

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 26 November 2021

Public Authority: British Broadcasting Corporation (BBC)
Address: BBC Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant has requested information relating to asbestos at Television Centre 2 including asbestos registers, records related to removal, asbestos surveys and test and details of minutes of meetings relating to the removal of asbestos. The BBC refused the request on the basis it would exceed the cost limit under section 12 of the FOIA to comply.
2. The Commissioner's decision is that the BBC has correctly refused the request under section 12 but failed to fulfil its obligations under section 16 by providing advice and assistance at the time of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - provide the complainant with advice and assistance to assist in narrowing the request
4. The public authority must take these steps 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

5. On 27 April 2021 the complainant made a request to the BBC for information in the following terms:

"Asbestos at the BBC I act for a client who was diagnosed Mesothelioma (allegedly) contracted during the course of his work at BBC Television Centre. Pursuant to the above Act, please provide copies of the following in relation to Television Centre 2 (TC2). We require:-
 - All asbestos registers for TC2 (current and historic)*
 - Memos relating to where asbestos was discovered at TC2 and plans for removal*
 - All asbestos surveys and asbestos tests for TC2 (current and historic)*
 - All permit to work documentation in respect of TC2*
 - All records relating to maintenance, removal and remedial work records relating to asbestos for TC2 (current and historic)*
 - Details of minutes, meetings etc relating to the presence of and removal of asbestos at TC2"*
6. The BBC responded on 25 May 2021 refusing the request under section 12 of the FOIA as it would exceed the appropriate limit to comply with the request. No advice or assistance was provided.
7. The complainant requested an internal review on 26 May 2021. The complainant argued that the information was significant enough that the request could not be disproportionate. The complainant also offered to cover the costs or to physically inspect the documents.
8. In 24 June 2021 the BBC asked for additional time to consider the request due to its complexity. The BBC issued its internal review response on 28 June 2021, upholding its decision and adding that 76 files had been located by the Archives teams and it would take 2.5 days to obtain, review, assess and apply any redactions (if needed) to the information.

Scope of the case

9. The complainant contacted the Commissioner on 1 July 2021 to complain about the way their request for information had been handled.
10. The Commissioner considers the scope of her investigation to be to determine if the BBC has correctly refused the request on the basis that it would exceed the cost limit under section 12 of the FOIA to comply.

She will also consider if adequate advice and assistance under section 16 has been provided.

Reasons for decision

Section 12 – cost of compliance

11. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit.
12. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £450 for public authorities such as the BBC.
13. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for the public authority.
14. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
15. In its submission to the Commissioner the BBC explained that its estimate had been based primarily on conducting activities related to determining if relevant information was held and the time required to extract relevant information from documents that might be identified.
16. The BBC explained that it first contacted the relevant department who would hold historic records of the kind request – the BBC Archives. The BBC explained that the information was held in paper form and required manual review. It further explained that in line with BBC records management and corporation retention schedule guidelines, divisional areas who hold records are required to review those files and send them to the Archives for appraisal.

17. The BBC Archives team was able to confirm that information relevant to the request is held and 76 files responsive to search terms had been identified. The BBC stated this activity had already taken approximately one day to undertake.
18. In order to provide an accurate estimate of the time needed to comply with the request the BBC Archives team ordered the hard copy files as these are not held electronically. The files are held in a secure off-site location and so are not readily accessible to the BBC Broadcast Centre where the Archives team is based. The BBC explained that the delivery of the files took approximately half a day.
19. The files themselves, once delivered to the Archives team, were identified as being lever arch folders. The Archives team undertook a sampling exercise to determine an accurate estimate as to how long it would take to determine if relevant information was held in each file.
20. Two lever arch files were sampled: one file contained 23 documents and another file contained 1 document. In the larger of the files the BBC determined the 23 documents contained details relating to cable running (asbestos under floor tiles). The amount of details in the documents varied depending on the work carried out and places which needed to be investigated. The second lever arch file contained a document request for sample analysis. Based on this sampling exercise the BBC concluded that the amount of information held is not indicative of the amount of the total amount of information in each file and that only part of the file may be relevant to the request.
21. The BBC confirmed that the sampling exercise took approximately 0.25 days and if every lever arch file contained a total of 23 documents of the same detail it would take approximately 9.25 days to extract the relevant information i.e. 0.125 days x 74 files. On this basis the BBC concluded that the appropriate cost limit under section 12 of the FOIA would be exceeded.
22. The Commissioner notes that the internal review had stated that complying with the request would take in excess of 2.5 days. This would include the time needed to obtain, review, assess and apply any redactions (if needed) to the information.
23. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
24. The first consideration is whether the time taken to identify information possibly in scope of the request was reasonable. The BBC stated it had taken approximately 1 day to identify the 76 files that might contain

relevant information. This was based on using search terms. The Commissioner accepts that it can be more onerous to search manual files for information than electronic records but as no further details were provided regarding how it took 1 day to narrow the information down to 76 files it is difficult for the Commissioner to understand how reasonable this is. She is also of the view that even if this were to be accepted as a reasonable time to identify files that many contain information that the 1 day referred to is 1 working day i.e. an average of 8 hours.

25. The BBC did conduct a sampling exercise of 2 of the files – one containing a single document and one containing 23 documents. For the larger of the files the BBC stated it had taken 0.25 of a day to review the documents to determine what was relevant to the request. Again, the Commissioner has taken this to be 0.25 of a working day (2 hours). The BBC stated that the sampling exercise had made it clear that not all the information in each file will be relevant to the request so there will be a need to review it and then based its overall estimate on each file containing 23 documents.
26. The Commissioner considers that the estimate should not be based on the assumption that each file will contain 23 documents as the sample of just 2 files demonstrated there can be very little information in the files and this will be a quick and straightforward task to review. Whilst it is entirely possible some files will contain more than 23 documents it is also possible some will contain only 1 or 2 documents. If 23 documents took 2 hours to review this is approximately 5 minutes per document.
27. The request was quite wide-reaching but was, at the same time, quite specific. It asked for clear information such as asbestos registers, surveys, memos and removal records. The documents reviewed by the BBC were related to possible asbestos locations and sample analysis which would seem to be within the scope of the request. The Commissioner appreciates that the documents would need to be reviewed to make certain they are relevant but it does not appear that this would be particularly time consuming given the specificity of the types of information asked for as it should simply be a matter of determining if the document(s) fall under the description of any of the types of documents/information listed in the request. Any further time needed to consider whether the information can be disclosed or needs to be redacted cannot be included in the cost estimate.
28. That being said, the Commissioner does acknowledge that there will be some time needed to review the documents. Based on the sampling exercise it seems clear some of the files will have multiple documents to review but the Commissioner does not consider it reasonable to make the assumption that the higher number of documents (23) should be

used as the baseline for the estimate, especially considering that one file only contained one document. For the purposes of determining whether the estimate is reasonable the Commissioner has worked on the basis of there being an average of 10 documents per file. If it took 5 minutes per document to assess if it was in the scope of the request then it would take approximately 50 minutes per file and in one hour a file could be assessed. Clearly this would exceed the cost limit as 76 files would need to be reviewed.

29. However, the Commissioner has already discussed how she is not convinced it would take such time to review each document given the way the request is worded and the categories of documents that were being requested. That being said, even if it only took 2 minutes per document if a file contained 10 documents it would take 20 minutes per file and, conservatively, 3 files could be reviewed an hour. This would still result in more than 25 hours needed to review the information to determine if it was relevant to the request and to extract it. The Commissioner has not even factored in the time needed to locate documents that may contain the information in the first place, estimated by the BBC as taking one day.
30. Therefore using the sampling exercise carried out by the BBC, ignoring its estimate of each file containing 23 documents and requiring 5 minutes per document and reducing this to a more reasonable 10 documents and 2 minutes per document, it would still far exceed the cost limit to provide the information requested. Even in the unlikely event that the number of documents per file was on average less than 10 it would still exceed the 18 hour limit permitted in the Fees Regulations once the time to locate the files was factored in.
31. Based on all the above, the Commissioner considers that the BBC was entitled to rely on section 12(1) in order to refuse the request.

Section 16 – advice and assistance

32. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the Section 45 Code of Practice issued by the Secretary of State, it will have complied with section 16(1).
33. The Code advises that, where an authority is not obliged to comply with a request for information because, under section 12(1) and the regulations made for that section, the cost of complying would exceed the appropriate limit, it should provide the requestor with reasonable advice and assistance.

34. The Commissioner's guidance states that the minimum a public authority should do in order to satisfy section 16(1) is indicate if it is able to provide any information at all within the appropriate limit. Communicating this to a complainant may avoid further and futile attempts to refine the request to bring it under the appropriate limit. If the requestor understands the way in which the estimate has been calculated to exceed the appropriate limit, it should help them decide what to do next.
35. The Commissioner notes that the BBC did acknowledge its duty under section 16 during the internal review process but did not provide any specific advice at this time other than stating that they would liaise with the requester going forwards.
36. In its submissions to the Commissioner, the BBC has provided more specific advice on how the request might be refined following consultation with internal BBC teams. The BBC has suggested narrowing the scope of the request to one report or document per bullet point of the original request. The BBC, to the best of the Commissioner's knowledge, has not provided this advice and assistance to the complainant directly and she therefore now expects the BBC to provide the complainant with meaningful advice and assistance to narrow his request.

Right of appeal

37. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

38. 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.
39. 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

Jill Hulley
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