

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 27 February 2008**

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

### Summary

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The complainant requested information on the salaries of a number of named BBC Northern Ireland presenters as well as information relating the in house production costs and the cost paid to an independent production company. The BBC refused to provide this information on the basis that it was held for the purpose of journalism, art or literature. During the course of the investigation the BBC also sought to rely on exemptions under the Act to withhold the information.

The Commissioner has investigated and concluded that the BBC misapplied the Schedule 1 derogation and that the information requested falls within the scope of the Act. The Commissioner investigated the BBC's application of the exemptions and found that the salaries of the presenters are exempt under section 40 of the Act. The Commissioner also found that some of the information was exempt under section 43 and that the public interest favoured maintaining this exemption. However, the Commissioner found the remaining withheld information was not exempt and should therefore be provided to the complainant within 35 calendar days of this notice.

### 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"). 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

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2. On 21 January 2005, the complainant made a request to the BBC for the following information:

*“1. What is the annual gross salary paid by the BBC to each of the following: George Jones, Stephen Nolan, Hugo Duncan, Gerry Anderson, John Daly, David Dunseith, Donna Traynor, Noel Thompson, Conor Bradford and Seamus McKee?*

*2. How much did the BBC pay Straightforward Productions last year and what programmes did this relate to?*

*3. What was BBC Newsline’s annual budget for outside broadcasts in each of the last five years?*

*4. How many individual foreign trips have been made by personnel working for BBC NI Spotlight programme in the past three years?*

*5. What has been the total cost of BBC NI Spotlight programmes involving overseas travel in the past three years?*

*6. What has been the single most expensive BBC NI Spotlight programme involving foreign travel in the past three years?”*

4. The BBC responded on 4 February 2005. It advised that *“the Corporation and other public service broadcasters are covered by this legislation only in respect of information held for ‘purposes other than those of journalism, art or literature’. This derogation effectively excludes information held for the purposes of creating the BBC’s output or information that supports, and/or is closely associated with, these creative activities”*. 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. The BBC informed the complainant of the procedure required to request an internal review of their decision not to provide the requested information.
5. The complainant made a request for an internal review of the BBC’s decision not to provide the requested information on 17 February 2005, and included a number of arguments to support his request.
6. The BBC’s internal review of 17 March 2005 upheld the original decision and stated that *“the Freedom of Information Act contains a clear derogation in regard to information held in support of journalism, art or literature- interpreted in this case to apply to the programmes in question. Questions about the cost of production, including the cost of talent, fall within this derogation.”*

## The Investigation

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### Scope of the case

7. On 15 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 the following point:
  - “How could the provision of ‘journalism, art or literature’ by the BBC be in any way impaired by the publication of the salaries of 10 presenters?”

### Chronology

8. On 28 June 2005, the Commissioner wrote to the BBC and requested further arguments in support of the BBC’s reliance on the exception detailed in Schedule 1 of the Act.
9. The BBC responded to this request on 8 August 2005. It advised that it had provided a full explanation of why the derogation applied to requests for information relating to presenters’ salaries, artists’ fees and other information contained in programme budgets, in a similar case, and referred to case number FS50067416.
10. The Commissioner wrote again to the BBC on 3 January 2007 requesting that it should reply specifically to the points raised by the complainant, clearly outlining the reasons for citing the derogation, and also to provide details, without prejudice, of any exemptions which it might rely on in the alternative, together with supporting arguments.
11. The BBC responded to this request on 28 February 2007 stating that Part VI of Schedule 1 of FOIA specifies that the BBC is only subject to the disclosure obligations of FOIA in respect of “information held for purposes other than those of journalism, art or literature”. The BBC’s view is that this does not mean that the information need itself be journalism, art or literature to be outside the scope of the Act; rather it maintains that the Act only applies where the dominant purpose for holding the information is other than for those purposes.
12. Furthermore, the BBC stated that financial information relating to programme and talent costs is a part of the production process and therefore has an obvious impact on creativity.
13. The BBC provided to the Commissioner, in the same letter, detailed arguments to support the exemptions which it believed were applicable to the information requested by the complainant. These were section 40 ‘personal data’, section 41 ‘information provided in confidence’ and section 43 ‘commercial prejudice’.
14. The BBC also clarified that in relation to question 1 it did not hold information on the salary paid to George Jones as he was at the time of the request contracted

to provide services to the BBC via the independent production company Straightforward Film and Television Ltd.

## Analysis

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### The Schedule 1 derogation

15. 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 (PSBs).
16. 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.
17. In this case the requested information that the BBC considers to be covered by the derogation is the information pertaining to talent costs and in-house programme costs.

### The BBC's view

18. 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, programme budgets and the total cost of in-house productions) 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.
19. 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*, EA/2005/0032 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 EA/2005/0032 to the Information Tribunal. 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.’*

20. In summary, the BBC's position is that the talent cost and in-house production cost 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**

21. The Commissioner has noted the arguments put forward by the BBC.
22. 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.
23. The Commissioner accepts that the requested information (talent costs and in-house programme costs) 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.
24. 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.
25. 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. It should be noted that the Royal Charter in existence on the date of the complainant's request for information (21 January 2005) ran from 1 May 1996 to 31 December 2006 and is known as the 1996 Charter. A new Royal Charter came into force on 1 January 2007 and is known as the 2006 Charter
26. The Commissioner has noted the following provisions of the 1996 Charter:
- Article 7(1)(b) 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...”*

- 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..."*
27. 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 include the operational management of the BBC, and the conduct of the BBC's operational financial affairs.
28. Under the 2006 Charter, the BBC Trust is the guardian of the licence fee revenue and the public interest. To fulfil this role the Commissioner understands the general functions of the BBC to include the following:
- (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) to ensure that the Executive Board conducts the BBC's operational financial affairs in a manner best designed to ensure value for money.
29. Therefore the Commissioner believes that, as a result of these 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.
30. People costs and in-house programme costs constitute financial information and therefore serves a number of purposes in addition to that accepted by both the BBC and the Commissioner, i.e. that it supports the creation of programme content.
31. 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.
32. In this case in-house programme costs and talent costs information served the following purposes:
- (i) It supported the delivery of programme content.



- (ii) It enables the BBC to monitor its expenditure against its agreed budget for that year.
  - (iii) It enables the BBC to predict with some certainty the future costs of engaging talent.
  - (iv) It enables the BBC to predict with some certainty the future costs of producing programmes in-house.
  - (v) It contributed to meeting the BBC's obligations to publish annual accounts.
  - (v) It contributed to the ability of the Governors (now the BBC Trust) and the Executive Board to perform their respective functions and operational duties under the Royal Charter.
33. The final factor which the Commissioner has weighed, in coming to a decision on whether the derogation applies, is whether the decision on the cost of in-house programmes and the cost of engaging talent constitutes a creative decision.
34. A creative decision would relate to the inception, planning and delivery of new content. For example, the decision to use presenter X instead of presenter Y would tend to be a creative decision, based on the reputation and standing of the entertainer in the industry, but the determination of the level of remuneration for presenter X or Y would not be characterised as a creative decision.
35. As such, the Commissioner does not consider that the requested information constitutes a creative decision.
36. After carefully balancing these competing purposes, the Commissioner finds that the requested information was, or was more likely to have been, held by the BBC for predominantly operational purposes (including financial, management and administrative purposes) and not for journalism, literature or art. As a result, Schedule 1 is not applicable to in-house programme costs and talent costs information and the BBC is a public authority with regard to this information.

### **Exemption Arguments**

37. 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.
38. The BBC explained that the information requested in part one of the request fell under the definition of 'talent costs' and was considered exempt under sections 43, 40 and 41 of the Act. The information in parts two to six were classed as 'programme costs' and the information in part two was considered exempt under section 43 and 41 with the information in parts three to six considered to be exempt under section 43.

### **Talent Costs**

1. What is the annual gross salary paid by the BBC to each of the following: George Jones, Stephen Nolan, Hugo Duncan, Gerry Anderson, John Daly, David Dunseith, Donna Traynor, Noel Thompson, Conor Bradford and Seamus McKee?

## Section 40 'Personal Data'

39. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would contravene any of the data protection principles contained in the Data Protection Act 1998 ('DPA').
40. 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 relates 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 intention of the data controller or any other person in respect of the individual.'*
41. The Commissioner accepts that the salaries paid to the named presenters clearly falls within the description of personal data as defined by the DPA because it is information which directly relates to a living individual.
42. The BBC argued that presenter's salary details are exempt from disclosure because to do so would breach the first, second and sixth data protection principles.
43. The first data protection principle has two components:
1. Personal data shall be processed fairly and lawfully and
  2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
44. In considering whether disclosure would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
- The presenters' reasonable expectations of what would happen to their personal data;
  - Whether the presenters specifically refused to consent to the disclosure of the requested information;
  - Whether disclosure would cause any unnecessary or unjustified damage to the presenters; and
  - The legitimate interests of the public in knowing how much the presenters earned weighed against the effects of disclosure on the presenters.
45. In the BBC's view 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.

46. Furthermore, with regard to the expectations of the talent, the BBC has explained that the contracts it enters into with talent contain express confidentiality provisions which state that: 'the Broadcaster shall not at any time during the Term or afterwards disclose to anyone in circumstances whatsoever confidential information relating to the business or affairs (including programmes) of the BBC its subsidiaries and associates'.
47. The BBC has acknowledged that, strictly speaking, individuals with knowledge of talent deals are free to disclose that information. However, the Commissioner understands that in this case none of the talent covered by the scope of the request have 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 the agreements with these individuals were negotiated, the BBC believes that the individuals covered by these requests would have a clear expectation that details of their agreements would not be disclosed.
48. On the basis of the above, the Commissioner accepts that the talent involved in this case would have an expectation that details of their financial arrangements with the BBC would not be disclosed. Furthermore, the Commissioner is also persuaded that this expectation is a reasonable one. In reaching this conclusion the Commissioner has placed considerable weight on the fact that the relationship which talent enters into with the BBC is distinct from the relationship that salaried employees enter into with the BBC. This key distinction is based on the fact that the talent's work for the BBC is inextricably linked to their private lives and because it is not possible to separate the private and professional aspects of their lives it would be unfair to disclose how much these individuals were paid by the BBC.
49. Therefore, the Commissioner accepts that disclosure would be unfair and therefore disclosure would breach the first data protection principle. Consequently, the information covered by part 1 of the request is exempt from disclosure by virtue of section 40(2).
50. As the Commissioner has concluded that the information covered by part 1 of the request is exempt by virtue of section 40 of the Act, he has not considered whether this information is also exempt on the basis of sections 41 or 43.

## Programme Costs

2. How much did the BBC pay Straightforward Productions last year and what programmes did this relate to?
3. What was BBC Newsline's annual budget for outside broadcasts in each of the last five years?
4. How many individual foreign trips have been made by personnel working for BBC NI Spotlight programme in the past three years?
5. What has been the total cost of BBC NI Spotlight programmes involving overseas travel in the past three years?
6. What has been the single most expensive BBC NI Spotlight programme involving foreign travel in the past three years?

## Section 43 – Commercial Interests

51. Section 43 (2) states that information is exempt if its disclosure would, or would be likely, to prejudice the commercial interests of any person.
52. In relation to part 2 of the request it is the BBC's position that the disclosure of the fee paid by the BBC to Straightforward in respect of programmes produced by them (in other words the fee paid by the BBC to an independent production company (IPC) in respect of a particular programme or programmes as opposed to the cost(s) of that programme) would, or would be likely to, prejudice the commercial interest of the BBC. In relation to parts 3,4, 5 and 6 of the request the BBC's position is that information relating to the budget or final cost of a programme would harm its commercial interests because disclosure of this information may result in a ratchet effect among bids from independent production companies (IPCs) for licence deals in respect of similar programmes.
53. The BBC provided the following arguments to support these assertions.
54. The BBC contends that disclosure of the fees paid by the BBC to in-house production firms and to independent production companies would harm its commercial interests because disclosure of this information may result in a ratchet effect among bids from independent production companies (IPCs) for licence deals in respect of similar programmes. This is because disclosure would allow IPCs to establish the minimum level of funds which were available for a particular programme or type of programme and IPCs will then have an incentive to bid beyond that level. This will prejudice the BBC's commercial interests because it will be forced to increase what it pays for those licence deals or face losing these deals.
55. The BBC operates within a strict commissioning regime. This regime, as detailed in its Agreement with the Department for Culture Media and Sport (see clause 52), requires the BBC to commission at least 25% of programmes through IPCs and to ensure that at least a further 25% of programming is open to competition

between in-house production departments and IPCs (under clause 54 this is known as the Window of Creative Competition – 'WOCC'). Furthermore, under clause 50 of the Agreement the BBC has to ensure that a certain proportion of broadcast content is of particular interest to persons living in that region (e.g. Northern Ireland).

56. The BBC has explained that its commissioning process ensures that bids from in-house and independent producers will always be evaluated side by side to ensure fair decision making, i.e. in-house producers are not given an advantage over external independent producers. Therefore, a competitive market effectively exists between BBC in-house producers and IPCs when bidding for commissions from the BBC. The BBC has also explained that in-house production staff whose role it is to bid for programmes would not be privy to bid information submitted to the BBC by IPCs. Moreover, very few people outside of their own companies will have knowledge of the relevant sums and although staff moving between companies may take knowledge with them, it will be current and of limited value. In addition all information is treated as confidential within the BBC and limited to those with a need to know.
57. For these reasons, the disclosure of information relating to the budget and cost of in-house programmes by the BBC alone would have the effect of creating an informational asymmetry. The BBC has argued that it is well known that the effect of such asymmetry is to change bidding strategies and to provide relative strength to the beneficiaries of the asymmetry. In support of this argument the BBC have cited Paul Klemperer's paper on Bidding Markets ([http://www.competition-commission.org.uk/our\\_role/analysis/bidding\\_markets.pdf](http://www.competition-commission.org.uk/our_role/analysis/bidding_markets.pdf)) which illustrates that a change to the relative flow of information between participants in an auction can affect the outcome of that auction. In this case where the information relates to the final cost of an in-house production it enables IPCs to ascertain with certainty what price the BBC is willing to pay in respect of a particular programme. This knowledge would then enable IPCs to increase their bids for licence deals with the BBC in order to provide the same services.
58. In order to demonstrate the likelihood of this prejudice occurring the BBC have highlighted the fiercely competitive nature of the media and entertainment industry which means that margins on programmes are very low. Consequently, a minor adjustment in the cost of an individual programme, as a result of a ratchet effect among bids from IPCs, can have a huge and deleterious effect on the broadcaster. Moreover, the BBC has highlighted the fact that since it is funded by the licence fee and has a corresponding duty to exercise careful stewardship of public money, this places it in a difficult position. In the short-term it may well be unable to afford the increased bids from IPCs. In the long term it may be that the BBC suffers an outflow of programming from IPCs and a reduction in programming quality.

#### The Commissioner's Position

59. The Commissioner understands that the main basis of the BBC's argument as to why information covered by request three to six should not be disclosed is based on the fact that disclosure of the cost of a single element of an in-house

- production would lead to further requests for the other costs of the programme and thus, over time, it is possible that the entire budget of a programme would be disclosed. Once the total cost of a production was in the public domain, the BBC's commercial interests would be harmed in the way outlined above.
60. In the Commissioner's opinion for this argument to be sustained the BBC has to be able to demonstrate that disclosure of the information covered by request three to six would lead to further requests for costs of the component parts of a production; that the information covered by these requests will always be disclosed; and that it will be practical to combine the cost of the component parts into a useable format. If these circumstances occur, then it is possible that the total cost of a production will essentially be placed in the public domain and the prejudice outlined above may occur.
  61. The Commissioner does accept that disclosure of the requested information in this case would encourage others to submit requests for details of the costs of other elements of an in-house production. This request in itself demonstrates that the public are interested in how much the BBC spends on various different aspects of a production i.e. this request asks for a variety of information including annual budget for outside broadcasts, how many foreign trips have been made by personnel and which is the single most expensive programme involving foreign travel. Furthermore, the Commissioner is aware from both BBC's online register of requests it has received (<http://www.bbc.co.uk/foi/docs/responses.shtml>) and from complaints he has received about the BBC's refusal of requests, that the BBC has received a significant number of similar requests.
  62. In relation to the point that disclosure of this information would enable other requesters to obtain information about the costs of other elements of an in-house production, in the Commissioner's opinion it is likely that there may be particular factors which preclude the disclosure of cost information about certain elements of an in-house production. For example, the Commissioner has issued decision notices (FS50070466 & FS50070468) in which he agrees that disclosure of talent costs, which form part of the budget for a programme, are exempt from disclosure on the basis of section 40 (indeed this decision notice also reaches this conclusion).
  63. Therefore, in the Commissioner's opinion it is unlikely that *all* of the separate cost elements of an in-house production will be disclosed under the Act. Consequently, the Commissioner does not consider it likely, as the BBC has suggested, that it is directly foreseeable that entire budgets will effectively be disclosed following a number of separate requests. Therefore, in the Commissioner's opinion the BBC's argument that disclosure of certain cost elements of an in-house production would in time lead effectively to the disclosure of the total cost of an in-house production is flawed.
  64. Furthermore, the Commissioner has considered whether disclosure of isolated information covered by requests would, in itself, be likely to prejudice the commercial interests of the BBC. Whilst the Commissioner accepts that in some cases disclosure of the overall total cost of a production may prejudice the BBC's commercial interests he does not accept that disclosure of these component

elements would. In the Commissioner's opinion disclosure of this information would not provide IPCs with sufficient information to allow them to formulate an alternative bid. Therefore, the ratchet effect described earlier would be unlikely to occur because disclosure of information covered by requests is simply not sufficient to allow IPCs to establish the price the BBC pays for certain programmes.

65. The Commissioner also considered that some of the information requested does not relate in any way to financial information, although it does relate to the overall budget of a programme (such as the number of foreign trips made by personnel on BBC NI Spotlight).
66. On the basis of the above the Commissioner has concluded section 43 does not provide an exemption from disclosure of the information covered by requests three through to six.

*Request 2 'How much did the BBC pay Straightforward Productions last year and what programmes did this relate to?'*

67. The Commissioner has considered whether disclosure of this information would, or would be likely to prejudice the BBC's commercial interests in the way outlined above. The Commissioner believes that this argument bears some similarity to those put forward in relation to the prejudice in the Information Tribunal case *John Connor Press Associates v Information Commissioner*. In this case, the public authority, the National Maritime Museum ('NMM'), argued that disclosure of financial information relating to the commission of a piece of art would prejudice the commercial interests of the NMM. The prejudice claim arose from the fact that the NMM's bargaining position would be compromised if other artists were aware of the commission's value in this case. The Tribunal decided that that prejudice might occur in this case but that this would depend on the nature of the information and the degree of similarity between the two transactions.
68. In deciding whether the section 43 exemption is engaged in relation to request two in this case the Commissioner has also considered the previous decision notices he has issued which involved requests submitted to the BBC for the costs of other television shows. In case FS50137791 the complainant submitted a request asking for the amount of money the BBC had paid to an external production company (Flickerpix) to commission an animation series (On the Air). In his decision notice on this case the Commissioner agreed with the BBC that disclosure of the cost of the commission was exempt under section 43 of the Act. Key to the Commissioner's conclusions in this case was the argument that auctions for a specific commission cannot be viewed as a one-off; in this earlier case the Commissioner accepted that prejudice was likely because the BBC may bid for another series of On the Air, and indeed had recently decided to commission a second series.
69. Having considered the circumstances of this request carefully, the Commissioner is of the view that future transactions between the BBC and the production companies (either in-house or IPC) would be very similar in nature and that the information in question (i.e. the cost to paid to Straightforward) is key to the



BBC's goal of obtaining value for money. Therefore in the Commissioner's view, in relation to the information requested in parts 2 of the complainant's request, the cost paid to Straightforward, this argument has merit and he is satisfied that prejudice is likely.

70. A key factor in the Commissioner reaching this conclusion is the fact that the auctions for a specific commission cannot be viewed in isolation. If the price that the BBC paid a production company for producing a programme or number of programmes was disclosed then the Commissioner accepts that IPCs would clearly not bid below the price the BBC paid for a previous programme and therefore the effect of artificially inflating the winning bid as described in para 57 above would be created.
71. However, the Commissioner considers that it is unlikely that disclosure of some of the information requested in part 2 (i.e which programmes the BBC paid Straightforward productions for) would, or would be likely to prejudice the BBC's commercial interests. The Commissioner has reached this decision based on the fact that much of this information is already publicly available on the Straightforward website. The Commissioner does not consider that disclosing a list of the programmes produced by the production company would have any of the prejudicial effects claimed by the BBC.

### Public Interest Test

72. Section 43 is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that information is exempt information where the public interest, in all circumstances of the case, in maintaining the exemption outweighs the public interest in disclosing the information.
73. The BBC advances three broad public interest arguments in favour of the maintenance of the exemption. These are as follows:
- (i) *There is a clear public interest in ensuring the BBC is able to provide quality programming and value for money in respect of its use of the license fee. Both these objectives will be threatened if a presumption is created in favour of the general disclosure of information relating to license deals....*
  - (ii) *...there is little public interest in the disclosure of license deal information as this information only enables the public to take an informed view of whether the BBC is contracting with indies on a competitive basis if it is in the possession of license deal information relating to commercial broadcasters. Since this information is not publicly available, information relating to the BBC is of little use.*
  - (iii) *...the general public interest in the transparency and accountability of the BBC in respect of its use of the license fee is served by a broad range of oversight mechanisms, internal and external. These include the oversight of the BBC Trust, the responsibilities of*



*which include commissioning value for money investigations into specific areas of BBC activity (Article 24 (2) (i) of the Charter), the Executive Board, the responsibilities of which include conducting the BBC's operational affairs in a manner best designed to ensure value for money (article 38 (1) (h) of the Charter), Ofcom and the fair trade regime, and competition law in general. Indeed... certain limited information on expenditure is provided in the Annual Report. Disclosure beyond this threatens to pose considerable harm to the BBC's commercial interests, without offering a proportionate benefit to the public.*

74. In the Commissioner's view there are three public interest factors in favour of disclosure. These are as follows:
- i. there is a general interest in facilitating accountability and transparency in the way public money is spent;
  - ii. there is an interest in furthering the public's understanding of, and participation in, public debates on a given topic;
  - iii. there is an interest in facilitating accountability and transparency of public authorities for their decisions;
75. Therefore the Commissioner must balance the factors in favour of disclosure with those against. If the balance lies in favour of maintaining the exemption, the information will be exempt from disclosure.
76. The Commissioner's view is that although there is a strong interest in understanding the way in which public money is spent, it is not clear that disclosure in this case would aid the public significantly. In order for information of this nature to be of use to the public they would need access to information about the costs to other broadcasters of commissioning similar content. Other public service broadcasters are subject to the Act, specifically Channel 4 and S4C, but the remainder of the broadcasting industry is not. Without information about other broadcasters' programme costs the information requested in this case becomes relatively useless to the public as a whole, however it would have a particular use within the industry potentially exposing the BBC to commercial prejudice as identified above.
77. The cost of programmes broadcast by public service broadcasters (PSB's), and particularly the BBC, is of interest to the public and would aid their understanding of the industry and the difficulty that PSB's face in winning and retaining quality programming. The increased transparency would reinforce trust in the BBC as an organisation with robust controls on the way that public money is spent. However, these controls are evident anyway. The BBC has a variety of mechanisms which seek to ensure value for money and high quality, for example, the Window of Creative Competition is a mechanism that ensures that 25% of BBC broadcasts are produced by the independent sector, and that a further 25% of broadcasts are opened to competition between the private sector and the BBC's in-house production divisions. The Trust (formerly the Board of Governors) has oversight of the way the BBC seeks to meet its corporate objectives providing a further level of scrutiny internally.

78. As regards transparency in the decision-making process, the Commissioner does not consider that this factor carries great weight. This view is formed on the basis that the decisions taken by the BBC do not affect the conduct of public affairs. Unlike most public authorities, the BBC is not making decisions which have the capacity to significantly affect governance and propriety in the public sector.
79. Having weighed these factors, the Commissioner's view is that the balance of the public interest favours maintaining the exemption under section 43 and that therefore the amount paid to Straightforward should not be released. Overall, the benefits in terms of transparency and accountability are outweighed by the damage that disclosure would be likely to cause in respect of the BBC's commercial interests.

### **Procedural matters**

80. Section 17(1) states that a public authority which is relying on a claim that the information is exempt, must, within the time for complying issue a refusal notice which:
- (a) states the fact that information is exempt,
  - (b) specifies the exemption in question, and
  - (c) states why the exemption applies.
81. As the BBC was relying on the Schedule 1 derogation, its refusal notice of the 4 February 2005 did not explain which exemption it considered applied to the requested information. Technically this is in breach of the requirements of section 17 of the Act.

### **The Decision**

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80. The Commissioner's decision is that the BBC failed to deal with the following elements of the complainant's request in accordance with the Act:
- i. The information requested is held by the BBC for a dominant purpose other than that of journalism, art or literature. Therefore 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)
  - ii. The BBC breached section 17 of the Act because it failed to provide a refusal notice stating which exemptions it believed applied to the information covered by the request listed in the previous paragraphs.
  - iii. The BBC was incorrect to rely on section 43 to withhold the information requested in parts two (the programmes produced by Straightforward) three, four, five and six of the request.

81. However, the Commissioner has decided that the following aspects of the request were dealt with in accordance with the Act:

i. The salary details of the presenters named in the request are exempt from disclosure under section 40(2).

ii. the information requested in part two (the amount paid to Straightforward) is exempt from disclosure under section 43 of the Act.

### **Steps Required**

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82. The Commissioner requires the BBC to disclose the information requested in parts two (the programmes produced by Straightforward), three, four, five and six of the request to the complainant within 35 calendar days.

## Right of Appeal

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83. 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 27<sup>th</sup> day of February 2008**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex

### General Right of Access

**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 1(2)** provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**Section 1(3)** provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

**Section 1(4)** provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

**Section 1(5)** provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

**Section 1(6)** provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

**Section 3(1)** provides that –  
“in this Act “public authority” means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
  - (i) is listed in Schedule 1, or
  - (ii) is designated by order under section 5, or
- (b) a publicly-owned company as defined by section 6”

**Section 7** provides that -

- (i) Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts 1 to V of this Act applies to any other information held by the authority.
- (ii) An order under section 4 (i) may, in adding an entry to Schedule 1, list the public authority only in relation to information of a specified nature.

### **Refusal of Request**

**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 17(2)** states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and



(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

**Section 17(3)** provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

**Section 17(4)** provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5)** provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

**Section 17(6)** provides that –

“Subsection (5) does not apply where –

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

**Section 17(7)** provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

### **Exemptions**

**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 41(1)** provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

**Section 43(1)** provides that –

“Information is exempt information if it constitutes a trade secret.”

**Section 43(2)** provides that –

“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 43(3)** provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”