

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 March 2021

Public Authority: British Broadcasting Corporation (BBC)

Address: BC2 A4 Broadcast Centre
201 Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information relating to the recruitment and selection process for a particular role, gender break down of roles within a particular department and complaints. The BBC confirmed that it did not hold some of the requested information under section 1(1)(a) FOIA, it refused to comply with some parts of the request under section 12 FOIA as it would exceed the cost limit to do so and it withheld some of the requested information under section 40(2) FOIA. It provided some information originally withheld under section 40(2) FOIA to the complainant during the course of the Commissioner's investigation (specifically the information requested at part 8 of the request).
2. The Commissioner considers that the BBC correctly withheld information under section 40(2) FOIA. It correctly refused to comply with some parts of the request under section 12 FOIA and on the balance of probabilities, the remaining information requested is not held under section 1(1)(a) FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 14th, 15th and 16th June 2020, the complainant made identical requests for the following information under the FOIA:

1) *The applications of applicants who were allowed to sit a test for the Broadcast Journalist role, which was advertised internally on 30 November 2016 at the Arabic Radio department, which is part of the World Service. This information is found at the Arabic HR Department, Arabic Radio and Legal Department. This means copies of the application forms for each of the candidates whose applications were found successful and allowed to the next stage of the process, indicating the gender of each candidate and their BBC job title/ position at the time when making the application.*

2) *Please supply information and confirm if there were successful applications (i.e. allowed to the next stage) from any female broadcasting assistants or any other females who were not journalists at the time when their applications were made and found successful.*

3) *The test papers of applicants who were allowed to sit a test for the Broadcast Journalist role, which was advertised internally on 30 November 2016 at the Arabic Radio department, which is part of the World Service. This information is found at the Arabic HR Department, Arabic Radio and Legal Department. This means copies of test papers for each of the candidates who were allowed to sit the test, indicating the gender of each candidate and their BBC job title/ position at the time when taking the test.*

4) *Please confirm if any female broadcasting assistants rather than journalists were allowed to take the test.*

5) *Please confirm if any female broadcasting assistants rather than journalists were interviewed.*

6) *The discussion and individual notes, which the interviewers used to discuss candidates applications and tests for the Broadcast Journalist vacancy, which was advertised internally on 30 November 2016 at the Arabic Radio department, which is part of the World Service.*

7) *All recorded information of any type whether written or otherwise (emails, linked-in instant chat messages, mobile phone messages or voice calls since you record all your telephone calls) that was received or initiated by HR staff and Arabic Radio regarding this vacancy*

8) *The gender breakdown of Arabic radio journalists and presenters on 30 November 2016 from staff rota as well as November 2017 and January 2020*

9) *The number of complaints received against Arabic Department managers since January 2008."*

5. The wording of the request quoted by the BBC is slightly different to the wording of the request quoted by the complainant. However the BBC has compared the wording and has confirmed that it would make no

material difference to the information covered. It confirmed that the wording it holds is the request received and this has therefore been quoted above.

6. On 7 July 2020 the BBC responded. It applied section 40(2) FOIA to withhold the information requested at parts 1, 2, 6 and 8 of the request. It confirmed it did not hold the information requested at parts 3, 4 and 5 under section 1(1)(a) FOIA. Finally it said it would exceed the cost limit under section 12 FOIA to comply with part 7 and 9 of the request. It provided advice and assistance in accordance with its obligations under section 16 FOIA in relation to parts 7 and 9 of the request.
7. The complainant requested an internal review on 23 July 2020. In its internal review dated 12 August 2020 the BBC upheld the application of section 40(2) FOIA to parts 1 and 3 of the request.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way the whole of his request for information had been handled. He said that he had not received the BBC's internal review.
9. The Commissioner asked the BBC to resend its internal review to the complainant. The BBC resent a copy of the internal review and the complainant subsequently confirmed to the Commissioner once this had been received. The complainant then provided the Commissioner with further submissions in support of his complaint.
10. The Commissioner asked the BBC to clarify whether it held information in relation to part 3 of the request as in its original response it confirmed this information was not held but in the internal review it applied section 40(2) FOIA to this part of the request.
11. The BBC has now clarified that it does not hold information relating to unsuccessful candidates in relation to part 1 of the request. It only holds this information in relation to successful candidates. It withheld the information relating to successful candidates under section 40(2) FOIA. It confirmed that information falling within the scope of parts 2-6 of the request was also not held. It applied section 12 FOIA to parts 7 and 9 of the request. It has now disclosed the information requested at part 8 which was originally withheld under section 40(2) FOIA.
12. The Commissioner has considered whether the BBC was correct to confirm it does not hold information in respect of part 1 of the request under section 1(1)(a) FOIA in relation to unsuccessful candidates and in

respect of parts 2 -6 of the request, whether the BBC was correct to refuse to comply with parts 7 and 9 of the request under section 12 FOIA and finally whether the BBC has correctly applied section 40(2) FOIA to withhold the information requested at part 1 of the request relating to successful candidates. The Commissioner has scoped part 8 of the request out of her investigation as the BBC withdrew its application of section 40(2) FOIA and disclosed this information to the complainant.

Reasons for decision

Part 1 (in relation to unsuccessful applicants) and parts 2-6 of the request – Section 1

13. Section 1(1)(a) of FOIA states that, "Any person making a request for information to a public authority is entitled – to be informed in writing by the public authority whether it holds information of the description specified in the request". Section 1(1)(b) of FOIA states that, "If that is the case, to have that information communicated to him".
14. The BBC explained that as part of responding to this ICO complaint, the BBC's Information Rights team liaised with BBC HR. BBC HR has in turn liaised with BBC Talent and Resourcing.
15. Upon further investigation, HR advised that information relevant to parts 1 (in relation to unsuccessful candidates) and 2– 6 of the request inclusive is not held. This is because, in accordance with the BBC's Records Management Policy and Corporate Retention Schedule, recruitment records such as applications, shortlisting and recruitment grids, and any tests, are only retained for a period of 6 months. This information is held for longer in respect of successful candidates only, where the Corporate Retention Schedule sets out a retention period of cessation + 6 years.
16. Part 1 of the request relates to the "applications of applicants who were allowed *to sit a test for the Broadcast Journalist role, which was advertised internally on 30 November 2016 at the Arabic Radio department*". In its decision and internal review decision, the BBC found this information to be exempt under section 40(2) of the FOIA. However, upon further investigation this information is not held in relation to unsuccessful candidates, in accordance with the BBC's Corporate Retention Schedule. This information, if held, would be held electronically by Talent and Resourcing, and the applicable retention period of information of this nature in this system is 6 months. The job the complainant has requested information about was advertised in

November 2016, and the retention period of 6 months for information of this nature is therefore expired.

17. This information would have existed at the relevant time, and for a period of 6 months thereafter. The BBC said that even if this information was held at this time, it would be exempt from disclosure under section 40(2) of the FOIA, as job applications are personal to the applicants and provided in confidence to the BBC. Indeed section 40(2) FOIA has been applied to the information held for successful candidates and is addressed later in this Notice.
18. The BBC said that this reasoning also applies to parts 3 and 6 of the request, which relates to "test papers" and any notes made by interviewers. The retention period for any recruitment tests is 6 months, and similarly, the retention period for any shortlisting and interview grids (which is what it understands part 6 of the request to relate to) is held for a period of 6 months only.
19. Parts 2, 4 and 5 of the request, which asks for information to confirm "*if there were successful applications (i.e. allowed to the next stage) from any female broadcasting assistants or any other females who were not journalists*", "*if any female broadcasting assistants rather than journalists were allowed to take the test*", and "*if any female broadcasting assistants rather than journalists were interviewed*", is premised on the information requested in parts 1, 3 and 6 of the request existing. Therefore, this information is also not held.
20. Based upon the BBC's submissions, the fact it has confirmed that in accordance with its retention schedule the requested information would only have been held for 6 months following the relevant recruitment campaign in 2016, and that the request was made in 2020 the Commissioner can only conclude on the balance of probabilities, the information requested at part 1 (in relation to unsuccessful candidates) and parts 2-6 is not held under section 1(1)(a) FOIA.

Parts 7 and 9 of the request - Section 12

21. Section 12 of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate cost limit to:
 - either comply with the request in its entirety, or
 - confirm or deny whether the requested information is held.
22. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments

and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request - 24 hours work for central government departments; 18 hours work for all other public authorities. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:

- (a) determine whether it holds the information
- (b) locate the information, or a document which may contain the information
- (c) retrieve the information, or a document which may contain the information, and
- (d) extract the information from a document containing it.

The appropriate limit for the BBC is £450 or the equivalent of 18 hours work.

23. The BBC explained that in part 7 of the request, the complainant has asked for "All recorded information of any type whether written or otherwise (emails, linked-in instant chat messages, mobile phone messages or voice calls since you record all your telephone calls) that was received or initiated by HR staff and Arabic Radio regarding this vacancy".
24. This is a very broad request, and lacks the requisite specificity to enable processing. It captures any and all types of correspondence initiated by the Arabic Radio team or HR regarding this vacancy, which would include:
 - a. All correspondence relating to the approval of funding for this position, which would capture correspondence that may be held by individuals within the broader division of News and Current Affairs, HR as well as the Arabic Radio team.
 - b. All correspondence relating to the advertising of this vacancy. This is likely to capture correspondence internally within the Arabic Radio team, as well as correspondence between Arabic Radio and HR.
 - c. Correspondence between HR and Talent and Resourcing, including correspondence about administrative arrangements such as the panel, and interview times and dates, and the allocation of these slots.
25. As the position the complainant has requested information about was advertised in 2016, and individuals may have left the BBC since this

time, searching and collating any information is also likely to involve the assistance of the BBC's IT department, to carry out searches of archived BBC inboxes for such individuals.

26. Such a process is likely to be made more onerous given the broad nature of this part of the request.
27. Part 9 of the request asks for "The number of complaints received against Arabic Department managers since January 2008".
28. This part of the request is also very broad, particularly as it spans 12 years.
29. HR advised that historical information, until 2016, is recorded on a HR case database which logs formal cases dealt with under the BBC's bullying and harassment, grievance and disciplinary policies, regardless of the outcome of the case, where the complainant(s) and/or the person(s) against whom the complaint was made, were BBC employees.
30. HR advised that this database is not a comprehensive or detailed record of all cases; rather, it is a means of logging and monitoring the number and type of cases under broad headings. Further details of individual cases are held on employee files. In addition, the database only records formal cases dealt under the policies mentioned above. There may also be informal complaints or cases, and again, individual personnel files would need to be consulted to confirm this. As such, for the relevant period of time until 2016, HR would need to consult individual personnel files to respond to this part of the request.
31. The Arabic Radio team is also an output team within BBC News and Current Affairs. In the circumstances, editorial complaints made against managers relating to the output of the Arabic Radio team could also be captured within the scope of this broad request in part 9. Information relevant to editorial complaints would be held by the BBC's Audience Services as well as the BBC's Editorial Policy and Standards team, and again, searches within the databases held by these teams would need to be carried out for a period of 12 years.
32. To provide an estimate of processing time, HR considered part 9 of the request and confirmed that in the past two years, between 1 February 2019 and now, there were 468 complaints recorded in its system when the dataset is filtered by 'World Service Languages'. This is the lowest tier that can be used to narrow the dataset. The dataset cannot be filtered any further by 'Arabic Radio', or even the 'Arabic Department' which Arabic Radio sits under. HR advised that each complaint file would need to be reviewed manually to ascertain the details of the complaint, and to confirm whether or not it was 'against ... managers'. HR

estimates that it would take ten minutes per file for the review, and this would be a conservative estimate as the roles of each individual would need to be double-checked and reconciled to determine if they were a manager or not at the time of the complaint.

33. Therefore, a conservative estimate to search for relevant complaints held in the last two years to 1 February 2019, accounting for ten minutes per file for 468 files, is 4,680 minutes. This equates to 78 hours. The BBC argued that this is a conservative estimate which only includes searching complaints made in the last two years, not the last 12 years as the requester has sought. This estimate is bound to increase significantly when factors like changes in the systems and the way information was recorded over the past 12 years is taken into account. Similarly, the processing time would again increase significantly if part 7 of the request were factored in, but given the lack of specificity of this part of the request, the BBC was unable to provide a meaningful estimate of processing time for part 7 due to it being very broad and diverse.
34. Given the broad nature of part 7 of the request and the fact that it dates back to a recruitment exercise in 2016 and therefore will require IT searching archived emails, the cost and time implications are likely to accumulate. This aggregated with part 9 of the request which spans a 12 year period and in relation to which HR would be required to search individual HR files, the Commissioner is satisfied that it would exceed the cost limit to comply with these parts of the request.

Section 16

35. Under section 16 FOIA the BBC is obliged to provide the complainant with advice and assistance to help enable the complainant to refine the request to fall within the cost limit or explain why this would not be possible.
36. In its initial decision, the BBC noted that it was mindful of its section 16 duty to provide advice and assistance, and suggested that part 9 of the request may be narrowed by limiting the information requested to the last two financial years. The BBC also flagged that, in doing so, this may attract the application of the personal data exemption under section 40(2). Given the lack of specificity in part 7 of the request about what information is actually requested, and where searches should be carried out, it is not possible to provide meaningful advice on how part 7 may be narrowed.
37. In this case, as the BBC has provided the complainant with advice and assistance in relation to part 9 of the request and confirmed it is unable

to provide any meaningful advice and assistance in relation to part 7 of the request, it has complied with its obligations under section 16 FOIA.

Part 1 of the request (in relation to successful applicants) – Section 40(2)

38. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
39. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
40. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
41. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

42. Section 3(2) of the DPA 2018 defines personal data as:-

“any information relating to an identified or identifiable living individual”.

43. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
44. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

45. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
46. The withheld information consists of the resumes, job applications and interview grids for the successful candidates, and the BBC considers this clearly relates to specifically identifiable and living individuals.
47. In the circumstances of this case, the Commissioner is satisfied that the information relates to identifiable data subjects. This information does therefore fall within the definition of 'personal data' in section 3(2) of the DPA.
48. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
49. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

50. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

51. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
52. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) GDPR

53. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
54. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

55. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

(i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

(ii) Necessity test: Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;

(iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

56. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

57. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to

² 1 Article 6(1) goes on to state that:- "Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks". However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) provides that:- "In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

58. In this case the requester has a personal interest in disclosure of the withheld information to ensure the BBC has followed its guidance and procedures in relation to a particular recruitment exercise.
59. The BBC recognises that there is a legitimate interest in accountability and transparency in its hiring processes.
60. The Commissioner does consider that there is a legitimate interest in disclosure of information which may hold the BBC to account and promotes transparency in relation to its recruitment procedures.

(ii) Is disclosure necessary?

61. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
62. In this case the BBC has argued that the legitimate interests in accountability and transparency are addressed through open and transparent recruitment processes whereby roles are advertised and interview feedback is provided. In addition, the BBC's Equality Information Report which is published annually contains information about the number of new joiners, internal movers, and leavers distributed by various factors, such as gender and age.
63. The Commissioner considers that the information published by the BBC in its annual Equality Information Report goes a good way to meeting the legitimate interests identified in this case. However disclosure of the information relating to the successful applicants in the particular recruitment exercise specified at part 1 of the request would further meet the legitimate interests identified and cannot therefore be said to be unnecessary.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

64. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the BBC

would disclose the withheld information to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

65. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that confirmation or denial may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern; and
 - the reasonable expectations of the individual.
66. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that the BBC would not disclose the withheld information. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
67. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
68. In this case the BBC has argued that employees would not reasonably expect their confidential job applications, any interview notes, and even the fact that they have applied for a particular role and the position they were in at the time of such an application, to be disclosed to a specific requester in response to a FOIA request. This is particularly the case due to the targeted nature of the request and the junior nature of the role. Such a disclosure could reasonably be expected to cause distress to the affected individuals.
69. In this case the withheld information is the resumes, job applications and interview grids for the successful candidates relating to a particular recruitment process. The Commissioner considers that the data subjects would not expect this information to be disclosed into the public domain.
70. The BBC recognised that the ICO has previously accepted that the disclosure of personal data such as job applications and interview notes

would be unfair and contravene the data protection principles, for example, FS50864052³ and FS50662159⁴.

71. The Commissioner has not been presented with any evidence in this case to persuade her that the balance would tip in favour of disclosure of the resume, job applications or interview grids of the successful applicants.
72. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is not an Article 6 basis for processing and so the disclosure of the information would be not be lawful.
73. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

³ <https://ico.org.uk/media/action-weve-taken/decision-notice/2020/2618138/fs50864052.pdf>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2013838/fs50662159.pdf>

Right of appeal

74. 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,
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Tel: 0300 1234504
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Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

75. 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.
76. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed.....

Gemma Garvey
Senior Case Officer

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