

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2022

Public Authority: British Broadcasting Corporation (BBC)
Address: 2252 White City
201 Wood Lane
London
W12 8QT

Decision (including any steps ordered)

1. The complainant has requested the cost of a specific procurement exercise. The BBC withheld the information under section 43(2) of FOIA, which concerns commercial interests.
2. The Commissioner's decision is that the BBC is entitled to withhold the requested information under section 43(2) of FOIA and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the BBC to take any corrective steps.

Request and response

4. On 17 December 2021 the complainant wrote to the BBC and requested information in the following terms:

“[1] The full cost of the contract with Change Associates to provide BBC Nations and Regions or English Regions with consultancy about workplace culture partly in light of the staff survey through the financial year of 2020-21 and [2] whatever is pre booked for the remaining financial year 2021-22”
5. The BBC responded on 20 January 2022. It withheld the requested information under section 43(2) of FOIA.

6. The complainant requested an internal review on 28 January 2022 and put forward public interest arguments for the information's disclosure.
7. The BBC provided an internal review on 22 February 2022. It upheld its decision.

Scope of the case

8. The complainant contacted the Commissioner on 23 February 2022 to complain about the way their request for information of 17 December 2021 had been handled.
9. In its submission to the Commissioner the BBC confirmed that at the date of the request no services were pre-booked for 2021-22 and so it did not hold any recorded information within scope of part [2] of the request at that time.
10. The Commissioner's investigation has focussed on the BBC's application of section 43(2) of FOIA to part [1] of the request and the balance of the public interest.

Reasons for decision

11. Section 43(2) of FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
12. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information were disclosed has to relate to the applicable interests within the relevant exemption.
13. Second, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must be real, actual or of substance.
14. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this

places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

15. Section 43(2) is subject to the public interest test.
16. The BBC says that the third party in this case - Change Associates, a consultancy firm - has conducted in-depth sessions with BBC staff across a large number of sites and is currently carrying out further work with the BBC. As such, the Commissioner is satisfied that the harm envisioned relates to the interests relevant to section 43 ie commercial interests. The BBC says its own commercial interests and Change Associates are likely to be prejudiced if the requested information is disclosed.
17. With regard to the second criteria; in addition to the explanation provided in its correspondence with the complainant, the BBC has provided the following explanation as to why disclosing the information would be likely to prejudice the above commercial interests.
18. First, the BBC's Human Resources team has confirmed that there is a real risk that disclosing the fees paid to Change Associates could undermine the BBC's ability to negotiate fees for providing similar services on a fair and equal footing in the future. This is because the withheld information could be used in future negotiations by other consulting firms to infer what the BBC would be willing to pay for similar services. This information could be used to determine a starting point for negotiations. This would ultimately impact the BBC's ability to enter negotiations on an equal footing and obtain the best value for public money. The BBC has noted that the Commissioner has previously recognised that such a causal connection exists between disclosure and prejudice of this kind in respect of the disclosure of amounts spent on external consultants by a college¹.
19. Second, there is also a risk that disclosing the information could discourage third party service providers, including other consulting firms, from bidding for work. Firms could believe that sensitive and confidential pricing information could be released into the public domain. The Commissioner recognised this risk in decision notice FS50856917².

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2619445/ic-53278-m2q2.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2616931/fs50856917.pdf>

Again, this is likely to prejudice the BBC's commercial interests and its ability to obtain value for money if fewer bids are received in the future.

20. Third, BBC HR has consulted with Change Associates and Change Associates has communicated that it strongly resists disclosure of the information on the basis of likely prejudice to its own commercial interests. Disclosing the requested information would amount to the disclosure of commercially sensitive pricing information about the fees Change Associates charges for its consulting services. In particular, it noted that a specifically negotiated and discounted rate was provided by Change Associates to the BBC for this work. In addition, although the request seeks a total cost, the nature of the services is very specific and well-known, as Change Associates has been conducting this work across BBC sites in England.
21. The BBC notes that Change Associates has advised that, as this was a specific piece of work rather than a number of assignments, disclosure would enable competitors to pinpoint the costs of this specific assignment. In these circumstances, disclosure would likely provide competitors with an unfair insight into Change Associate's pricing structure for these specific services, even if individual hourly rates cannot be worked out. This is likely to provide Change Associates' competitors with an unfair insight into its fees. In turn, this has the potential to undermine its competitive position vis-à-vis other consulting firms in future negotiations with the BBC or other intended recipients of its services.
22. Fourth, Change Associates is engaged in providing ongoing services to the BBC. The fact that there is an ongoing relationship between the BBC and Change Associates increases the risk of likely prejudice. This is because, while the test for prejudice is "time sensitive", in the present case the pricing information sought remains commercially sensitive as it relates to an ongoing relationship between the BBC and Change Associates; services of this nature are likely to remain relevant in the near future.
23. The Commissioner considers that the above reasoning satisfactorily explains why disclosing the information in this case would be likely to prejudice its own commercial interests and those of Change Associates. The BBC has also provided the Commissioner with a copy of its correspondence with Change Associates in which Change Associates confirmed that it would prefer the information not to be disclosed.
24. Finally, the BBC has confirmed it is relying on 'would be likely' to occur as the relevant threshold for prejudice in this case, rather than 'would occur'. The Commissioner is satisfied that the chance of prejudice occurring is more than a hypothetical possibility and there is a real and significant risk.

25. Since the three criteria have been met, the Commissioner is satisfied that the information the complainant has requested engages the exemption under section 43(2) of FOIA. This decision is in line with the previous decisions he has made in similar cases and to which the BBC has referred. The Commissioner has gone on to consider the public interest test associated with section 43.

Public interest test

Public interest in disclosing the information

26. In their request for an internal review the complainant presented the following arguments for disclosure:

- The public interest in openness and transparency about the BBC's commercial activities could not be greater, at a time when the license fee is under threat.
- The BBC already publishes the names of any employees earning over £150,000 and it could be argued that by doing so, it gives competitors an unfair advantage in terms of poaching talent. Some of those individuals, such as Gary Lineker, are businesses/brands with outside interests. There is no difference in their status than with individual companies like Change Management.
- Through publishing individual salaries, this principle of transparency overriding commercial confidentiality has already been established. There is no plausible reason why the same transparency should not be applied to private contractors, like Change Associates.
- Change Associates is a long-term BBC client and was brought in to restore trust after the Saville scandal. The themes that emerged from that review are still, in the complainant's view, a presence in the latest BBC staff survey for Nations and Regions. The complainant considers that that brings into question the BBC's commitment to act on findings from external consultants. This is further evidence that transparency is required over the funding of such exercises, to make sure they are acted upon.
- The BBC argues that disclosure could allow other consultancy groups to undercut Change Associates and give them an unfair advantage. In the complainant's view, Change Associates, which displays the BBC logo as its client prominently on its website, has already gained an unfair advantage over competitors in what the complainant considers to be a misleading way.

- Because it has paid an outside consultancy the BBC needs to show total transparency. This is especially so at a time where the licence fee is under intense scrutiny and over-75s are being asked to foot their own bill, and whilst there's a cost of living crisis, and job cuts in [BBC] Nations and Regions to save money.

27. The BBC has provided the following arguments:

- There is a public interest in promoting transparency, accountability and public understanding of the BBC's decision-making processes in relation to the expenditure of public funds. There is also a specific duty under Article 12 of the BBC's Charter to seek to maximise transparency, openness and accountability.
- Private sector bodies engaging in work with public authorities would reasonably expect that some information about those activities may be liable to being disclosed in the public domain.

Public interest in maintaining the exemption

28. In its submission to the Commissioner, the BBC has provided the following arguments for maintaining the exemption, which it had discussed in its correspondence to the complainant:

- There is a public interest in ensuring that the BBC has a safe space in which it can negotiate with third party providers to secure value for public money in the supply of services, particularly with respect to live and ongoing services.
- There is a public interest in ensuring that the BBC maintains a strong bargaining position "as against service providers" during contractual negotiations in order to ensure that the licence fee is spent effectively.
- There is a public interest in ensuring that Change Associates' competitive position in its particular market is not disadvantaged by doing business with the BBC. This is a real risk in circumstances where the services are specific and well-known.

Balance of the public interest

29. The BBC has summarised for the Commissioner that, in its view disclosure, in circumstances where there is an ongoing need to procure consulting services of this nature, is likely to undermine the BBC's negotiating position and hinder its ability to obtain value for money, as it explained above. Similarly, there is potential for real detriment to be caused to the commercial interests of Change Associates through

disclosing sensitive pricing information that could then be used by its competitors in future negotiations to gain an unfair advantage. Finally, in considering how far the requested information would further the public interests in disclosure identified above, it is unlikely that disclosing the requested information would add value or meaningfully contribute to the information the BBC already proactively publishes about how it spends public funds.

30. The Commissioner acknowledges the complainant's arguments and associated concerns. He considers complaints brought to him on a case by case basis, but considers that, as in the previous decisions to which the BBC referred, the public interest also favours maintaining the exemption in this case. The general public interest in the BBC being transparent about how it spends public money is met through the information it proactively publishes. The Commissioner is satisfied that there is greater public interest in the BBC being able to achieve the best value for money that it can and in the BBC being able to choose from a good range of well-performing organisations when it procures services in the future. Both risk being undermined if the information was to be disclosed.

Right of appeal

31. 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

32. 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.
33. 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

Cressida Woodall
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