

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 October 2018

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

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

Decision (including any steps ordered)

1. The complainant requested information about a pay review. The BBC disclosed some information and withheld some information under sections 36(2)(b)(i) and (ii) and 36(2)(c) – prejudice to the conduct of public affairs and section 40 - personal data. The Commissioner is satisfied that sections 36(2)(b) and 40 are engaged in respect of all the information to which they have been applied. The Commissioner does not require the public authority to take any action.

Background

2. In June 2018, the BBC supplied the following as a background.
3. In recent years unions and individual employees have raised numerous issues associated with pay discrepancies within pay structures, policies and conditions across the BBC. Through negotiations with unions and internal consultations, the BBC has proposed a new and simplified contract, which was accepted by way of ballot on 12 June 2018 and is now being implemented across the BBC.
4. Due to the specific issues about the discrepancies in pay within the BBC World Service and Monitoring (WS), on 21 November 2016 the BBC announced a formal review of pay in Journalism within Network News (NN) and WS. The aim of this specific project was to understand whether there were any differences in pay within broad job groupings between WS and NN and, if so, what the causes were.

5. This WS review was separate from the BBC's statutory gender pay gap reporting and the Equal Pay audit, which were also ongoing at the time of the report.
6. On 22 February 2017 the BBC engaged PricewaterhouseCoopers (PwC) to provide support in carrying out a pay analysis across BBC News. PwC were to review the differences in pay for off-air journalism staff in WS and NN in relation to broad job groupings.
7. Stage One involved PwC carrying out a fact-finding exercise of historical data to determine trends in pay practices over time. It involved reviewing and gathering the data to understand more about the relevant roles, profiles and pay arrangements. It also involved meetings with relevant BBC employees and groups to conduct interviews and understand alignment of staff to distinct jobs. The information created in Stage One falls within the scope of this FOI request.
8. Stage Two involved PwC Legal providing legal advice arising from these findings. This information was created post 7 July 2017 and is out of scope.

Request and response

9. On 7 July 2017, the complainant wrote to the public authority and requested information in the following terms:

'1: Any documents held by the BBC related to the setting up of the review into pay in the World Service Group as announced by James Harding and Fran Unsworth on 21 November 2016.

2: Any documents provided to the BBC by PWC as part of the review into pay in the World Service Group.'
10. After the intervention of the Commissioner with a decision notice dated 9 October 2017 (Reference FS50700148) the BBC responded on 17 October 2017. It provided 2 documents on the terms of reference dated 31 May 2017 (withholding some parts under sections 40 and 43) and the findings dated 25 September 2017. (BATCH A). The BBC also withheld information under section 42. (BATCH B).
11. The complainant requested an internal review on 19 October 2017. He did not dispute the application of the exemptions but argued that there are further documents.
12. The BBC sent him the outcome of its internal review on 27 November 2017 upholding the decision to apply section 42 on legal professional privilege.

13. On 6 December 2017 the complainant wrote to the Commissioner. He confirmed that he is not disputing the application of the exemptions (sections 40, 42 and 43) but believes that the BBC has a number of other documents in its possession which should have been disclosed. He provided the Commissioner with evidence that there was a Core Management meeting on 24 March 2017 and an email from PwC inviting comments from BBC staff.

Summary of initial investigation and further released documents

14. During the initial investigation in February 2018 the Commissioner, after agreeing the scope of the request with the complainant and the BBC, focused on whether or not there was any further information that could be disclosed.
15. The BBC conducted further searches and wrote to the complainant on 9 April 2018. The BBC explained that *'when the original searches were completed, it was not considered that searching material generated from regular weekly meetings such as the Core Management Meeting would fall within the scope of the request, as it was not considered the most logical place to search.'*
16. The BBC found 5 further documents (BATCH C) from the March Core Management meeting which included 2 already held by the complainant. The BBC withheld the 3 remaining emails under section 40(2) (personal information).
17. On 16 April and 2 May 2018 the Commissioner asked further questions about the searches completed and the application of the exemptions to determine if there is any other information within the scope of the request that could be disclosed outside of the exemptions under sections 40, 42 and 43.
18. On 1 June 2018 the BBC provided supporting arguments on section 40 and 43. It informed the Commissioner that it was carrying out a comprehensive review of this request and had been working closely with PwC to confirm on whose behalf the documentation was held (pursuant to s3(2)(b),FOIA). The BBC had initially understood that the documentation was not being held on the BBC's behalf but *'this position has since been revisited'*.
19. In June, the BBC confirmed it held additional documentation which fell within the scope of the request and was seeking the opinion of the BBC's Qualified Person to engage section 36.
20. On 22 June the BBC advised the Commissioner:

'PwC confirmed that there was such information Although the documentation was not physically held by the BBC, the information is

held on behalf of the BBC and therefore falls within the scope of FOI Act, pursuant to section 3(2)(b) of FOIA. ... The BBC is disclosing the information to the complainant, with some information redacted under section 40 and section 36'

21. On 4 July 2018 the BBC released the 22 newly identified documents from PwC (BATCH D) to the complainant. It covered approved and non-approved papers and minutes of meetings. The BBC redacted some of the information under sections 40 and 36. The BBC also stated that it had applied the derogation to some limited information about flagship programming. (BATCH E)
22. The BBC also confirmed to the Commissioner on 22 June that *'it holds legally privileged information in respect of the World Service review. However, as the FOI request was received on 7 July 2017 that privileged documentation falls out of the scope of this request. Therefore, the BBC no longer seeks to rely upon section 42.'* (BATCH F)
23. On 23 July the complainant commented on the disclosed documents. He disputed that the BBC was not previously aware of these documents and rejected the application of the exemptions:

'Almost an entire year later, you have now sent me a number of documents which you appear to claim have only recently come into the BBC's possession from PwC.

I say "appear to claim" because your covering letter... is very carefully worded so it is not clear whether the BBC was already aware of the existence of these documents. If that is the case, then your letter is disingenuous and you are attempting to use PwC as a cover for your failure to properly disclose the documents at an earlier stage in response to my FOI request...

You have also decided to redact a large amount of information from these documents claiming exemptions under sections 36 and 40(2) of the FOI Act. I absolutely reject your attempt to use these exemptions, and in particular section 36 which was never intended, either in letter or in spirit, to allow public organisations to try to cover up alleged race discrimination, which I believe is what the BBC is attempting to do in this case.

These concerns are in addition to my existing complaints ... regarding the repeated and continuing refusal of the BBC to disclose documents as required under the FOI Act, the false denials that any such documents existed until faced with irrefutable evidence, the repeated delays and failures to meet deadlines including those set by the ICO, and the incorrect application of exemptions.'

Scope of the case

24. On 8 August 2018 the Commissioner wrote to both parties to establish the scope of the case.
25. During the investigation, the Commissioner applied labels to identify the batches of disclosed information with their exemptions. In summary the agreed scope is as follows for each batch of information:

BATCH A - (sections 40 and 43, see paragraph 10 above). The complainant has accepted the initial view of the Commissioner that the exemption Section 43(2) - commercial interests has been correctly applied to the pricing information for PwC's professional services in Batch A. Therefore, the outstanding exemption is section 40 (personal information).

BATCH B and BATCH F - (section 42, see paragraphs 10 and 22 above) The BBC has confirmed that both of these batches refer to the same legally privileged information which was created post 7 July 2017, the date of the FOIA request. The BBC no longer relies on section 42 and the Commissioner accepts that this information is out of the scope of this request.

BATCH C - (section 40, see paragraph 16 above) - the outstanding exemption is section 40.

BATCH D - (sections 40 and 36, see paragraph 21 above) - the outstanding exemptions are section 40 and section 36 - prejudice to the effective conduct of public affairs.

BATCH E - (the derogation, see paragraph 21 above) - the complainant did not accept the Commissioner's initial view that the derogation applies to the information on flagship programming. The outstanding issue is to decide if the derogation applies.

26. The Commissioner accepts that the information disclosed in July 2018 (see paragraph 21 above) was held by PwC on behalf of the BBC. Section 3(2) sets out the criteria for establishing if information is held for the purposes of FOIA. The BBC accepted that it was held on their behalf and disclosed it. The BBC has apologised to the complainant and the Commissioner for the delays in this case.
27. Therefore the Commissioner considers the matters to be decided is whether any of the information which the BBC is continuing to withhold engages the derogation and the exemptions cited at sections 40 and 36.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

28. The BBC applied sections 36(2)(b)(i) and (ii) and 36(2)(c) to withhold information within Batch D.
29. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –
 - (b) would or would be likely to inhibit:
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purpose of deliberation, or
 - (c) would otherwise prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs.
30. As section 36(2)(c) is worded specifically as “would otherwise prejudice”, it is the Commissioner’s opinion that if a public authority is claiming reliance on section 36(2)(c) of the FOIA the prejudice claimed must be different to that which would fall in section 36(2)(b)(i) and (ii).
31. The Commissioner considers section 36(2)(c) of the FOIA is concerned with the effects of making the information public. It can refer to an adverse effect on the public authority’s ability to offer an effective public service or to meet its wider objectives or purpose. She considers the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example, the diversion of resources to managing the effects of disclosure.
32. The Commissioner will first consider if section 36(2)(b)(i) and (ii) has been cited correctly by the BBC.
33. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by the BBC, the Commissioner is required to consider the qualified person’s opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and

- Consider whether the opinion was reasonable.

34. The qualified person for the BBC is its Chairman, Sir David Clementi. The BBC has advised the Commissioner that the qualified person's opinion was sought on 8 June and finalised on 15 June 2018. The Commissioner is therefore satisfied that the qualified person did provide his opinion that the information in question was exempt under section 36(2)(b)(i) and (ii) and 36(2)(c).
35. The exemption can be engaged on the basis that the prejudice to public affairs either 'would' or would be 'likely' to occur. In this case the BBC has applied the exemption on the basis that disclosing the information in question would be 'likely' to prejudice the conduct of public affairs. This is taken to mean that the qualified person considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk, even if that risk is less than 50%.
36. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
37. The BBC stated that the nature of the prejudice claimed under 36(2)(b) is that the BBC requires a safe space to conduct public affairs and develop effective policy without external interference. It is the qualified person's opinion that disclosure would be likely to prejudice the effective conduct of public affairs for a number of reasons:

'Disclosure of the information would be likely, in my view, to divert resources from dealing with live practical issues, such as the implementation of new Terms and Conditions, the wider On-Air Review and ongoing pay related work. This would be an unnecessary distraction from the BBC conducting its day-to-day business in compliance with its Charter obligations. ...

A requirement to disclose such information would be likely to result in communications becoming overly formal and written where an informal or oral approach would have been appropriate, or vice versa, as a consequence of public perception being taken into account. This would be likely to harm the policy development process and would deny them flexibility in deciding the nature and timing of any such communications.'

38. The BBC also explained that while the findings into this World Service pay review had been published in September 2017, there are other related pay issues and reviews ongoing at the BBC, so the prejudice and the “chilling effect” arguments remain. For example, on 12 July 2018 the Unions agreed to new Terms and Conditions and there continue to be ongoing pay reviews for on-air staff and senior managers at the BBC.
39. It was the qualified person’s opinion that:
- ‘I have given due weight to the fact public officials and consultants advising them are expected to be impartial and robust when exchanging views for the purposes of deliberation and not easily deterred from expressing their views by the possibility of disclosure. I have also considered that the prejudice disclosure would have on the future provision of advice is strongest when the issue is still live. ... there remains a significant risk that disclosure of this information would be likely to inhibit the BBC’s safe space to consider advice and deliberate on important issues, given the implementation of new Terms and Conditions, the wider On-Air Review and ongoing pay related work.’*
40. It is now necessary to consider whether the qualified person’s opinion was reasonable. To do so the Commissioner relies on the Oxford English Dictionary’s definition of reasonableness, that is, the opinion must be “in accordance with reason; not irrational or absurd”. There can be more than one reasonable opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person’s opinion. The qualified person’s opinion can only be considered unreasonable if it is one that no reasonable person could hold.
41. In very broad terms, the withheld information provides extensive lists of individuals’ pay and job details and includes the consultant’s formulation of different approaches to the situation, risk assessments and recommendations on various options. Having viewed the withheld information the Commissioner is satisfied that it is reasonable for the qualified person to have concerns over the release of this information. The candid analysis of the issues is a necessary part of the review process and it would not necessarily be helpful to share that analysis with a wider audience.
42. The Commissioner is satisfied that the qualified person’s opinion (that disclosure would be likely to prejudice the effective conduct of public affairs) is a reasonable opinion to hold.
43. For these reasons, the Commissioner finds that the exemption provided by sections 36(2)(b))(i) and (ii) are engaged in respect of all the information to which it has been applied.

Public interest test

44. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case the harm that disclosing the information would cause is greater than the public interest in its disclosure.
45. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an important piece of evidence in her assessment of the balance of the public interest.
46. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the information now under consideration, and therefore will give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring.

Public interest arguments in favour of disclosure

47. The complainant has argued that section 36 *'was never intended, either in letter or in spirit, to allow public organisations to try to cover up alleged race discrimination, which I believe is what the BBC is attempting to do in this case.'*
48. The Qualified Person stated that he gave weight to *'promoting transparency, accountability, public understanding and involvement in decision-making, and in the public knowing whether the BBC are fulfilling their function and acting in the best interests of the organisation and of licence fee payers. I also give due weight to the particular public interest arising in the information itself, which concerns a pay discrepancy within the BBC... Disclosing the information at issue is unlikely to further the debate or increase accountability, particularly when some of the information is not accurate or properly thought-through, and it would likely prove disruptive to the BBC's work.'*
49. The Commissioner accepts that there are public interest arguments in favour of disclosure. There is a public interest in openness and transparency and in understanding more clearly how decisions are made on pay discrepancy.

¹ EA/2006/0011; EA/2006/0013

Public interest arguments in favour of maintaining the exemption

50. The Qualified Person concluded that the factors weighing in favour of maintaining the exemption and withholding the requested information *'are strong, including the public interest in: protecting a safe space for discussion...ensuring candid deliberation of issues and options; an effective negotiating process (in particular, one that allows the BBC to seek the best outcomes); and the ability of the BBC to analyse and plan, consider options and present proposals, without untimely external interference.'*
51. The BBC considered that there is a public interest in having *'the safe space in which to receive full and proper advice from its employees and third parties. This must include the safe space for persons including advisors (internal and external) to give opinions or make statements that could equally turn out to be reasonable and accurate or inaccurate and misleading. Furthermore, there is a public interest in allowing public authorities the private space to conduct candid conversations about pay, purported pay issues and to analyse data, risks and information.'*
52. The Commissioner is satisfied that disclosure would be likely to compromise the integrity of the decision making process.

Balancing the public interest arguments

53. The Commissioner has considered both the complainant's and the BBC's public interest arguments.
54. The Commissioner notes that the qualified person acknowledges the public interest in openness and transparency on pay discrepancies and pay reviews. However, the qualified person recognised that there is a strong public interest in having the ability to conduct free and frank discussions for the purposes of deliberation and decision making in order to deliver an effective pay review for this particular area and the further ongoing pay reviews.
55. The Commissioner would add to this her view that there is a significant public interest in the value of a safe space if the BBC is to have the best opportunity to overcome the challenges it faces on pay discrepancies. The Commissioner notes that after the date of the FOIA request in July 2017, the BBC concluded other negotiations for a simplified contract in June 2018 and that there were and are other reviews into pay discrepancies. To disclose the information withheld under section 36 at the time of the request could have had a chilling effect on the BBC's ability to do so.
56. In light of the above the Commissioner finds that although there is a significant and important public interest in the public understanding how

pay review decisions are made, there is a greater public interest in allowing the BBC the safe space in which to consider various options with a third party, based on a candid assessment of the issues. The request was made at an early stage of the pay review process (towards the end of Stage 1 before PwC collated its report on the issues in September 2017) and so there was still a need for a safe space for the BBC to consider the issues and resolve them. Therefore, the public interest favours withholding this information.

57. The Commissioner finds that the BBC is entitled to withhold the information (within Batch D) to which it applied section 36(2)(b)(i) and (ii). Therefore, the Commissioner has not gone on to separately consider the BBC's application of section 36(2)(c).

Section 40(2) – Third party personal data

58. The public's right of access to the personal data of third parties is in effect governed by the Data Protection Act. At the time the request was made and dealt with by the BBC the relevant Data Protection Act was the 1998 Act. Since that time the Data Protection Act 2018 has come into force and section 40(2) of the FOIA has been amended to accommodate the changes it has introduced. However the Commissioner's role is to determine whether the BBC correctly applied the legislation that was in force at the time it was handling the request.
59. At that time section 40(2) of the FOIA provided that a public authority is entitled to refuse a request for information which constitutes the personal data of someone other than the person making the request, if disclosing that information would breach any of the data protection principles set out in Schedule 1 of the Data Protection Act 1998.
60. The information which has been withheld under section 40(2) (in Batches A, C and D) consists of the names of PwC and BBC employees, job titles, raw and aggregated pay details and special categories information, which includes diversity data. It includes a mix of junior and senior members of employees in the BBC World Service and Monitoring (WS) and Network News (NN).
61. The BBC explained that *'due to the number of documentation, where possible, the BBC applied a standardised approach to deciding when to engage the personal data exemption. When the aggregated data set included less than 20 individuals, the information was withheld. In some cases, the BBC withheld groups of larger data sets; this is where you could, by using other sets available and a process of elimination, identify a small group of individual who held a particular role.'*
62. The BBC was increasingly concerned in the disclosure of these documents (the larger aggregated data sets) about the "jigsaw" effect with the information subject to disclosure. The *'documentation included*

so much information about employees that one could piece together the different bits of information across all the documentation to identify an individual and create a more complete picture of an individual; i.e. their earnings, contractual terms (such as allowance entitlement or pension valuation data) or diversity data. Therefore, in some cases, even when the data was aggregated, individuals could be identifiable from the information, and therefore this would constitute "personal data" as it the information would relate to an "identified or identifiable living individual". Where the aggregated data was of a large pool of individuals and there no risk of "jigsaw" identification, the BBC disclosed the information.'

63. The BBC has argued that disclosing this information would have breached the first data protection principle.
64. The BBC believes that it is relevant to note that the complainant is an employee of the BBC's World Service and in a position to identify individual data subjects more readily than a member of the public.
65. The Commissioner is satisfied that the lists of names, grades, individual job titles and reporting structure, raw salary and allowance information and diversity information is clearly personal data (that would be found in an individual's personal file. Therefore, the withheld information constitutes the personal data of third party individuals.

Would disclosure breach the Data Protection Principles?

66. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
67. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

68. The BBC explained that the reasonable expectation of a BBC employee is dependent on a number of factors, including the nature of the information itself and the seniority of their role at the BBC. For example, the BBC has disclosed the details of those individuals who hold significant financial or management responsibilities or sit on a divisional board; and the names of senior employees who attend the meetings have been left within the disclosed documents.

69. In regards to salary information, the BBC has published salary information of employees on a full time equivalent salary of £150,000 or more. *'BBC employees who do not have a full time equivalent salary of £150,000 or more, or who do not sit on a major divisional board, have a reasonable expectation of privacy in relation to details of their work, remuneration from the BBC and wider financial affairs.'*
70. The BBC has not disclosed diversity information: *'all BBC employees hold an expectation that diversity information will be withheld and to disclose information of this nature would undoubtedly cause distress.'*
71. The BBC has not disclosed the names of the PwC employees as *'while public sector organisations are more used to the concept of transparency, the PwC employees named in the engagement letter would not expect their names and association with this particular project be disclosed.'*
72. The Commissioner understands that the BBC would not routinely make public such information.

Consequences of disclosure

73. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the individuals. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life.
74. In this case the BBC has stated that *'to disclose the personal data or special category data of employees could cause distress or harm; it may encourage unnecessary public scrutiny on an individual's work or financial information, and prejudice future employment or negotiations. The risk that individual employees would be targeted as a consequence of their work or disclosure of personal data is a real risk and one that the BBC takes seriously as a responsible employer.'*
75. Having viewed the withheld information the Commissioner considers that for junior staff, it would be unfair to disclose the details of their pay or grade. The Commissioner notes that salary information over £150,000 is regularly disclosed in the BBC annual reports and has been disclosed in this case. The Commissioner accepts that diversity information is sensitive personal information and would be unfair for both junior and senior staff to have this information disclosed.
76. The Commissioner is satisfied that the individuals would have a reasonable expectation that the disputed information would not be placed into the public domain by disclosure under the FOIA. Therefore she considers that disclosure of this information would be an unfair

invasion of the privacy of the individual(s), and as such may cause them some distress.

Balancing the rights and freedoms of the individual with the legitimate interests in disclosure

77. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
78. The BBC has said that there is a legitimate public interest in disclosing information to provide an understanding of how public money is spent by the BBC and ensure the BBC operates in accordance with other regulations. The BBC publishes information concerning salary data, diversity data and gender pay to satisfy public interest in the information.
79. The Commissioner accepts that there is a legitimate interest in the overall transparency in the way a public authority such as the BBC conducts its business and the Commissioner notes that the BBC disclosed aggregated information and the personal data of senior BBC employees. However, the Commissioner is not convinced that the specific information requested, is of sufficient wider public interest to warrant overriding the protection of the third party personal data.
80. Having viewed the withheld information and considered the BBC's submission and the views of the complainant the Commissioner is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that the BBC has put forward for protecting the individuals' personal data, namely:
 - the individuals' likely expectation about how their personal data will be managed;
 - the individuals' lack of consent to its release; and
 - the possible negative consequences to the individuals of releasing the information.
81. Therefore, the Commissioner is satisfied that the withheld information is personal data and that disclosure would breach the first data protection principle as it would be unfair to the individuals concerned. The Commissioner upholds the BBC's application of the exemption provided at section 40(2) of the FOIA.

Derogation

82. The BBC withheld some limited information (identifying flagship programming, Batch E) under the derogation.
83. Schedule One, Part VI of FOIA provides that the BBC is a public authority for the purposes of FOIA but only has to deal with requests for information in some circumstances. The entry relating to the BBC states:

"The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature."

84. This means that the BBC has no obligation to comply with part I to V of the Act where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.
85. The House of Lords in *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has the jurisdiction to issue a decision notice to confirm whether or not the information is caught by the derogation. The Commissioner's analysis will now focus on the derogation.
86. The scope of the derogation was considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715, and later, on appeal, by the Supreme Court (*Sugar (Deceased) v British Broadcasting Corporation* [2012] UKSC 4). The leading judgment in the Court of Appeal case was made by Lord Neuberger of Abbotsbury MR who stated that:
- " once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes." (paragraph 44), and that*
"....provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA." (paragraph 46)
87. The Supreme Court endorsed this approach and concluded that if the information is held for the purpose of journalism, art or literature, it is caught by the derogation even if that is not the predominant purpose for holding the information in question.
88. In order to establish whether the information is held for a derogated purpose, the Supreme Court indicated that there should be a sufficiently direct link between at least one of the purposes for which the BBC holds the information (ignoring any negligible purposes) and the fulfilment of one of the derogated purposes. This is the test that the Commissioner will apply.

89. If a sufficiently direct link is established between the purposes for which the BBC holds the information and any of the three derogated purposes – i.e. journalism, art or literature – it is not subject to FOIA.

90. The Supreme Court said that the Information Tribunal's definition of journalism (in *Sugar v Information Commissioner* (EA/2005/0032, 29 August 2006)) as comprising three elements, continues to be authoritative

“1. The first is the collecting or gathering, writing and verifying of materials for publication.

2. The second is editorial. This involves the exercise of judgement on issues such as:

- * the selection, prioritisation and timing of matters for broadcast or publication,
- * the analysis of, and review of individual programmes,
- * the provision of context and background to such programmes.

3. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making.” However, the Supreme Court said this definition should be extended to include the act of broadcasting or publishing the relevant material. This extended definition should be adopted when applying the ‘direct link test’.”

91. The Supreme Court also explained that “journalism” primarily means the BBC’s “output on news and current affairs”, including sport, and that “journalism, art or literature” covers the whole of the BBC’s output to the public (Lord Walker at paragraph 70). Therefore, in order for the information to be derogated and so fall outside FOIA, there should be a sufficiently direct link between the purpose(s) for which the information is held and the production of the BBC’s output and/or the BBC’s journalistic or creative activities involved in producing such output.

92. The information that has been requested in this case concerns identifying flagship programming.

93. The Supreme Court has defined ‘journalism’ as ‘output on news and current affairs’. The Commissioner considers that there is a direct link between the information being sought – the criteria for identifying flagship programming – and the BBC’s journalistic activities.

Specifically, the selection and prioritisation activities it undertakes to produce its journalistic output.

94. Consequently, she has found that the information falls within the derogation and that the BBC is not obliged to comply with Parts I to V of the FOIA in respect of this part of the request.

Other matters

95. Although the BBC has apologised to both the complainant and the Commissioner for the delays in this case, the Commissioner is disappointed with the manner in which this request has been handled.

96. On 17 July 2017 the complainant clearly asked for *'Any documents provided to the BBC by PwC as part of the review into pay in the World Service Group.'* However, it was nearly a year later that the BBC released the 22 newly identified documents from PwC to the complainant on 4 July 2018.

97. The complainant disputed that the BBC was not previously aware of these documents:

'Almost an entire year later, you have now sent me a number of documents which you appear to claim have only recently come into the BBC's possession from PwC.'

I say "appear to claim" because your covering letter... is very carefully worded so it is not clear whether the BBC was already aware of the existence of these documents. If that is the case, then your letter is disingenuous and you are attempting to use PwC as a cover for your failure to properly disclose the documents at an earlier stage in response to my FOI request...

98. It is not within the remit of the Commissioner to comment on whether the BBC was previously aware of this documentation but given the importance and scale of the pay review the Commissioner would be surprised if it was not aware of the documentation. Therefore, the Commissioner reminds the BBC that adequate searches must be made at every stage of the FOIA process. Given the explicit phrasing of the request the BBC should have consulted PwC at an earlier stage.

99. In the future, the Commissioner would remind the BBC to consider each FOIA request very carefully so that all possible information that is potentially within the scope of the request is identified and considered at the time of the first response to the complainant.

Right of appeal

100. 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

101. 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.

102. 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
Water Lane
Wilmslow
Cheshire
SK9 5AF**