

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 July 2010

Public Authority: British Broadcasting Corporation
Address: 2252 White City
201 Wood Lane
London
W12 7TS

Summary

The complainant requested information relating to the BBC's total taxi spend over the previous financial year and to the BBC's contract and taxi spend with a ground transportation booking and management company called One Transport. The BBC provided answers to some of the requested information but withheld part of the information under section 43(2). The Commissioner has concluded that section 43(2) is not engaged. The Commissioner also found that the BBC had not met the requirements of sections 1(1)(b), 10(1), and 17(1).

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"). This Notice sets out his decision.

The Request

2. On 6 April 2009 the complainant requested the following information:

"1. Please could you provide me with a breakdown of taxi fares paid for by the BBC in the last financial year showing the total spend and the

spend by various departments. Over the same time period please state how much the BBC has spent on private hire cars.

2. In the 08/09 financial year how much money did the BBC pay to One Transport for the provision of taxis to the BBC? What proportion of the total taxi budget for the 08/09 financial year did this payment to One Transport amount to?

3. For each month of the 08/09 financial year please state (i) the amount spent on taxis by the BBC, (ii) the amount spent on taxis with one transport (sic) and (iii) the number of taxi journeys booked with one transport and (iv) the cost of the single most expensive journey booked with one transport as well as the start and finish destinations of the journey."

4. The company number for One Transport and its registered address.

5. A copy of the contract between the BBC and One Transport.

6. Copies of any instructions sent to BBC staff telling them how to book taxis through One Transport ."

3. The BBC responded on 13 May 2009. Though the BBC felt that some of this information fell outside the scope of the Act on the basis that it was information held for the purposes of journalism, art or literature, it provided the complainant with the following information:

4. Question 1 was answered in its entirety.

5. The information requested under Question 2 was withheld by the BBC. It did however comment that its response to Question 3 disclosed both the BBC spend on taxi journeys in total in the 2008/09 financial year and the total spend on taxi journeys booked through One Transport including the number of journeys booked through this service provider. However the BBC stated that whilst it held details of payments made to One Transport for the provision of the booking and management service for 2008/09 and the proportion of the total taxi budget this represented it considered this information to be exempt under Section 43(2). The BBC concluded that this information was exempt under section 43(2) as likely to be prejudicial to the commercial interests of the BBC and the supplier:

"Such a disclosure would reveal valuable pricing information not only to the suppliers' potential and existing customers, but also to their competitors which may then have an impact on the charges made to the BBC. "

6. Question 3 was partly answered, except that for Question 3 (i) the BBC's response did not include the fees paid to One Transport for the provision of the booking and management service which the BBC claimed was also exempt under section 43(2). The BBC did not disclose the single most expensive taxi journey as it stated that it was programme related and outside the scope of the Act.
7. Question 4 was answered in full.
8. Question 5 was not provided other than to explain who the contract was held with and that it existed.

A redacted copy was offered to the complainant with any provisions of a commercially sensitive nature withheld. It would appear that the offer of the redacted copy was not accepted as the complainant went on to request a review of the BBC's decision to withhold the information covered by question 2.

9. The requested information regarding question 6 was provided in full.
10. In its letter of 13 May 2009 the BBC also outlined its public interest test in favour of disclosure as transparency; accountability; openness and honesty. The arguments in favour of withholding the information were commercial sensitivity; maintaining a strong bargaining position to ensure that the licence fee is spent effectively; and the need to ensure that the competitive position of companies was not disadvantaged by dealing with the BBC. These reasons, it was maintained, outweighed the arguments for disclosure.
11. The complainant requested an internal review on 15 May 2009 but confined his appeal to the unanswered element of Question 2, namely, the fees paid by the BBC to One Transport for the booking and management service. He did not feel that the information was subject to the section 43(2) exemption as the contract had already been signed and he cited *John Connor Press Associates Ltd v the Information Commissioner (EA/2005/005)* in support of the argument that clear evidence needed to be produced that its interests would be prejudiced. He additionally stated that it was anti-competitive not to let other potential bidders know what the price of the current contract was.
12. On 26 June 2009 the BBC provided the complainant with its internal review response upholding its original decision to withhold the requested information on the basis of section 43(2). The reviewer had discussed the principles of remuneration with the Procurement Department at the BBC and reached his decision as a result of this

discussion. It stated that a transactional model had been used and the reviewer felt that to disclose the requested information would, in effect, be providing One Transport's pricing structure to its competitors or their pricing structure regarding the BBC. This would undermine both One Transport and the BBC's negotiating tactics in a competitive market. Finally the reviewer concluded that he may have "erred on the side of the information being disclosed" had a fee-based model been in operation where a lump sum formed part or all of the remuneration for providing the service as the information would have been less commercially sensitive. The Internal Review emphasised that the tender was carried out fairly and there was a periodical retendering process which proved due diligence from the BBC as part of its responsibility to the Licence Fee payer.

The Investigation

Scope of the case

13. On 14 July 2009 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 points:
- That he did not believe that the section 43(2) exemption applied to Question 2 of his request, namely, how much the BBC pays One Transport for its booking and management service and the proportion of the total taxi budget for the 08/09 financial year this payment amounted to
 - That, even if it did apply, the public interest lay in disclosing the requested information as the BBC needed to prove that it was providing value for money

It was evident from the Commissioner's correspondence with both parties that both the complainant and the BBC had interpreted the reference in question 2 to "how much money did the BBC pay to One Transport for the provision of taxis to the BBC?" to refer to the fee paid to One Transport for the provision of the management and booking service. The Commissioner has therefore applied this same interpretation.

14. Although not referred to by the complainant, the Commissioner has also considered the BBC's compliance with the requirements of sections 1, 10 and 17 of the Act.

Chronology

15. On 9 December 2009 the Commissioner wrote to the BBC outlining his intention to determine whether the exemption at section 43(2) was correctly applied with regard to the fee the BBC pay to One Transport for the booking and management service. The Commissioner asked to look at the withheld information to assist him with his investigation.
16. The Commissioner asked the BBC to answer certain points regarding the withheld information. Having quoted *Derry Council v Information Commissioner* (EA/2006/0014), the Commissioner went on to state that he did not consider it appropriate to take into account speculative arguments advanced by public authorities about how prejudice may occur to third parties, in this case, One Transport. He asked the BBC a number of questions to assist him in determining whether the BBC had correctly applied section 43.
17. He wrote to the complainant on the same day to outline the scope of the case stressing that he was confining his investigation to the complainant's request as to how much the BBC pays to One Transport for its booking and management service.
18. The BBC was asked to provide a response by 15 January 2010. After several emails and telephone calls asking for a response, a final deadline of 5 February 2010 was given. The BBC was subsequently served with an Information Notice on 15 February 2010 which gave it 28 days to respond.
19. On 5 March 2010 the BBC provided its response to the Commissioner. This correspondence contained the withheld information concerning the payments made to One Transport for the provision of its service to the BBC and the proportion of the total taxi spend for the 2008-2009 financial year that the payment to One Transport amounted to. The BBC also gave the following answers to the Commissioner's questions:
 - Disclosure of the requested information "would be likely to" prejudice the commercial interests of the BBC and its supplier, One Transport
 - It was confirmed that the BBC had consulted One Transport and that the latter had confirmed that it believed the information to be commercially sensitive though there was no written confirmation of this view at that point
 - The Commissioner had asked why a transactional model which, it had been claimed was the basis of the remuneration from the BBC to One Transport, was more commercially sensitive than a fee-based model. However, the BBC confirmed in this letter that

the pricing structure is “a combination of both a transactional and fee based model” but believed that either model was commercially sensitive. It was stressed that, as the BBC was One Transport’s main customer, disclosure would undermine any future negotiations with other potential customers

- The BBC informed the Commissioner that the original contract was awarded on 1 September 2006 and was for a 3 year term with the option of two 1 year extensions
- If current rates were known it might cause companies in the future to pitch their prices just below these rates during the retendering process
- The BBC then speculated on whether this would result in an unsustainable business model

20. In the same response the BBC put forward its reasons for believing that the disclosure of the requested information would be commercially sensitive to itself.

21. The commercial sensitivity of the disclosure of the requested information to One Transport was also outlined by the BBC.

22. On 12 March 2010 the Commissioner asked for clarification as to whether One Transport had completed a document on the BBC’s website entitled *Freedom of Information Guidance for Suppliers and other Contractors*. In section 6 Consultation it states that “...the BBC will refer to this summary of ‘designated information’ when considering a FOIA request”. In asking for clarification the Commissioner was attempting to establish what One Transport had considered to be prejudicial to its commercial interests at the outset whilst noting the BBC’s disclaimer that:

“... it will not disclose such information pursuant to a Freedom Of Information Act request except to the extent that the BBC reasonably believes that such disclosure is required under the FOIA”.

23. On 18 March 2010 the Commissioner wrote to the BBC asking for clarification on certain points.

24. The Commissioner wrote again to the BBC on 6 April 2010 expressing the view that he needed to understand One Transport’s model for calculating the fee it charges in order to determine the likelihood of prejudice.

25. The BBC provided an approximate figure for the booking and management fee for each taxi journey that it felt could be calculated by the complainant or a competitor by using the requested information

along with information already disclosed by the BBC. The Commissioner, however, questioned the BBC about how an accurate figure could be arrived at without the factoring in of other information.

26. The BBC responded on 22 April 2010.

Analysis

Substantive Procedural Matters

Exemptions

Section 43

27. The BBC confirmed to the Commissioner that it was seeking to rely on section 43(2) regarding the withheld information:

“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).”

28. The full text of section 43 can be found in the Legal Annex at the end of this Decision Notice.
29. The Commissioner accepts that the BBC is a publicly owned company engaged in commercial activities. The commercial activity is the contract for the provision of taxis and the prejudice being claimed relates to that specific activity. As part of those commercial activities the BBC requires the provision of services and awards contracts accordingly. Therefore he considers that the information in question falls within the scope of the exemption.
30. The Commissioner has then gone on to consider whether the disclosure of the information would, or would be likely to prejudice, the commercial interests of any person.
31. The BBC informed the Commissioner that it believed that disclosure of the withheld information would have been likely to prejudice its own commercial interests and those of One Transport.
32. In reaching his decision on the question of prejudice the Commissioner has considered the comments of the Tribunal in *Hogan and Oxford City Council v The Information Commissioner* (at paragraph 30)

"Second the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoronton has stated "real, actual or of substance " (Hansard HL (VOL. 162, April 20, 2000, col. 827) If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

Lord Falconer clarified the strength of prejudice necessary and that prejudice must be "real, actual or of substance".

33. The Commissioner's view of this is that the choice of the term "prejudice" is important to consider in this context. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
34. In the case of *John Connor Press Associates Limited v The Information Commissioner*¹ the Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (paragraph 15) This interpretation follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office* [2003]. In that case, the view was expressed that, "Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."

In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

35. The Commissioner has also taken into account the view of the Tribunal in the same case that, "the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction" (paragraph 15). However, the Tribunal noted that certain factors should be considered in such cases, stating that whether or not prejudice was likely, "would depend on the nature of the information and the degree of similarity between the two transactions".

¹ Found at http://www.informationtribunal.gov.uk/Documents/decisions/connorpress_v_infocommissioner.pdf

36. The Commissioner's view, taking into account the Tribunal's comments in *Hogan* (see paragraph 25), is that there is an evidential burden on the public authority to be able to demonstrate that:
- the nature of the prejudice claimed can be linked back to the disclosure of the information in question
 - the likelihood of the prejudice occurring meets the test for the level of likelihood claimed.
37. The Commissioner acknowledges that it is not always possible to provide conclusive evidence of what will happen in the future. In *England v ICO and London Borough of Bexley* (LBB) the Tribunal stated that it was impossible to provide "evidence of the causal link between the disclosure of the list [of empty properties] and the prevention of crime. That is a speculative task, and as all parties have accepted there is no evidence of exactly what would happen on disclosure, it is necessary to extrapolate from the evidence available to come to the conclusion about what is likely." ²
38. The Commissioner has therefore considered the potential prejudice to both One Transport and the BBC in turn.

Prejudice to the commercial interests of the BBC

39. The BBC explained that the contract with One Transport was initially awarded on 1 April 2006 but negotiations between the parties meant that terms were not agreed and signed until 1 September 2006. It is a 3 year contract with the option of two 1 year extensions. At the point of extension of the contract on 1 September 2009, the option to extend the contract was taken up by the BBC and all terms and conditions were extended to the new contract date. Therefore the contract is due for formal review or re-tendering later in 2010. However it would appear that the original date of 1 April 2009 had been left on the contract as the date beyond which the information would not be considered exempt.
40. The BBC also referred to its obligations to adhere to the Public Contracts Regulations 2006 which meant that "pricing and profit margins" could not be disclosed. If the BBC disclosed the total figure during 2008-2009 for how much money it paid to One Transport and the proportion of the total budget that it represented in that financial year it argued that this would result in the disclosure of One Transport's "pricing and profit margins" (for the reasons given in

² Found at

<http://www.informationtribunal.gov.uk/Documents/decisions/MrCPEnglandandLonBoroughofBexleyvInfoComm10May2007.pdf>

paragraphs 66 and 67 the Commissioner does not accept that the information would reveal pricing and profit margins).

41. Information pertaining to a major proportion of the current contract prices, particularly any form of price breakdown, will remain valuable to potential suppliers of ground transportation services to the BBC at least until those new contracts are finalised and indeed beyond contract signature. It therefore believed disclosure of the information would undermine its negotiating position in any subsequent contract re-tendering, and potentially the willingness of bidders to provide details of its transactional costs as part of their transparency. As a result it could put the BBC at a disadvantage in trying to obtain best value in future tendering exercises. It considered that it would also increase the pressure just on price when there were other considerations in awarding a contract. This, in turn, could have an effect on the BBC's long term strategy, business support and future market opportunities.
42. The BBC further argued that disclosure of the requested information would allow the complainant to 'reverse engineer' the figures he required (for the reasons clarified in paragraph 56). It explained that this was because, as the BBC had already provided the complainant with the BBC's total taxi spend, he would be able to apply the proportion of the total taxi spend to work out the first part of his request i.e. in 08/09 financial year how much money did the BBC pay to One Transport for the provision of taxis to the BBC. It argued that disclosure of this information would be commercially sensitive to the BBC and One Transport as this would allow the complainant to work out One Transport's pricing and profit margin and in turn lead to the disclosure of its commercial model.
43. Disclosure of One Transport's commercial model would minimise One Transport's ability to resell elsewhere at a greater margin and this could impact on its ability to deliver further efficiencies to the BBC.
44. BBC staff might challenge the need to use One Transport to avoid incurring the fees involved. If the booking and management fee is made known, individuals may perceive that it is cheaper to book directly with a taxi company to avoid incurring the fee. The BBC argued that this could damage the benefits of using One Transport as it considers this service is substantially more efficient than the previous costs of managing this service internally by the BBC.
45. If the information was disclosed the BBC could find itself priced out of the market. The BBC argued that this presents a serious risk, as one of the most high profile users of cabs in Europe. One Transport provides

- related services which allow the BBC to consider efficiencies in other areas, for example, the BBC's commitment to reduce transport emissions. It would not be possible for the BBC to report on these savings itself, and an in-house system alternative would need to be purchased or developed, were One Transport no longer in business or its service provider.
46. Finally it also argued that if One Transport was to go out of business it would impact on the BBC with regard to the movement of staff or the arrival of guests. It argued that the BBC does not have the infrastructure to develop and maintain this integrated, cost saving service for itself and therefore it argued disclosure of this information also presents a significant risk of harm to both the BBC and One Transport.
 47. However, the public authority must be able to provide some evidence to extrapolate from. The Commissioner considers it unlikely that the BBC would be unable to find an alternative supplier given that it had 23 bids for the contract. The Commissioner does not accept that the BBC has provided any evidence to support its view that the likely prejudice may occur.
 48. It is the Commissioner's view that the nature of the prejudice claimed cannot be adequately linked backed to the disclosure of the information in question. The only cogent argument put forward by the BBC with regard to the likelihood of prejudice to its own commercial interests is the ability of the BBC to negotiate in a competitive market. However, the Commissioner finds this to be a generic argument unsupported by evidence. He does not believe that the BBC's negotiating tactics would be undermined in any subsequent retendering or that potential bidders would be deterred from bidding for a lucrative contract because their transactional costs might be revealed.
 49. The Commissioner has considered the BBC's arguments carefully. In the BBC's letter to the Commissioner, dated 22 April 2010, it is stated that there are a number of considerations beyond the pricing structure that the BBC considers when awarding a contract. Other relevant factors in the tendering process were listed as service, infrastructure, support, availability and innovation. Indeed in its internal review response to the complainant it stated that "for the avoidance of doubt, cost whilst important to the final decision was not the deciding factor, rather the combination of capabilities and an overall value for money comparison". Given that the BBC has stressed that just knowing a price is not the only factor in winning a contract the Commissioner does not consider that the release of the requested information could impact on the commercial interests of the BBC in any meaningful way. Reinforcing

the Commissioner's view is his opinion that he is not convinced that anything other than an approximate figure can be reached from the disclosure of the requested information and that it is not possible to determine a booking and management fee that would be anything other than speculative from the release of the information.

50. The Commissioner has also taken into account the specific nature of the tender requirements when the contract was first awarded in 2006. In its internal review response the BBC commented that the award of this work included a transition from a service in part carried out by the BBC itself in booking taxis, the infrastructure and associated roles. Any future bid will not have to take into account these transitional costs. Therefore the Commissioner is not persuaded that any future bidders could make much use of the price details contained in a contract awarded 4 years ago and with different requirements.
51. The Commissioner is also aware of the BBC's position as a publicly funded body, supported by the licence fee payers. The Commissioner does not accept that release of the information requested will impact on the BBC's ability to provide value for money whilst maintaining business support and competitiveness. Neither is he persuaded that the release of the requested information would have an impact on business strategy.
52. The Commissioner has not, in his view, been provided with sufficient evidence to support the application of section 43(2) to the information which has been withheld concerning the commercial interests of the BBC. He is not persuaded by the BBC's argument that disclosure of this information would have been likely to have any of the prejudicial effects cited.

Prejudice to the Commercial Interests of One Transport

53. The Commissioner considers that paragraphs 30-34 are also applicable to the commercial interests of One Transport.
54. The BBC explained that One Transport is a relatively new subsidiary of Radio Taxis and the BBC is One Transport's main customer. It has a limited number of customers with only a few very small accounts and the business is just starting to expand its portfolio. As a result the BBC argued disclosure of the requested information would immediately put it at a disadvantage because it would allow competitors to gain a commercial advantage of knowing where they needed to pitch their prices.

55. The BBC argued that it is One Transport's pricing infrastructure which underpins its business and as such, this information is highly commercially sensitive. Disclosure of this information is likely to place One Transport at a significant disadvantage when negotiating with existing and potential clients for future work. It argued that the ground transportation market is highly competitive with the fee offered playing a crucial role in determining the choice of supplier.
56. The BBC argued that with the knowledge already gained from a previous request for information and further information that would be supplied to anyone tendering at the next re-tendering process, if the complainant was provided with the withheld information he could "calculate a close approximation of the details of the transactional model" which would be commercially prejudicial to One Transport. Furthermore it added that the complainant could use the requested information and other information already in the public domain to calculate an approximate value of the fee for each taxi journey. However the BBC undermined its own argument by suggesting that any such calculation would be "misleading" due to the different methods of booking (the Commissioner is cautious about accepting arguments that information should be withheld on the basis that it is "misleading")
57. The BBC confirmed that the complainant would not be able to break down the requested information to the specific booking fee value. However, the BBC argued that even a close approximation might result in a commercial advantage. Once in possession of pricing information overhead costs for services of this nature are limited in scope and it would enable them to "achieve a close approximation of achievable profit margin".
58. Disclosure of its commercial model with the BBC would in effect minimise its opportunity to re-sell elsewhere at a greater margin. It would also enable its competitors to understand more about One Transport's pricing strategy and gain insight as to the amount One Transport may bid for future contracts. It argued that One Transport would not be in the same position as its competitors.
59. The BBC argued that the commercial prejudice inflicted on One Transport is likely to be accentuated by virtue of the asymmetric disclosure of the confidential pricing information. The release of the information would enable One Transport's competitors to understand more about One Transport's pricing strategy and gain insight as to the amount One Transport may bid for future contracts (both BBC and non-BBC) One Transport would not be in possession of the same information regarding its competitors.

60. Fair competition could also be hindered and, as the BBC is subject to the Public Contracts Regulations 2006, the release of the pricing and profit margins could put the company at a disadvantage when retendering.
61. The uncertainty that confidential information in contracts would not be kept confidential would be likely to have an effect which could be reflected in any bids from companies when the contract is renewed or replaced.
62. Companies may not wish to continue their commercial relationship with an entity subject to FOIA because sensitive commercial information about them may be disclosed
63. In the view of the Commissioner, those contracting with public authorities must expect a somewhat robust approach to the issue of commercial sensitivity. As he recorded in his Decision Notice FS50063478, which dealt with another case in which the section 43 exemption had been asserted:

"The Commissioner is of the view that those who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about the details of those activities than had previously been the case prior to the Act coming into force."

64. Furthermore, when considering prejudice to a third party's commercial interests the Commissioner must be convinced that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must usually be based on concerns put forward by the third party, whether during the time for compliance with a specific request or as a result of prior consultation, and the relevant arguments are those made by the third party itself.
65. Though concern was raised by One Transport that disclosure would place it at a commercial disadvantage as it would allow its customers and competitors alike to see its charges, most of the arguments put forward were those of the BBC. Indeed at the time of writing to the Commissioner on 5 March 2010 the BBC confirmed that there was no written correspondence between the BBC and One Transport on this particular matter. Although it did subsequently provide the Commissioner with a copy of an email from One Transport to the BBC, dated 24 March 2010, confirming that it believed disclosure of a commercially confidential bid price would seriously prejudice its commercial interests it did not explain how it would do so. The

Commissioner finds that the argument put forward by One Transport is unconvincing. It would not be possible to ascertain from the disclosure of the requested information, even with additional information in the possession of the complainant at the time of the request, a detailed and accurate price breakdown. The Commissioner is not persuaded that simply knowing a price will be sufficient to jeopardise the contractor's commercial interests.

66. The Commissioner also notes that the BBC has now clarified that contrary to what the complainant was advised in its internal review response, a combination of a transactional and fee based model was deployed with One Transport for the management and booking fee element. He accepts that in providing the complainant with the overall fee he will be able to calculate an approximate fee per journey. However he is not persuaded that disclosure of this information would reveal the actual pricing mechanism used by One Transport to arrive at this approximate figure. The Commissioner does not accept that the approximate figure would prejudice One Transport's commercial interests. The BBC has repeatedly emphasised that the complainant has not sought the pricing mechanism/model and the Commissioner understands this. However the Commissioner considers that it is this precise information which is of most significance and of real commercial sensitivity.
67. The information if disclosed would not give any indication as to how it was calculated nor is it broken down into component parts. In the Commissioner's view, in order for One Transport's competitors to be able to predict with any certainty the price it might include in tenders for future similar contracts they would need to be able to identify the pricing mechanism or model that One Transport was using, assuming that it was using the same, or similar mechanism or model for future tendering exercises. The Commissioner does not therefore accept that disclosure of the booking and management fee would identify One Transport's pricing mechanism or model.
68. The Commissioner also notes that at the time of the request the pricing information was approximately two and a half years old. He is aware that the market for this work is highly competitive. The BBC highlighted in its internal review response to the complainant that it originally received 23 bidders for the tender which were subsequently shortlisted to 7 in the final decision process. The Commissioner notes that the BBC has indicated that it considers the crucial element is the booking and management fee as other overhead costs for services of this type do not vary greatly and are very limited in scope. However the Commissioner is not convinced the fees charged in this case would necessarily be replicated in any future tenders, particularly given the

unique element of the original tender in having to take into account the transitional costs of outsourcing a service previously provided by the BBC in-house. Pricing structures will fluctuate with market conditions and resources available, therefore even if contracts are re-tendered later this year it does not necessarily follow that the same value will be achieved. Requirements change and costs fluctuate. The Commissioner does not therefore accept that disclosure would be likely to prevent One Transport from being able to compete fairly in the future for other contracts.

69. The Commissioner has not, in his view, been provided with sufficient evidence to support the application of section 43(2) to the information which has been withheld concerning the commercial interests of One Transport. He does not therefore accept that disclosure would have been likely to have had the prejudicial effect on One Transport's commercial interests as suggested by the BBC.
70. Having considered the arguments presented to him by the BBC, the Commissioner is of the view that there is insufficient evidence to support the application of section 43(2) to the withheld information. He has therefore decided the exemption is not engaged and the information should have been disclosed.
71. As the Commissioner has concluded that the exemption is not engaged, he has not gone on to consider the public interest test in this case.

Procedural Requirements

Section 1(1)(b): duty to provide information

72. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out above the Commissioner is of the view that the requested information ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the public authority failed to comply with section 1(1)(b) of the Act.

Section 10(1): time for compliance

73. Section 10 of the Act states that a public authority must comply with section 1(1) promptly and in any event not later than twenty working days after the request has been received.

As the Commissioner finds that the public authority wrongly withheld the requested information from the complainant, it follows that the public authority failed to communicate this information to the complainant within the statutory time limit. Therefore the Commissioner finds that the public authority failed to comply with section 10(1) of the Act.

Section 17: refusal of request

74. 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.

The Commissioner notes that, in taking more than 20 working days to issue its refusal notice, the BBC was clearly in breach of the statutory timescale. This constitutes a breach of section 17(1).

The Decision

75. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

The Commissioner has determined that the BBC was wrong to rely on the provisions of sections 43(2) of the Act to withhold the requested information concerning how much the BBC pays to One Transport for booking taxis through them.

In consequence of this breach, the BBC also breached section 1(1)(b), and 10(1) of the Act in failing to provide this information to the complainant in response to his request. The Commissioner also finds the BBC in breach of section 17(1).

Steps Required

76. The Commissioner requires the BBC to take the following steps to ensure compliance with the Act:

The BBC is required to provide the complainant with the requested information regarding how much the BBC paid to One Transport for the provision of taxis in 2008/2009 (the fee for the provision of the booking and management service) and what proportion of the total taxi budget for 2008-2009 this amounted to.

77. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Right of Appeal

79. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 21st day of July 2010

Signed

**Lisa Adshead
Group Manager**

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

Legal Annex

1 General right of access to information held by public authorities

(1) 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.

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

(3) 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.

(4) 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.

(5) 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).

(6) 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”.

10 Time for compliance with request

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be

disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) In this section—

“the date of receipt” means—

(a)

the day on which the public authority receives the request for information, or

(b)

if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

17. Refusal of request –

(1) 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.

(3) 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

43 Commercial interests

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

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

(3) 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).