

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 08 November 2019

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

**Address:** Broadcast Centre  
White City  
Wood Lane  
London  
W12 7TP

#### Decision (including any steps ordered)

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1. The complainant made a freedom of information request about the cost of the review of over 75 funding. The BBC refused the request under the section 43(2) (commercial interests) exemption.
2. The Commissioner's decision is that section 43(2) was correctly applied and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

#### Request and response

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3. On 3 December 2019 the complainant requested the following information:  
  
*'1. Please let me know the cost of commissioning the Frontier Economics Review of over-75s funding and associated publications.*  
  
*2. Please also let me know the budgeted costs of the whole consultation exercise.'*
4. On 17 January 2019 the BBC refused to provide the requested information citing section 43, commercial interests. It explained that:  
  
*'The BBC held a competitive tendering process for a "review of longer-term funding options in the next Charter period, in light of the new funding arrangements set out by Government". The contract was put to*

*a number of suppliers on the BBC's framework agreement, and was won by Frontier Economics.*

*The amount that we have paid to Frontier Economics and the amount we have budgeted for the whole consultation exercise is commercially sensitive, and we consider that its release would be likely to prejudice the commercial interests of the BBC, for example, in negotiating future contracts for similar services.'*

The complainant requested an internal review on 23 January 2019:

*'I wish to appeal against your decision to withhold all the information requested on the grounds of commercial sensitivity. Whilst I do not consider that the issue of contracts paid for out of public funds should be regarded as commercially sensitive, I can at least follow your reasoning in the case of the Frontier Economics tender.*

*However, the total costs of the whole over-75 TV licence consultation, cannot be regarded as commercially sensitive; the BBC is a public body; it's expenditure, budgeted and unbudgeted, is a matter of legitimate public interest; as such I believe that I am entitled to receive this information and I would appreciate a review of the decision to withhold the information requested in my second question.'*

5. The BBC sent him the outcome of its internal review on 17 May 2019. The BBC stated that the scope of the review related to the second question of the request (*the budgeted costs of the whole consultation exercise*) and upheld the decision to cite section 43(2) to refuse the information.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 24 April 2019 to complain about the way his request for information had been handled. The Commissioner has focussed her investigation on whether the BBC correctly applied the exemption under section 43(2) of the FOIA to the withheld information at question 2 - *'the budgeted costs of the whole consultation exercise'*.

## **Background**

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7. The BBC provided the following as a background.
8. In 2017, Parliament gave the BBC power to determine age-related TV licence concessions, subject to requiring the BBC to consult before

making a decision. The BBC therefore commissioned four pieces of work from the following companies:

- (a) Frontier Economics provided detailed analysis on possible approaches and a paper on intergenerational fairness, published in October and November 2018.
  - (b) Traverse were commissioned to report to the Board on responses submitted by members of the public.
  - (c) Populus interviewed representatives of organisations and interests (e.g. needs and interests of older people).
  - (d) Ipsos Mori conducted nationally-reflective qualitative research.
9. Each formed part of the consultation. When responding to the information request, the BBC took the costs of these studies to be part of the costs of the consultation. Other costs that would be included are the costs of providing a telephone line to request hard copies of the questionnaire and to answer other queries, postage of hard copies, Welsh translations and the hosting of stakeholder round table discussions.
10. The consultation opened on 20 November 2018, and more than 190,000 people shared their views. In June 2019 the BBC Board decided that from June 2020 any household with someone aged over 75 who receives Pension Credit will be entitled to a free TV licence paid for by the BBC.
11. The BBC will publish the actual costs of the exercise next July, in the BBC's Annual Report and Accounts for 2019/ 20. It will be a cumulative figure protecting the commercial confidentiality of the organisations concerned but ensuring transparency. Publishing the actual costs, however, would not answer the complainant's request, which asked for the '*budgeted costs*', which the BBC took to mean the prediction of the eventual costs.

## **Reasons for decision**

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### **Section 43(2) - Commercial interests**

12. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test which means that even if it is engaged account must be taken of the public interest in releasing the information.

13. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.
14. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
  - Firstly, the actual harm which the BBC alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
  - Secondly, the BBC must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. whether there is a real and significant risk of the prejudice occurring.

#### *Commercial interests*

15. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her guidance on the application of Section 43. (<https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>). This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*
16. The BBC stated that its commercial interest *'is the BBC's ability to negotiate in a competitive way for the provision of services in a manner that ensures value for money for TV licence fee payers'*.
17. The BBC explained that it *'has obligations as a publicly-funded body to exercise rigorous stewardship of public funds, including achieving value for money: Royal Charter, article 16. Disclosure would risk undermining our ability to fulfil those obligations'*.
18. The Commissioner is satisfied that the actual harm alleged by the BBC relates to its commercial interests. Accordingly, she is satisfied that the first criterion is met.

### *Causal link*

19. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some *causal* link between the potential disclosure and the prejudice.
20. The BBC has provided the Commissioner with the withheld information. The Commissioner notes that the withheld information is not a single total figure but a projected range from low to high.
21. The BBC provided details of the way in which it believes its commercial activities would be affected by disclosure of the requested information: *'we believe that the BBC's position in future negotiations with suppliers would be likely to be prejudiced if they had information as to what the BBC was prepared to spend in a comparable situation'*.
22. The Commissioner is satisfied that revealing the budgeted range of costs for the whole consultation exercise could affect future negotiations and that the BBC has provided reasonable arguments to suggest that there is a causal link between the requested information and its commercial interests.

### *Likelihood of prejudice*

23. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] the Tribunal said:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."(paragraph 33)
24. In this case, the BBC has confirmed that it is relying on the lower threshold to engage the exemption. The BBC has argued that disclosure would be likely to prejudice its negotiating position with suppliers of consultancy services. The Commissioner's view is that "would be likely to" place an evidential burden on the public authority to show that the risk of prejudice is real and significant.
25. The BBC pointed out that
  - As a public authority that takes significant decisions of public importance, it is foreseeable – even inevitable – that the BBC will undertake other, similar consultations requiring independent expert third party assistance.

- For example, any new determination of an age-related concession would likely need to be preceded by further consultation.
  - Under its Charter, the BBC has an obligation to engage with audiences (article 10) and act with openness and transparency (article 12). Hence, it has a public duty to consult on a range of issues from regulatory issues to the performance of Charter obligations, and given the public interest in the BBC, these are often on a large scale and need a variety of different organisations to tender depending on the process: its capacity to manage smaller consultations in-house is limited.
  - In the normal operation of its business the BBC also frequently engages with market research organisations for audience feedback.
  - The companies engaged by the BBC provide specialised services in a very small market. This means that any future, similar work required by the BBC would likely be procured from the same providers.
  - Knowledge of the BBC's acceptable range of payment for such services would be likely to prejudice the BBC's ability to negotiate the lowest fees available on a limited market.
26. The Commissioner has seen the withheld information and she is satisfied that it would be of use to a future company seeking consultation work with the BBC as it would provide valuable insight into a budgeted range of funds available.
27. This is not in itself a reason not to disclose the information under FOIA. However, it does indicate the importance that the BBC attaches to this information and the prejudice that would be caused if it was disclosed.
28. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and therefore has now gone on to consider the public interest test.

### **Public interest test**

29. Section 43(2) is a qualified exemption which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

### **Public interest arguments in favour of disclosure**

30. The complainant stated that the *'total costs of the whole over-75 TV licence consultation, cannot be regarded as commercially sensitive; the*

*BBC is a public body; its expenditure, budgeted and unbudgeted, is a matter of legitimate public interest'.*

31. The BBC recognises the general arguments in favour of disclosure in the commercial realm, including—
- the strong case for openness and transparency in public affairs, and about how public decisions are taken (bearing in mind also the BBC's own transparency and accountability obligations under its Royal Charter: see article 12)
  - the need for accountability for public spending, to give a basis for public confidence in financial decision-making or to empower the public to challenge decisions (especially in the context of a BBC decision that involves restricting a concession on grounds including affordability)
  - the fact that transparency can promote competition in public procurement, by encouraging companies to take part in the process and help them improve their bids, and help public authorities to get value for money.

### **Public interest arguments in favour of maintaining the exemption**

32. As regards the public interest in maintaining the exemption the BBC said that disclosure would undermine the BBC's capacity to effectively negotiate any future fees with the same or similar companies. As the BBC is funded directly from the public the BBC is '*committed to reducing costs and delivering value for money for the licence fee payer*'.
33. The BBC explained that disclosure of pricing details could in this case actually be prejudicial to fair and effective competition as the companies engaged by the BBC provide specialised services in a very small market. This would jeopardise the aim to reduce costs and deliver value for money for the licence fee payer which would be contrary to the public interest.

### **Balance of the public interest arguments**

34. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
35. The Commissioner notes that the actual (rather than the requested budgeted) costs will be available in the next Annual Report and this will go some way to addressing the public interest in transparency.

36. The Commissioner understands that release of the budgeted information into the public domain would undermine the BBC's ability to negotiate similar services in the future. Therefore there is a stronger public interest in protecting the commercial interests of the BBC by not disclosing the budgeted figures to ensure that it is able to compete fairly.
37. In conclusion, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

### **Other matters**

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38. The code of practice produced under section 45 of the FOIA recognises that there are no statutory time limits on how long an internal review should take to complete. Nevertheless it provides that any deadlines set by the public authority should be reasonable.
39. The Commissioner considers that generally an internal review should take no longer than twenty working days to complete. In exceptional circumstances it may be necessary to extend that to forty working days. (<https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>)
40. In this case the complainant requested an internal review on 23 January 2019 and the BBC provided the outcome of its internal review on 15 May 2019 after the intervention of the Commissioner.
41. The Commissioner does not consider this to be satisfactory and would expect the BBC to deal with reviews within the suggested deadlines in the future.



## Right of appeal

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42. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

43. 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.
44. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**SK9 5AF**