

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2017

Public Authority: British Broadcasting Corporation (BBC)

Address: Room BC2 A4
Broadcast Centre White City
Wood Lane
London W12 7TP

Decision (including any steps ordered)

1. In two requests, the complainant has requested information from the BBC about incidents of inappropriate sexual behaviour and incidents of nudity. The BBC provided the complainant with web links to where some information relating to the first request is published. It withheld some information under section 22(1) of the FOIA because this information was intended for future publication.
2. With regard to the second request, the BBC initially said it holds no relevant information. During the Commissioner's investigation the BBC confirmed that it was not obliged to comply with the second request because to establish whether or not it holds relevant information would exceed the appropriate cost limit under section 12(2) of the FOIA.
3. The Commissioner's decision is that the BBC:
 - correctly applied section 22(1) to Request 1 and that the public interest favoured maintaining the exemption;
 - is not obliged to confirm or deny it holds information within the scope of Request 2 as to do so would exceed the appropriate limit under section 12(2) of the FOIA; but
 - breached section 16(1) with regard to Request 2 because it did not offer appropriate advice and assistance.

4. The Commissioner requires the BBC to take the following step to ensure compliance with the legislation:
 - provide the complainant with appropriate advice and assistance in accordance with its obligations under section 16(1) of the FOIA.
5. The BBC must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

Request 1 - FS50644978 (BBC reference RFI20160350)

6. On 25 February 2016, the complainant wrote to the BBC and requested information in the following terms; one of four requests submitted:

"1. How many reports have been received by the BBC HR or legal departments or other about inappropriate behaviour (sexual) in the past 11 years."
7. The BBC responded on 27 April 2016. It provided a web link to where it said relevant information prior to March 2013 is published. It also provided web links to where information for 2013/2014 and 2014/2015 is published and a link to where information on the number of complaints under the 'Savile Compensation Scheme' was published in February 2016.
8. The BBC said it was withholding information relating to figures for 2015/2016 under section 22 of the FOIA as it intended to publish this information later in 2016. The BBC said that the public interest favoured maintaining this exemption.
9. Following an internal review the BBC wrote to the complainant on 7 June 2016. It upheld its position.

Request 2 – FS50672521 (BBC reference RFI20161037)

10. On 12 May 2016, the complainant wrote to the BBC and requested information in the following terms:

"How many reports have been received by the BBC HR or legal or other departments about incidents of nudity (specifically what might be termed indecent exposure or colloquially 'flashing') on BBC Entertainment or Drama productions (and the filming location thereof)

by on screen talent (i.e. actors/actresses or presenters) over the past 11 years. 3. What action was taken in any of these cases?"

11. This request was a refinement of one of the other requests the complainant had submitted to the BBC on 25 February 2016.
12. The BBC responded on 10 June 2016 and said that there had been no reports received.

Scope of the case

13. The complainant contacted the Commissioner on 5 September 2016 to complain about the way his requests for information had been handled. He considers that the public interest favoured releasing the information he had requested in Request 1 and that the BBC may not have undertaken the necessary research before providing its response to Request 2 ie that it holds relevant information that it has not disclosed.
14. The complainant had not requested an internal review of Request 2 and, given the passage of time at the point when the Commissioner began her investigation, she considered a review was not necessary. However, the BBC has confirmed that, as a result of the Commissioner's investigation, it has conducted a full review of its response to Request 2. Its amended position is that it refuses to comply with this request under section 12(2) of the FOIA. This is because establishing whether the BBC holds the requested information would exceed the appropriate cost and time limit.
15. The Commissioner's investigation has focussed on whether the BBC correctly applied section 22(1) to Request 1; whether it has correctly applied section 12(2) to Request 2 and whether it met its obligation under section 16(1) with respect to Request 2.

Reasons for decision

Section 22 – intended for future publication

16. Section 22(1) of the FOIA says that information is exempt from disclosure if, at the time of the request, the public authority holds the information with a view to publishing it at some future date, whether determined or not, and it is reasonable in all the circumstances that the information should be withheld until it is published.
17. Section 22(1) is subject to the public interest test.

18. In order to determine whether section 22(1) is engaged the Commissioner generally considers the following questions:
- When the complainant submitted the request, did the BBC intend to publish the information at some date in the future?
 - If so, had the BBC determined this date when the request was submitted?
 - In all the circumstances of the case, was it 'reasonable' for the BBC to withhold the information until some future date (whether determined or not)?
19. In its submission to the Commissioner, the BBC confirmed that the information in question was published in the Dame Janet Smith progress report in July 2016¹. Acknowledging that it had not been published in its annual report as originally anticipated, the BBC nonetheless confirmed that it maintains that section 22 was correctly applied at the time of the request and did not provide further submissions on this point. It has therefore been necessary for the Commissioner to review the BBC's response to the complainant and its internal review.

Was the information held with a view to its publication at a future date and, if so, had the BBC determined this date when the request was submitted?

20. The Commissioner's guidance on section 22 says that although a public authority must hold the information at the time of the request with a view to its publication, the exemption does not require a set publication date in place. A public authority may still be able to apply section 22 if:
- there is a publication deadline, but publication could be at any date before then
 - publication will take place once other actions have been completed
 - publication will take place by reference to other related events; or
 - there is a draft publication schedule that has not been finalised.

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http://downloads.bb.co.uk/aboutthebbc/insidethebbc/reports/pdf/bbc_progressreport_damejanetsmith_july2016.pdf

21. Therefore as long as the public authority has decided that it or another person will publish the information at some time in the future, the exemption may apply.
22. In its response to the complainant, the BBC indicated that the requested information was to be published in its annual report later in 2016. In its internal review, the BBC said it was clear that, given its conduct since March 2013 of disclosing information relating to the number of sexual harassment complaints received by it in the form of annual reports, the BBC both had a fixed intention to publish the requested information and it held that intention prior to receiving the request.

In all the circumstances of the case, was it 'reasonable' for the BBC to withhold the information until some future date? / Public interest considerations

23. In its internal review, the BBC said that the considerations pertinent to the reasonableness criterion are, in large part, identical to those which weigh in the balance in favour of maintaining the exemption. In order to avoid unnecessary duplication, it set out the following considerations which it considered were sufficient to satisfy the requirement of reasonableness:
 - Early disclosure would risk placing the information out of context. Given the seriousness of the matters to which the information relates, whether for the victims of sexual harassment, the alleged harasser or for the organisation as a whole, it is clearly in the public interest that such context be provided in order to ensure that public debate on these issues is informed and balanced. The Commissioner recognised the BBC's need to place information it publishes in its proper context as a justification for maintaining the s.22 exemption in decision notice [FS50341616](#).
 - Early disclosure would grant preference to the complainant over all other licence payers (and other persons interested more generally) who would not receive the information until the scheduled disclosure.
 - The BBC publishes information relating to sexual harassment annually. The complainant (and all other members of the public) already has access to a broad range of information relating to reports of sexual harassment within the BBC. The extent to which public knowledge is likely to be enhanced by the early publication of this year's statistics (which SC does not allege are likely to be unusual) is therefore limited.

- The complainant will not wait longer than a year to receive the information. No reasons have been given as to why he, or any other member of the public, requires the information before that point.
 - It is in the public interest that the information be presented in an accessible, easily digestible and accurate manner. The BBC has scheduled in sufficient time and resources to ensure that this is achieved: it will not be able to do so if early publication is demanded. The Information Tribunal has recognised that delaying publication in order to ensure its dependability is a reason justifying maintaining the s.22 exemption (Queen Mary University of London v Information Commissioner (2013) 133 BMLR 210 (FTT (GRC))).
24. The BBC recognised the public interest in favour of early disclosure as being enhanced transparency and accountability of the BBC as a publicly funded organisation. It recognised that those are important public interests. However, it considered they are not obviated by disclosure of the information at the scheduled time: the BBC said it enhances its transparency when the information is published. The BBC said that its decision to withhold the information prior to its scheduled publication date simply delays the point at which those public interests will be realised.
25. In his complaint to the Commissioner, the complainant said he was not satisfied with the BBC's response because, at the point he submitted his complaint to the Commissioner; the requested information had not been published in its annual report. He also disputed that releasing the information would grant preference to him over other licence payers; that the BBC had insufficient resources to prepare the information ahead of its schedule; and that he should be required to give reasons as to why he wanted the information.
26. The Commissioner has noted the complainant's concerns but she is satisfied that the BBC correctly applied section 22(1) to Request 1. It seems clear to her, in view of its release of related information for previous years through its annual reports, that the BBC had a settled intention to publish information relating to 2015/2016. It had indicated that it would be published in its annual report later in 2016 but in the event it was published in the Dame Janet Smith Progress Report in July 2016. This does not detract from the Commissioner's view that, at the time it received the complainant's request, the BBC intended to publish the requested information at a future date.
27. With regard to the public interest, the Commissioner considers that the BBC has put forward generally strong public interest arguments for

publishing the information at a future date as it had planned, rather than disclosing it early in response to an FOI request. The Commissioner is satisfied that the public interest favoured maintaining the exemption at the time of the request. She notes that the requested information has now been published.

Section 12 – cost exceeds the appropriate limit

28. In its response to Request 2 the BBC indicated that it did not hold any related information; that is, that it had not received any reports of incidents of nudity.
29. In its submission to the Commissioner, the BBC confirmed that it had now carried out a full review and, as result, considered that to categorically confirm that it does, or does not, hold the requested information would exceed the appropriate limit under section 12(2) of the FOIA.
30. The BBC added that in conducting its review, it had searched its electronic databases, to the extent that it is possible to electronically search for the information in question, and identified that it holds no information to suggest that the requested information is held.
31. Section 1(1) of the FOIA says that anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to him or her if it is held.
32. Section 12(1) says that section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.
33. Section 12(2) says that 12(1) does not exempt the public authority from its obligation to comply with section 1(1)(a) unless the cost of complying with that paragraph alone would exceed the appropriate limit.
34. The appropriate limit for central government departments is £600 and £450 for all other public authorities.
35. Where a public authority claims that section 12 of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit – in line with section 16.
36. The BBC has told the Commissioner that, if it is held, the requested information would be likely to be held by its Human Resources (HR) team and/or its Employment Legal Department ('the Department').

37. The Employment Legal Department receives queries from HR as well as directly from the other divisions within the BBC. Since February 2016, the Department has opened 91 new files. It will open a new file if the matter is substantial or simply file the query under one of the 'General' files it has (eg General – World Service, General – Television etc). The name of the file is usually the employee's name (if it is regarding a particular employee) and the file name will not record the nature of the query.
38. The BBC says that, therefore, if a query was raised involving allegations of 'inappropriate sexual conduct', this would not be recorded in the subject heading of the file. In order to establish a comprehensive list of relevant files to determine if the requested information was held, a BBC employee would have to read each individual file to see whether it related to an allegation of 'inappropriate sexual conduct'. The BBC estimates that this would take an average of 15 minutes for each file (each file varies in length from a few pages to several lever arch files).
39. The Commissioner notes that the BBC sometimes refers to 'inappropriate sexual conduct' in this part of its submission, and that the request refers to incidents of 'nudity'. The BBC has confirmed that this phrase was included because if it held a file that contained details of any incidents of nudity ('flashing') it is unlikely that this would be the name of the file. That word – 'nudity' or 'flashing' – would be contained within the contents of the file but incidents of that nature may be recorded under 'inappropriate sexual conduct'. Therefore, in order to establish if any of the files highlighted from the search the BBC conducted concerned such incidents of nudity, an employee would have to manually read each individual file.
40. The BBC notes that the request relates to the last 11 years of information held. It says that the previous 12 months would give an accurate indication of the number of files received each year for the past 11 years: approximately 91 files per year over 11 years would equal approximately 1001 files. If each file took on average 15 minutes to review, this process would total approximately 250 hours.
41. In addition, the BBC says that, as noted, queries are sometimes recorded on 'General' files. There are around 27 General files in the Department and each of these would need to be manually checked to see if any relevant queries were raised. This would take longer than the average 15 minutes given that many different queries are recorded on General files. The BBC estimates that one to two hours per file would be required to properly check the General files. With approximately 27 General files, the process would take in total, approximately 35 hours to review.

42. The BBC therefore considers that it would take the Employment Legal Department approximately 252 hours to conduct a full review of the information it holds in order to establish if the requested information is held.
43. The BBC has next discussed its HR team. It has told the Commissioner that in October 2015 the HR team changed the way it would hold the requested information, if it is held.
44. For information relating to cases prior to October 2015, the information (if held) would be held on the BBC's Core database, which is the central repository for storing information concerning HR disciplinary and grievance cases. The Core database is an excel spreadsheet, which details high level case information.
45. The BBC says that 121 cases of conduct/grievance matters were identified on the Core database which may be of relevance and which would need to be reviewed. Those cases related to bullying, harassment or inappropriate behaviour. The HR team has confirmed that the 121 cases would need to be reviewed manually in order to establish if any of the cases held any relevant data in order to respond to Request 2. Conducting a manual review of 121 cases at 30 minutes for each case equals 3,630 minutes or 60.5 hours.
46. Since October 2015, the BBC has engaged with an external provider (Manager Advice) to hold information of the nature requested. Therefore the BBC says that for the period from October 2015 to 12 May 2016, Manager Advice would be required to undertake a search of its central database to determine whether the requested information was held.
47. Manager Advice has identified 13 cases in the relevant period that may be of relevance and which would need to be searched to determine if the requested information was held. In light of the complaint to the Commissioner, the BBC carried out a sample exercise to review each of these files to determine how long it would take to review the files. The BBC carried out a manual search of the case files to identify whether the words 'nude' or 'nudity' (or similar) could be located in these 13 files. It took 30 minutes to conduct a manual review of each case. This equalled 390 minutes (6.5 hours) to conduct the review. No cases related to 'nude' or 'nudity' were found to be held.
48. To review all the related HR files would therefore take approximately 67 hours. In addition to this, the BBC says that when conducting the review it may come to light that other divisions may hold relevant data that might not have been apparent at the current initial stages. In

which case, the total number of hours needed to conduct a full review would increase.

49. The Commissioner has considered the submission that the BBC has provided. She notes the way the BBC manages its relevant files and the sample exercise the BBC carried out. The Commissioner is prepared to accept as reasonable the estimates the BBC has given for the length of time it would take its two most relevant teams to confirm definitively whether or not the requested information, which concerns incidences of inappropriate nudity specifically, is held. Since significantly more than 18 hours would be required to provide this confirmation, the Commissioner is satisfied that section 12(2) can be applied to this request and that the BBC is not obliged to confirm or deny it holds information relevant to it.

Section 16 – advice and assistance

50. In its submission, the BBC has noted its obligations under section 16 to provide reasonable assistance so far as it would be reasonable to do so.
51. The BBC has noted that it provided the complainant with links to the published information which it considered he might find useful. It has also referred to the “end of the BBC’s letter” in which it identified that if it received a revised request from the complainant, and if it were able to confirm or deny it holds relevant information, within the cost limit, it would then need to consider whether any exemptions applied to any held information, such as the exemption under section 40(2) of the FOIA (third person personal data).
52. Having reviewed it, the Commissioner understands the “BBC’s letter” to have been its response to the complainant of 27 April 2016, in response to which the complainant *did* send in a revised request: Request 2.
53. Aside from the links to its published information, such advice and assistance that the BBC provided therefore appears to have been given with regard to a separate request submitted on 25 February 2016. The BBC has provided the Commissioner with information regarding its database of Employment Tribunal cases. The BBC does not appear to have passed this information to the complainant or advised him on how he might revise his request of 12 May 2016. The Commissioner notes the BBC’s points at paragraph 30 regarding its search of its electronic database, and paragraph 50 regarding possible exemptions, but must find that the BBC has breached section 16(1) with regard to Request 2 as it does not appear to have offered the complainant advice and assistance with regard to this request specifically.

Right of appeal

54. 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

55. 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.
56. 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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