

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 October 2007

Public Authority: British Broadcasting Corporation (BBC)
Address: MC3 D1
Media Centre
Media Village
201 Wood Lane
London
W12 7TQ

Summary

The complainant requested details of the BBC's financial agreement with Gary Lineker, including details of his gross remuneration, for the past three years. The BBC refused to provide the information on the basis that the information was held for the purposes of journalism, art and literature. Having considered the purposes for which this information is held, the Commissioner has concluded that the requested information was not held for the dominant purposes of journalism, art and literature and therefore the request falls within the scope of the Act. However, the Commissioner has also concluded that the requested information is exempt from disclosure by virtue of section 40 of the Act.

The Commissioner's Role

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"). In the particular circumstances of this complaint, this duty also includes making a formal decision on whether the BBC is a public authority with regard to the information requested by the complainant. This Notice sets out his decision.

The Request

2. On 1 March 2005, the complainant made a request for a copy of the 'BBC's financial agreement with Gary Lineker [including] details of Mr Lineker's gross remuneration for the past three years, including details of bonuses'.

3. The BBC responded on 4 April 2005. It advised the complainant that it considered the request 'fell outside the scope of the Act because information about BBC programmes, content and their production is not covered by the Act. Schedule 1 of the Act says that the BBC, Channel 4 and S4C are covered by the Act only in respect of information held for purposes other than journalism, art or literature'. Consequently, the complainant was informed that the BBC is not obliged to supply information held for the purposes of creating its output (i.e. its programmes) or information that supports and is closely associated with these creative activities.
4. The BBC also informed the complainant that no internal review procedure was available to him, although he was advised of his right to make a complaint to the Commissioner.

The Investigation

Scope of the case

5. On 5 April 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information in question was held for the purposes other journalism, art and literature, and following this whether the information should be provided to him under the Act.

Chronology

6. On 22 September 2005 the Commissioner contacted the BBC and requested further arguments supporting the BBC's claim that the requested information is not held for purposes other than journalism, art and literature.
7. The BBC responded on 3 November 2005 and provided the Commissioner with a detailed explanation as to why it considered the requested information to be covered by the Schedule 1 derogation.
8. On 10 January 2007 the Commissioner contacted the BBC again and asked it to provide, without prejudice to its position on the application of the Schedule 1 derogation, details of any exemptions it would seek to rely on in the event that the derogation did not apply in this case.
9. In a letter to the Commissioner dated 1 March 2007 the BBC re-iterated its position that the requested information was covered by the derogation and provided further arguments to justify this position. The BBC also explained that it considered the requested information to be exempt from disclosure by virtue of the exemptions contained at section 40 (personal data), section 41 (information provided in confidence) and section 43 (commercial interests).

Analysis

The Schedule 1 Derogation

10. Part VI of Schedule 1 of the Act states that the BBC is a public authority 'in respect of information held for purposes other than journalism, art and literature'. This is commonly referred to as the Schedule 1 derogation. Similar provision exists in relation to Channel 4 and S4C – as a group these organisations are called public service broadcasters.
11. In order to determine the purpose for which information is held the Commissioner will apply a dominant purpose test. This means that where information is held for a number of purposes he will weigh these purposes against each other to determine the dominant purpose for which that information is held.
12. In this case the complainant's request was for information which the BBC refers to as 'talent costs', i.e. the amount of money paid by the BBC to Mr Lineker for three years. The BBC has explained that programme budgets are made up of a range of different financial costs including these talent costs.

The BBC's view

13. The BBC believes that the Schedule 1 derogation applies broadly and therefore its scope includes information such as programme content but also extends to include multi-purpose information, such as financial information related to the cost of programme making. The BBC argue that although this financial information (including details of talent costs) is not in itself journalism, art or literature, this financial information is part of the production process and therefore has an obvious impact on creativity.
14. By way of an example the BBC suggests that the Vicar of Dibley would not have been the same without Dawn French or the distinctive location used of the fictional village of Dibley.
15. In support of this view the BBC cite three sources:
 - (a) The Commissioner's view in his Provisional Decision in the case of *Sugar v Information Commissioner*, FS50133791 that this sort of budgetary information deals with the 'sustenance...of the creative journalistic purpose that the designation is meant to protect'.
 - (b) Evidence given by Mr Richard Sambrook, Director of News at the BBC, in relation to appeal of the *Sugar* decision notice to the Information Tribunal (EA/2005/0032). He stated that

'Questions about how you make (various) selections or the resources that are available to make selections, might be characterised on the one hand as management, but they are

absolutely core to journalism and determine both the quality, nature and character of journalism.'

(c) A letter from the Home Office to the Department for Culture Media and Sport of 13 January 2000 which states:

'the Government has sought to ensure that...including them [the public service broadcasters] in the Bill does not place them at a commercial disadvantage to their commercial rivals. The Bill therefore provides that the inclusion of the public service broadcasters does not relate to information held for journalistic, artistic or literary purposes.'

16. In summary, the BBC's position is that the requested information is not held for purposes other than journalism, art of literature and therefore is outside the scope of the Act.

The Commissioner's view

17. The Commissioner has noted and considered the arguments advanced by the BBC.
18. In the Commissioner's view the purpose of the derogation is to protect journalistic, artistic and literary integrity and to preserve a "creative space" in which programme makers can continue their core activities free from outside interference.
19. The Commissioner accepts that the fee paid to Mr Lineker supports the creation of programme content, it is self evident that in the majority of cases some form of financial support is necessary to produce programme content. The BBC and the Commissioner agree on this point and as such he has not considered it further.
20. However, the Commissioner's view is that the requested information is also held by the BBC for operational purposes in **addition** to being held for journalistic, literary and artistic purposes. The Commissioner believes that financial information serves a number of direct purposes; for example, it is used to budget, monitor expenditure, identify opportunities to improve efficiency, and to comply with legal obligations.
21. In the particular circumstances of this case, the Commissioner has found it useful to understand the Royal Charter which constitutes the BBC when considering these purposes. At the time of this complaint the 1996 Charter was in force, however, at the time this complaint is to be determined the 2006 Charter is in force. Therefore, the Commissioner has considered both Charters in order to determine for what purposes the requested information is held by the BBC.
22. The Commissioner has noted the following provisions in the 1996 Charter:
- (a) Article 7 (1) states that it shall be the functions of the Governors to "satisfy themselves that all the activities of [the BBC] are carried out in

accordance...with the highest standards of probity, propriety and value for money in the use of the Licence Revenue and moneys paid..."

(b) Article 16 (1) states that the BBC is authorised, empowered and required to *"collect the Licence Revenue and to receive all funds which may be paid by [the] Secretary for State...and to apply and administer such funds in accordance with the terms and conditions...attached to the grant"*

(c) Article 18(1) states that the BBC's accounts shall be audited annually. Article 18 (2) provides that the BBC *"shall...prepare an Annual Report...and attach thereto an Account or Accounts of the Income and Expenditure of the Corporation and...shall include in such Report such information relating to its finance, administration and its work generally..."*

21. The 2006 Charter has similar provisions to the 1996 Charter albeit with a new structure to reflect changes in corporate governance, via the BBC Trust, and the formalisation of the Executive Board as the executive body of the BBC with responsibility for the functions listed in paragraph 38 of the 2006 Charter. Notably, these functions include the operational management of the BBC and the conduct of the BBC's operational financial affairs. Furthermore, the Commissioner also understands that under the 2006 Charter the role of the BBC Trust includes:
- (i) assessing the performance of the Executive Board in delivering the BBC's services and activities and holding the Executive Board to account for its performance;
 - (ii) representing the interests of licence fee payers and exercising rigorous stewardship of public money; and
 - (iii) ensuring that the Executive Board conducts the BBC's operational financial affairs in a manner best designed to ensure value for money.
22. Therefore the Commissioner believes that, as a result of both Charters, the BBC holds financial information to enable:
- (i) the Governors (and now BBC Trust) to perform their role as 'guardians' under the Royal Charter by assessing the performance of the Executive Board; and
 - (ii) the Executive Board to manage the BBC's financial and operational affairs in a manner best designed to ensure value for money.
23. In the Commissioner's view, failure by the BBC to hold talent costs information would have a prejudicial effect on the ability of the Governors and Executive Board to perform their respective functions and operational duties under the Charters.
24. The Commissioner also considers that if the BBC failed to hold information related to business costs this practice would also be incompatible with the most

basic business and accounting practices and would adversely affect the administrative, business and financial operations of the BBC.

25. The Commissioner is therefore satisfied that the requested information is held by the BBC for multiple purposes. Where information is held for a number of purposes the Commissioner's approach is to consider whether the dominant purpose for holding that information is a purpose specified in the Schedule 1 derogation.
26. The Commissioner considers that the ultimate purpose of the derogation is to protect journalistic, artistic and literary integrity by carving out a creative and journalistic space for programme makers to produce programmes free from the interference and scrutiny of the public. While he acknowledges the BBC's view that the information required for the purposes of Schedule 1 does not necessarily need to be journalistic, artistic or literary in nature, it is his view that such information should have the necessary journalistic, artistic or literary application to justify its status as being held for the dominant purpose of schedule 1.
27. The Commissioner does not believe that talent costs information possesses enough journalistic application to enable it to be held for a dominant journalistic purpose. Although he acknowledges that the requested information was generated by the need to hire presenters for BBC shows and that this is creative purpose, the Commissioner considers that the reasons that the information continued to be held by the BBC are essentially ones of financial management. The Commissioner considers the talent costs information to be central to the operational heart of the BBC's policies, strategies and allocation of resources and the prejudicial consequences of not holding this information support the view that the requested information is held for the dominant purpose of the BBC's operations, rather than one of the purposes of Schedule 1.
28. Therefore, the Commissioner considers the BBC to be a public authority with regard to this information.

Exemption Arguments

29. As noted in paragraph 9, the BBC provided additional arguments, without prejudice to its view that the derogation was engaged, as to the exemptions which it would seek to rely on, in the event that the Commissioner found that the derogation did not apply in this case. These were:
 - Section 40 – Personal data.
 - Section 41 – Information provided in confidence.
 - Section 43 – Commercial interests.

Section 40

30. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA). (The relevant sections of section 40 are included in the legal annex attached to this notice).

31. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal information as:

*“...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any persons in respect of the individual”*

32. The Commissioner is satisfied that the requested information consists of personal data as defined by the DPA. This is because the financial agreement that Mr Lineker entered into with the BBC is clearly data which relates directly to him and includes indications of the BBC's intentions in respect of Mr Lineker, e.g. payment of x pounds for presenting particular shows.

The first data protection principle

33. The first data protection principle requires that the processing of personal data should be fair and lawful and that personal data should not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.
34. In correspondence with the Commissioner, the BBC has argued that disclosure of the information would breach the first data protection principle because disclosure would be both unfair and unlawful and furthermore, none of the conditions in Schedule 2 of the DPA can be met.
35. In order to make a decision as to the applicability of section 40 in this case the Commissioner has focused on whether disclosure of the information would be unfair.
36. The Commissioner's guidance on section 40 notes that the concept of fairness is not easy to define. However, the guidance suggests that the sort of issues which should be considered when establishing whether it would be unfair to pass on information without the consent of the data subject would include:
- Would the disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
 - Would the third party expect that his or her information might be disclosed to others?
 - Has the person been led to believe that his or her information would be kept secret?
37. The BBC has explained that unlike some other individually negotiated contracts with talent, the agreement between the BBC and Mr Linker does not contain any express confidentiality provisions. Nevertheless, the BBC has argued that the

requested information is of a confidential nature and throughout the contract negotiations all parties, including Mr Lineker, had a tacit understanding that the details of the agreement would not be disclosed to other parties.

38. The BBC has acknowledged that, strictly speaking, individuals with knowledge of talent deals are free to disclose that information, e.g. Mr Lineker could publicly announce the details of his financial agreement with the BBC. However, the Commissioner understands that in this case Mr Lineker has not made any public comment to such an effect. Furthermore, the BBC has explained that in fact there is very little sharing of information of this kind and that this is demonstrated by the newsworthiness of leaks to the press regarding individual talent deals. The BBC argues that if such information were commonplace it would not merit the headlines that it normally does. The BBC has also noted, on occasions where details of deals have been leaked to the press the BBC has received complaints from several agents and from talent themselves about breaches of confidentiality. Therefore, set against this context of talent costs very rarely being proactively disclosed, and the particular circumstances in which this agreement was negotiated, the BBC believes that Mr Lineker would have an expectation that details of the agreement would not be disclosed.
39. On the basis of the above, the Commissioner accepts that Mr Lineker would have had an expectation that information pertaining to his financial agreement with the BBC would not be placed in the public domain. In reaching this conclusion the Commissioner has placed particular weight on the nature of the contract negotiations, i.e. they were confidential and therefore the BBC owed Mr Lineker an implicit duty of confidence.
40. However, simply because an individual has an expectation that information held about them by a public authority will not be disclosed this does not necessarily mean that the expectation is a **reasonable** one. The Commissioner's guidance notes suggest that when considering what information third parties should expect to be disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private lives. The guidance accepts that although there are no 'hard and fast rules':

'Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.'

41. On the basis of this guidance the Commissioner considers that senior public sector employees should expect information about their roles and the decisions they take to be disclosed under the Act. The Commissioner also considers that senior officials in public authorities should expect details of their salary bands to be disclosed because senior officials are paid out of public funds commensurate with their level of responsibility.
42. This approach is supported by a recent Information Tribunal decision (House of Commons v Information Commissioner and Norman Baker MP. EA2006/0015

and 0016). This decision involved a request for information about the details of the travel allowances claimed by MPs. In its decision the Tribunal noted that:

'where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives'. (Tribunal at paragraph 78).

43. In the BBC's view however payments made to talent are not analogous to the salaries paid to senior employees in public sector organisations. This is because the sums paid by the BBC to talent do not relate to the performance of a public function, but rather to individuals who are contracted to provide services to the BBC in an entirely private capacity. In the BBC's view disclosure of the requested information would therefore impinge on the private lives of the relevant individuals, particularly given that in the case of talent, their work forms part and parcel of their lives to such a degree that the professional and private aspects of their lives are often intertwined.
44. In this case, the Commissioner accepts that the talent, Mr Lineker, is not in a position to make influential policy decisions or take decisions related to the expenditure of public funds. Therefore, the Commissioner accepts that Mr Lineker will have different expectations as to what information will be disclosed about his financial agreement with the BBC than senior salaried employees at the BBC. Consequently, the Commissioner accepts that it was reasonable for Mr Lineker to expect that details of his financial arrangement with the BBC would not be disclosed despite the different expectations that the Commissioner believes senior salaried employees of the BBC should have with regard to disclosure of their financial arrangements with their employer.
45. In conclusion, the Commissioner is satisfied that Mr Lineker had a reasonable expectation that the BBC would not disclose details of his financial agreement with the BBC and consequently to disclose details of this agreement would be unfair. Therefore, to disclose the requested information would breach the fairness element of the first data protection principle and therefore the exemption provided by section 40(2) of the Act is engaged.
46. Although the BBC applied more than one exemption to the requested information, as the Commissioner has found that the section 40 exemption has been correctly applied he did not consider the application of section 41 or section 43.

Procedural Matters

47. The complainant requested details of Mr Lineker's financial agreement on 1 March 2005 and the BBC refused the information on 4 April 2005. In their refusal the BBC relied on the Schedule 1 derogation and therefore did not specify the exemptions under which it also considered the information to be exempt from disclosure. As the Commissioner has found that the requested information is not covered by the Schedule 1 derogation and therefore falls within the scope of the Act, he must conclude that technically a breach of section 17 has occurred.

48. Section 17(1) requires that when a public authority refuses access to information it must specify in a notice to the applicant the exemptions on which it is refusing the application and why, if not clear, those exemptions apply. Therefore, a breach of section 17 occurred because the BBC failed to provide the complainant with a refusal notice which cited sections 40, 41 and 43.
49. However, the Commissioner acknowledges that the BBC did not, at this juncture, intend to rely on any exemptions under the Act as they had concluded that the requested information did not fall within the scope of the Act.

The Decision

50. The Commissioner's decision is that the requested information is held by the BBC for purposes other than those of journalism, art and literature. However the Commissioner is satisfied the requested information is exempt from disclosure on the basis of section 40 of the Act although the BBC failed to provide a refusal notice as required by section 17 of the Act.

Steps Required

51. The Commissioner requires no steps to be taken.

Right of Appeal

52. 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

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 8th day of October 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

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

Legal Annex

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 40(1) provides that –

“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.”

Section 40(2) provides that –

“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.”

Section 40(3) provides that –

“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.”

Section 40(4) provides that –

“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).”

BBC resources

2006 Royal Charter

http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/royalchartersealed_sept06.pdf

2006 Agreement with Department for Culture Media and Sport

http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/bbcagreement_july06.pdf

1996 Royal Charter

http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/BBCs_royal_charter.pdf

1996 Agreement with the Department of National Heritage

http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/Agreement.pdf

2003 Amended agreement with Department for Media Culture and Sport

http://www.bbc.co.uk/foi/docs/bbc_constitution/bbc_royal_charter_and_agreement/Amendment_to_the_Agreement.pdf