

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 March 2008

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

Summary

The complainant requested details of the expense statements submitted by Andrew Marr and Natasha Kaplinsky. The BBC refused to provide the information on the basis that it was not a public authority in relation to the complainant's request because the information was held for the purpose of journalism, art or literature within the meaning set out in Schedule 1 of the Act. As an alternative argument the BBC has applied the exemption under section 12 of the Act to withhold the information from the complainant. After a careful evaluation of the nature of the request, and the relevant provisions of the Act, the Commissioner's decision is that the BBC has incorrectly applied Schedule 1 and that the information is held for purposes other than those of journalism, art and literature. The Commissioner also finds that the exemption under section 12 is engaged and suggests that the BBC contact the complainant in order to refine his request in line with its duty under section 16 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. The complainant has advised that on 5 January 2005 he made the following requests for information to the Department for Culture Media and Sport (DCMS):

“Details of all approved expense statement for Andrew Marr of the BBC which have been incurred by the BBC as a result of travel, entertainment and hospitality provided to the DCMS and ALL OTHER GOVERNMENT DEPARTMENTS.

Details of all approved expense statements for Natasha Kaplinsky of the BBC, which have been incurred by the BBC as a result of travel, entertainment and hospitality provided to any third party.

3. DCMS transferred the requests to the BBC with effect from 1 February 2005 and the BBC responded to these requests on 22 February 2005.
4. The BBC informed the complainant that the information requested was held for the purpose of journalism, art or literature and was therefore not covered by the scope of the Act.
5. The Complainant responded on 6 March 2005 requesting in internal review of the decision by the BBC to withhold the information requested.
6. On 15 March 2005 the BBC communicated the findings of the internal review to the complainant. The internal review upheld the finding that the information requested is held for the purpose of journalism, art or literature and is therefore not covered by the scope of the Act.

The Investigation

Scope of the case

7. On 24 June 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 investigate the BBC's refusal to disclose the information claiming that the information is held for a purpose other than that of journalism, art or literature.

Chronology

8. The Commissioner began his investigation on 15 June 2006 by writing to the BBC to request further arguments regarding the application of the derogation to the information requested.
9. The Commissioner, having received no response, wrote again to the BBC on 3 January 2007. The Commissioner requested further arguments regarding the

application of the derogation and, without further prejudice, details of any exemptions which it would seek to rely on in the alternative.

10. The BBC responded in full on 5 October 2007 providing the Commissioner with additional arguments to support its application of the derogation to the information. The BBC also provided, without prejudice, alternative arguments under section 12 and 43 of the Act to withhold the requested information.

Analysis

The Schedule 1 derogation

11. 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).
12. 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.
13. In this case the requested information relates to expense statements of two individuals

The BBC's view

14. 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 associated with programme production. The BBC consider that the dominant purpose for holding information is the critical factor in making a determination on whether information is held for the purposes of journalism, art and literature, or some other purpose.
15. The BBC state that:

'Financial information is integral to the production process and held in support of our programmes. ... The information requested is not held for purposes other than journalism, art or literature and is therefore outside the scope of FOIA and exempt from disclosure.'
16. 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.’

17. In summary, the BBC’s position is that financial information, such as expenses, is not held for purposes other than journalism, art or literature and is therefore outside of the scope of the Act.

The Commissioner’s view

18. The Commissioner has noted the arguments put forward by the BBC.
19. 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.
20. The Commissioner accepts that the requested information 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.
21. However, the Commissioner’s view is that the requested information is 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 comply with legal obligations.
22. 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 (5 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.
23. 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...”*
24. Although drawing directly upon the 1996 Charter to determine for what purposes the requested information was held by the BBC in this case, the Commissioner has also considered the 2006 Charter to assist future cases. 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.
25. Under the 2006 Charter, the BBC Trust is the guardian of the licence fee revenue and the public interest (paragraph 23 refers). 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.
26. Therefore the Commissioner believes that, as a result of the Charter, 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.
27. The expense statements of individuals constitute financial information and therefore serve a number of purposes in addition to that accepted by both the BBC and the Commissioner, i.e. that they support the creation of programme content.

28. 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.
29. In this case the expense statements serve the following purposes:
 - (i) They supported the delivery of programme content;
 - (ii) They enabled the BBC to monitor its expenditure against its agreed budget for that year;
 - (iii) They enable the BBC to predict with some certainty of future programming costs
 - (iv) They contributed to meeting the BBC's obligations to publish annual accounts.
 - (v) They 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.
30. The final factor which the Commissioner has weighed, in coming to a decision on whether the derogation applies, is whether the approval of expense statements constitutes a creative decision.
31. 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.
32. In the context of this complaint, the decision to approve expenses could be considered as a creative decision as it may relate to specific programmes or planned programmes, however, the record of this approval is not as it does not provide information relating to a specific programme but merely reflects that an expense claim has been submitted and authorised.
33. 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, the Schedule 1 derogation is not applicable to the expense statements and the BBC is a public authority with regard to this information.

Exemption: Section 12 'Cost Limit'

34. Section 12 of the Act does not oblige a public authority to comply with a request if the authority estimates the cost of complying with the request would exceed the appropriate limit. The Appropriate Limit and Fees Regulations 2004 set a limit of £450 to the cost of complying with a request for all public authorities subject to the Act not listed Schedule 1 part I. The cost is calculated at a rate of £25 per person per hour, which therefore translates to 18 hours of staff time. In estimating the cost of complying a public authority can take the following into account:

- determining whether it holds the information requested,
 - locating the information or documents containing the information,
 - retrieving such information or documents, and
 - extracting the information from the document containing it.
35. The BBC considers that it would take more than 18 hours' staff time to retrieve the information and therefore complying with the request would exceed the appropriate limit as set out in the Regulations. They explained that the complainant's request asked for details of those expenses claimed back by Andrew Marr for travel, entertainment and hospitality provided to DCMS and other government departments. He also asked for details of those expenses claimed back by Natasha Kaplinsky for travel, entertainment and hospitality provided to third parties. As there is no date limitation, the request would encompass details of all expense statements incurred by both parties whilst working for the BBC. Andrew Marr has carried out work for the BBC since 2000, whilst Natasha Kaplinsky has carried out work for the BBC since 2002.
36. The BBC also pointed out that the request was only concerned with expense details relating to third parties, it would therefore need to examine all expense claims submitted to it to determine which related to travel, entertainment and hospitality, and in the case of Andrew Marr in addition specifically related to government departments.
37. The BBC explained that as well as its electronic expense system (e-expenses) the BBC also allows for manually submitted individual invoices, that is, one claim form per item. From samples of claim forms supplied to the Commissioner, it is clear that these can be submitted whenever required, which may be as frequently as once or twice per week. Both types of expense claim are part of the programme budget but are submitted in a different way. In order to comply with the request the BBC would need to check and cross-reference both systems as well as the many hundreds of manual expense forms submitted over the years to identify the information falling within the scope of the request.
38. The Commissioner considers that in this case it is clear from the scope of the request and from the explanation provided from the BBC regarding the expenses procedure that to comply with the request would exceed the appropriate cost limit. In reaching this decision the Commissioner has considered the fact that there is no date limitation specified in the request and the request is only for specific expenses related to travel, entertainment and hospitality. Having viewed sample expense forms it is clear that each form submitted by the presenters, either electronic or manual would need to be viewed to locate information within the scope of the request. The Commissioner is therefore satisfied that to provide the complainant with all the information sought would exceed the appropriate limit. As the Commissioner is satisfied that section 12 applied to the requested information he has not gone on to consider the application of section 43.

Section 16 'Duty to provide advice and assistance'

39. Section 16 of the Act provides public authorities with a duty to provide advice and assistance. In most cases of this nature the Commissioner would expect the public authority to go back to the complainant and ask them to refine their request in order to bring it within the cost limit. However, in this case, as the BBC's position was and remains that the information is derogated; the Commissioner did not deem it appropriate in this case to ask the BBC to undertake this course of action.
40. However, as the Commissioner has found that the information requested is not covered by the derogation, he would now suggest that the BBC should contact the complainant to ask him to refine his request to bring it within the cost limit.

Procedural matters

41. 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.
42. As the BBC was relying on the Schedule 1 derogation, its refusal notice of the 22 February 2005 did not explain which exemptions it considered applied to the requested information. Technically this is in breach of the requirements of section 17 of the Act.

The Decision

41. 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 covered by the request 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 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.
42. However, the Commissioner has decided that the following aspects of the request were dealt with in accordance with the Act:
- (i) The information covered by the request is exempt from disclosure under section 12 of the Act.

Steps Required

43. The Commissioner requires no steps to be taken. However he would ask the BBC to note his comments at paragraph 40 above with regard to handling requests in accordance with sections 12 and 16 of the Act.

Right of Appeal

44. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 25th day of March 2008

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 12(3) provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

Duty to provide Advice and Assistance

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

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.”