance issues exist they are identified at the time they arise through informal meetings. If the issues do not improve, then a more formal capability process is instigated.

53. In any staff survey, there will be staff or teams or divisions who score least highly (and those that score most highly) and the Commissioner considers that the public will appreciate this. That is the purpose of such surveys: to identify problem areas and put steps in place to address these areas. The Commissioner considers that the actions the BBC says it has taken in response to the staff survey in question sufficiently address the public interest arguments that it has put forward regarding value for money, accountability and how it treats its staff. In 2012, the BBC identified the 30 teams feeling most stressed and under pressure and took action to improve those teams' WPI scores.
54. The Commissioner is not of the view that naming the 30 teams in question would add anything to the wider public interests in transparency and accountability discussed above. Particularly as the survey is now approaching three years old. He therefore considers that any wider public interest in publishing this information does not outweigh the significant public interest in protecting individuals' personal data, enshrined in the Data Protection Act.
55. To summarise, the Commissioner is satisfied that the disputed information is the personal data of third persons and that it is exempt from disclosure under section 40(2) of the FOIA, by virtue of section 40(3)(a)(i). He considers that the public interest favours maintaining this exemption.
56. The Commissioner recognises that he is reaching a different decision from that reached in FS50534038 for exactly the same information and with reference to the same exemption. In response to this, the Commissioner would point out that he has to consider the circumstances and facts of the case at the time of the request. He has considered the further, more detailed arguments provided by the BBC in this case and noted that the Information Tribunal did not reach a decision at appeal in the first case due to the pseudonym issue. He is therefore now satisfied that the application of section 40(2) in this case is correct.

Other matters

57. As noted at paragraph 21, the Commissioner has previously investigated a complaint that resulted from an identical request. A subsequent appeal to the Information Tribunal was set aside as it was found that the requester in that case had used a pseudonym.
58. Section 8 of the FOIA describes a 'request for information' as one that is in writing, gives the name and address of the applicant and describes the information requested. In order for a request under the FOIA to be a valid one, the applicant must use his or her real name, rather than a

pseudonym. A request made by an applicant using a pseudonym is not valid and the public authority would not be obliged to deal with the request.

59. Given all the circumstances of this case, the Commissioner considers that the BBC acted reasonably when it sought assurance from the complainant that they were not using a pseudonym.

Right of appeal

60. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. 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.
62. 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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