

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 11 December 2006

**Public Authority:** British Broadcasting Corporation  
**Address:** MC3 D1, Media Centre  
Media Village, 201 Wood Lane  
London W12 7TQ

#### Summary

The complainant asked the BBC how much its staging of the Children in Need charity appeal programme cost in 2005; how much of the money raised was spent on televising the appeal and how much individual presenters and other personalities including Terry Wogan, Eamon Holmes and Natasha Kaplinsky were paid. The complainant also requested a list of all music acts which were paid for their services on the night.

The BBC refused the request on the grounds that it fell outside the scope of the Act. The Commissioner decided that the Act did apply. He also decided that the exemptions under sections 40 and 43 of the Act which were submitted by the BBC did not exempt the information from disclosure.

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#### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

#### The Request

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2. On 21 December 2005 the complainant requested the following information from the BBC:
  - (i) *How much did the staging of the Children in Need telethon cost the BBC in 2005? This figure should include the costs of the actual telethon and the programmes specifically staged in the run up to the event.*
  - (ii) *How much of the money raised by the programme is actually spent on televising the appeal?*
  - (iii) *How much were individual presenters paid for their services on the night? Could you please provide an overall figure and a breakdown for key participants in the fundraiser including Sir Terry Wogan, Eamon Holmes and Natasha Kaplinsky.*

- (iv) *Were any other BBC presenters and personalities who took part in the telethon paid for their services? Could you please provide a full list of those who were paid together with their amounts.*
- (v) *Could you please list all music acts who were paid for their services on the night.*
3. The BBC refused the complainant's request on 4 January 2006 on the grounds that it fell outside the scope of the Act. This was because information held by the BBC for purposes of journalism, art or literature is not covered by the Act. The BBC considered that the requested information in this case was associated with these creative activities and therefore there was no obligation to disclose it.
4. The BBC informed the complainant that all public donations in response to the appeal went towards helping children and young people. (The Commissioner considers that this answered part (ii) of the request.) The BBC also advised that all the charity's costs including administration costs, promotional materials and salaries are paid for from the interest that is accumulated by the final total raised. The BBC advised that information on how the money is spent can be found at [www.bbc.co.uk/pudsey/about\\_us/annual\\_accounts.shtml](http://www.bbc.co.uk/pudsey/about_us/annual_accounts.shtml)
5. Because the BBC considered that the requested information was not covered by the Act it did not afford the complainant an internal review.

## The Investigation

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### Scope and Chronology of the case

6. The complainant contacted the Commissioner on 17 January 2006 to formally complain about the BBC's decision.
7. The complainant maintained that:
- because the BBC is funded by public money it has a responsibility to provide information as to how that money is spent.
  - because Children in Need is a distinct registered charity, the BBC should account for how much public money it spends on behalf of an external body.
  - because millions of viewers are encouraged by the BBC to donate their money and free time to the cause, the issue of payment to individuals is particularly pertinent.
8. On 19 April 2006 the Commissioner asked the BBC to provide its reasons for withholding the information on journalistic, artistic or literary grounds. In the absence of a valid reason the Commissioner required the BBC to detail the section(s) of the Act which exempted the information from disclosure.

9. In its response of 17 May 2006 the BBC stated that the reason for withholding the information on creative grounds was because the dominant purpose of the information was to support BBC content/output. The BBC stated that it would not provide any detailed argument in support of this contention as this had been set out in correspondence on another complaint (ICO case reference FS50067416). The BBC said its summarised view was that financial information such as staff and talent cost was integral to the production process and that such financial information supported its programmes.
10. On 24 May 2006 the Commissioner informed the BBC that he was not persuaded by its argument that the Act did not apply merely on the basis of an association between financial information and programme production. He asked the BBC to advise him of the exemption(s) under the Act which supported nondisclosure of the information. He also asked the BBC to provide him with a copy of the requested information in order that he could examine this.
11. The BBC provided the Commissioner with the requested information on 17 July 2006 and also submitted exemptions under the Act which it considered supported its case for withholding the information. These were section 43 (commercial interests) and section 40 (personal information). The BBC did not attach an argument to support the application of the exemptions nor did it provide a consideration of the public interest test as required in respect of section 43. Instead it stated that arguments in relation to this case were outlined in previous correspondence dated 23 December 2005 and 4 May 2006 concerning complaint reference FS50067416 which it considered to be identical. The BBC stated that its submission of exemptions was an alternative argument and was without prejudice to its view that the Act did not apply in this case.

## Findings of fact

12. The BBC is subject to the Freedom of Information Act. It is listed in Part VI of Schedule 1 as, '*The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature*'. This is often referred to as the derogation. The purpose of the derogation is to protect journalistic, artistic and literary integrity and to preserve a 'creative space' in which programme makers can produce programmes.

## Analysis

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13. The Commissioner holds the view that financial information about a programme cost or a payment made has no bearing on the ability of a programme maker to be creative. Indeed, in this instance the programme had already been created. Any later request for information about cost or payment can have no effect on the original journalistic, artistic or literary creativity that went into the programme's production. The Commissioner does not accept that the requested information was held for the purposes of journalism, art or literature and is therefore satisfied that the Act applies in this case.

## Exemptions

### Section 43 (Commercial interests)

14. In its letter of 17 July 2006 the BBC stated that it relied upon section 43 of the Act to withhold the information relating to parts (i) (ii) and (v) of the request. However, in previous correspondence to which it had directed the Commissioner, the BBC had also submitted section 43 arguments in respect of payments made to presenters and other talent costs. These arguments are considered by the Commissioner to relate to parts (iii) and (iv) of the request and he has therefore addressed these in his Decision Notice.
15. Section 43 is a prejudice - based exemption and as such it is necessary to establish the nature of the prejudice that might result from disclosure of the information requested.
16. With reference to disclosing programme costs, the BBC referred in its argument to its policy of commissioning programmes from independent producers as well as in-house production departments. Its argument was that relationships with these companies would be damaged if the BBC revealed independent production company costs.
17. The Commissioner is not persuaded by this argument. Part (i) of the complainant's request asked for the cost of staging the BBC's Children in Need appeal and its run-ups. The appeal is promoted as a flagship BBC production and as far as the Commissioner is aware costs incurred by independent companies are not central to that production.
18. With regard to parts (iii) and (iv) of the request – payments to key presenters and payments to other BBC presenters and personalities for their services on the night - the BBC argued that disclosure would put it at a disadvantage to its commercial rivals. In its argument the BBC referred to the umbrella term, 'talent costs'. In this notice, the term 'presenters' is utilised to include 'other BBC presenters and personalities' in consideration of both (iii) and (iv) of the request.
19. The BBC argued that revealing details of payments made to presenters would have the following consequences:
  - (a) Knowledge of payments made would enable competitors to 'outbid' the BBC, forcing it to increase its payments to presenters in order to retain them.
  - (b) If other BBC presenters discovered the payments made to their colleagues, they might bid for increased pay themselves. This could lead to a 'ratchet' effect increasing payments made by the BBC in order to retain presenters.
  - (c) It might discourage presenters from joining the BBC. Because private sector companies are not subject to the Act, presenters might be more inclined to join those companies as they might then be less likely to be the subject of press coverage about their salaries.

(d) It could adversely effect subsequent exploitation of the programme (such as DVD sales) by the BBC's commercial partners. The broad drift of this argument is that if disclosure of the requested information caused initial payments to be increased, the follow on effect would be concomitant increases in backend arrangements such as royalties due from DVD sales.

(e) It would affect the BBC's ability to balance its obligations as a public corporation (ie payments to presenters should deliver value to the license fee payer) with the fact that it operates in a competitive broadcasting market. It argued that if information about costs was disclosed by only one participant in the market (the BBC) it would distort the market and be inherently uncompetitive.

20. The Commissioner is not persuaded by these arguments. With reference to the argument outlined in 19 (a) above, he notes that the request was for disclosure of a one-off payment that was (possibly) made for presenting a single evening's charity appeal. The Commissioner understands that most BBC presenters have long term contracts lasting up to three years. On that basis he considers it unlikely that one isolated payment would provide an adequate platform on which to formulate an alternative contractual package that sufficiently encompasses an individual's long term professional worth.
21. The Commissioner considers that disclosure would in any case be unlikely to harm the BBC in the manner claimed given the ability of presenters (and their agents) to disclose details of their earnings to a competitor should they choose to do so. Indeed, the outbidding of competitors already appears to operate freely in the BBC's favour – witness the corporation's recently successful poaching of the presenter Graham Norton away from Channel 4.
22. The BBC's argument in 19 (b) is similarly flawed. It argued that it would need to ratchet up payments to presenters if individuals discovered the earnings of their colleagues. However, the Commissioner notes that internal comparison of presenters' salaries can arise at any stage given that individuals are free to disclose salary details to each other whenever they want. He also considers that during contract negotiation the BBC should be capable of adequately explaining the basis for determining the level of remuneration it deems appropriate for each individual.
23. The Commissioner is not convinced by the proposition in 19 (c) that possible press reportage of salary details is a defining factor in choosing a prospective employer. For this argument to carry conviction the finding would need to be apparent in career choices made by those employed in all occupations that straddle the public/private sector divide. The Commissioner is unaware of any research that supports this hypothesis. Indeed it appears the contrary may be the case in that some chat show hosts seem to publicly revel in the coverage of high salaries received – witness recent proclamations by Jonathan Ross on the signing of his new £18 million contract.
24. In any event, it appears that being employed in the private sector does not prevent publicity about earnings. The salaries of those employed by both the BBC

and its competitors are routinely the subject of media reporting owing to the frequency of leaks.

25. The argument in 19 (d) relies on the validity of that in 19 (a). It falls because of the weakness of that argument. Notwithstanding this, the Commissioner has considered the argument put forward in 19 (d).  
The argument assumes that backend payments such as royalties and residuals must always be based on a set and unchanging percentage in relation to initial payments received by presenters. The Commissioner, however, is not persuaded that the application of backend payments cannot be fine tuned in future contract negotiations should the BBC consider this to be necessary.
26. The argument in 19 (e) recasts that in 19 (a) in relation to the general broadcasting market. The argument's premise is that disclosure of the requested information would raise the cost of BBC presenters thus denying value for money to the license fee payer. The argument concludes that this is uncompetitive because if the situation arose as posited in 19(a) the market would become distorted. However, the Commissioner has already found the argument in 19 (a) to be flawed (see paras 20 & 21) and it follows that any proposition based on that argument also fails.
27. The Commissioner notes that the argument in 19 (e) is based on the assumption that the BBC itself acts fairly in the competitive market and that it delivers value for money in terms of payments to presenters. He observes that this assumption is not held by the corporation's competitors who maintain that the reverse is true. These broadcasters have complained in public that the high level of BBC payments makes it difficult for commercial companies to compete. The Commissioner also notes that the BBC's value for money argument appears weakened by its own presenter, Terry Wogan, who maintains in his recently published book that the corporation overpays its presenters.
28. Part (v) of the request asks for a list of all music acts which were paid for their services on the night. It does not refer to amounts paid. The arguments that were put forward by the BBC to support its withholding of the requested information all concern the perceived effects of cost disclosure. None of these arguments apply to part (v) of the request and in that respect the BBC has failed to provide an adequate reason why that information should not be disclosed.
29. Having examined all the arguments, the Commissioner considers that the BBC has failed to demonstrate the prejudice that would result from disclosure. As the exemption at section 43 is not engaged there is no requirement to explore the public interest arguments. However, in view of the background to this case, the Commissioner has decided that the public interest arguments should be considered in this instance.

## Public interest test

30. Public interest arguments in favour of disclosure include the following:
1. Central to the case is the BBC's exhortation to the public to donate money to charity. The BBC's Children in Need appeal is extensively promoted on the premise that celebrities agree to give their time without payment whilst the public agree to give their money and in some cases their free time as well. This partnership formula is considered by many to be the programme's unique selling point. It is the reason why the public donates. The celebrity most closely associated with the charity's partnership approach is the programme's presenter, Terry Wogan. He has fronted the programme for 25 years and is considered to be the main driver of the appeal. Because there is doubt as to whether he and other high profile participants of the appeal do give their services freely on these occasions, it is important that the situation is clarified in order that public confidence in this important charity is maintained.
  2. The Children in Need programme relies on the generosity of the public to raise money. It has raised in excess of 200 million pounds since its inception. In this context, it is important for the public to clearly understand the basis on which they agree to donate such large sums.
  3. It is recognised that when major appeals raise large amounts of money from the public, other charities will suffer corresponding reductions in donation. If there is concern that the BBC has somehow unfairly acquired public donations owing to misperception then the position needs to be clarified in the interests of fair competition between charities.
  4. Removal of uncertainty and clarification of the situation is in the interests of all the celebrities who give their time freely in support of the appeal.
  5. The BBC is funded by license fee payers who provide a three billion pound subsidy. The provision of greater transparency and accountability to its license fee payers is a matter of legitimate public interest.
  6. More openness is required if the BBC is to justify its current bid to increase the annual license fee. In its consideration of this bid the government has made clear that BBC wage costs are a serious issue for license fee payers.
31. The BBC put forward the following public interest arguments in support of its decision to withhold the information:
1. Disclosure would lead to inflated staff costs and/or poaching of staff by competitors. This would affect the BBC's ability to deliver value for money to the license fee payer.  
(NB - the inflated staff costs argument was invoked by the BBC as one of its prejudice arguments and has been discounted by the Commissioner (see paras 20 & 21).

2. Disclosure would force the BBC to divert license fee payers' money to responding to questions from the public about programme costs.
32. The BBC also maintained that public interest in accountability for spending was served by the oversight of its Board of Governors, the fair trading regime, Ofcom and general competition law, the BBC's Annual Report, the BBC's Charter Review and the license fee settlement procedures. The corporation did not explain how the specific accountability and transparency relevant to the requested information was covered in this way.
33. The Commissioner has weighed the competing public interest arguments and has concluded that the public interest in disclosing the information outweighs the public interest in withholding it.

#### **Section 40 (Personal information)**

34. The BBC relied upon section 40 of the Act to withhold the information relating to parts (iii) and (iv) of the request.
35. The corporation maintained that information relating to payments made to presenters and other celebrities in the programme was exempt under section 40(2). It contended that disclosure of the requested information would contravene the first data protection principle.
36. The Commissioner is not persuaded by the BBC's argument. It argued that the subjects of the request had not previously consented to the release of information detailing their salaries. Although, the corporation acknowledged that it could have asked the subjects for this consent, in its view this would not be freely given (and so the BBC did not ask).
37. Although the BBC referred to an expectation that information about staff salaries would not be disclosed, the Commissioner has not been made aware by the BBC of any explicit agreement with its staff that such information would not be released.
38. The BBC's argument for withholding the information under section 40 was actually submitted in relation to a complaint which concerned disclosure of an individual's salary. However, for the purposes of this Decision Notice the Commissioner is not required to consider disclosure of an annual salary. Instead he is required to consider the withholding of information relating to a particular payment that was (possibly) made for one evening's work.
39. In considering this matter the Commissioner has taken into account the public perception that none of the celebrities receive payment for their participation in that evening's charity appeal. Whilst the Commissioner does not make any suggestion that the public has been deliberately misled in this respect he recognises the uncertainty as to whether all participants give their services freely on these occasions. None of the reports or media articles that he has seen concerning the appeal provide any acknowledgement by the BBC that such payments are made. Equally, none of them contain any correction to or refutation



of the view that all celebrities give their services freely. Under the circumstances, it would be reasonable to assume that celebrities who may be the subject of misperception would welcome public clarification of the situation.

40. The Commissioner considers that the information requested is personal data in that it falls within the definition of 'personal data' in the Data Protection Act. In deciding whether such information should be released the Commissioner makes a distinction between 'professional personal information' and 'private personal information'. Certain information that a public authority holds about individuals will only concern their professional life, for example job descriptions and details of their professional responsibilities. On the other hand, it will also hold sensitive information about individuals, for instance sickness records. In the latter case, disclosure of such information without consent would likely contravene the first data protection principle.
41. The Commissioner expects that work-related information about senior staff employed in public authorities or those in a public-facing role would normally be disclosed. In general, the more senior a person is the less likely it will be that to disclose information about him would be unfair. The BBC has accepted that such disclosure would not breach the first data protection principle but in its argument to support the withholding of information about salaries it sought to restrict disclosure to members of its Executive Board and Board of Governors. However, the Commissioner holds the view that there is a strong public interest in transparency of information concerning remuneration of senior staff at the BBC whether or not they are Board Members.
42. The presenters of the BBC's Children in Need appeal are viewed by the public as carrying out an important and influential role. The BBC itself considers Terry Wogan to be its senior presenter. The importance and value of his profile are reflected in the high salary he receives (apparently the highest in BBC Radio). The Commissioner considers that individuals who hold such high profile and public facing roles should expect information about them to be available to the public. This is especially so in a climate where the public are constantly alerted by the media to the high earnings of its programme presenters and in a society where the requirement for scrutiny of public spending is increasingly expressed.

## The Decision

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43. The Commissioner's decision is that:
  - (i) The BBC has incorrectly applied Part VI of Schedule 1 of the Act to the request for information concerning the cost and payments involved in staging the Children in Need appeal programme. Information about payments to presenters and the cost of staging the charity appeal are not held for the purposes of journalism, art or literature. In respect of this case the BBC is a public authority under the Act and must therefore deal with the information request within the scope of the Act.

(ii) The BBC has not dealt with the complainant's request in accordance with Part 1 of the Act in that it failed to comply with its obligations under section 1(1).

(iii) Exemption from disclosure under section 43 of the Act was incorrectly applied by the BBC to the requested information concerning the cost of the Children in Need appeal and its payments to presenters and other personalities.

(iv) Exemption from disclosure under section 40 of the Act was incorrectly applied by the BBC to the requested information regarding payments to presenters and other participants in the appeal.

### **Steps Required**

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44. The Commissioner requires that the BBC shall provide the complainant with the information requested within 35 calendar days of the date of this notice.

### **Failure to comply**

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45. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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46. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 11 day of December 2006**

**Signed .....**

**Richard Thomas  
Information Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire SK9 5AF**

## Legal Annex

### Relevant Statutory Obligations and Provisions under the Act

**Section 1(1)** provides that -

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

**Section 43** states that:

43. - (1) *Information is exempt information if it constitutes a trade secret.*

(2) *Information is exempt information if its disclosure under this Act would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).*

**Section 40** states that:

40. - (1) *Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*

(2) *Any information to which a request for information relates is also exempt information if-*

- (a) *it constitutes personal data which do not fall within subsection (1), and*
- (b) *either the first or the second condition below is satisfied.*

(3) *The first condition is-*

- (a) *in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*
  - (i) *any of the data protection principles, or*
  - (ii) *section 10 of that Act (right to prevent processing likely to cause damage or distress), and*
- (b) *in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of*

*the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.*

*(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).*

**The first data protection principle** of the Data Protection Act 1998 states that:

*1. Personal data shall be processed fairly and lawfully and in particular shall not be processed unless –*

*(a) at least one of the conditions in Schedule 2 is met.*