

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 May 2024

Public Authority: British Broadcasting Corporation, BBC
Address: Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant has requested emails from specific BBC staff. The BBC refused to comply with the request, citing section 12(1) (cost of compliance exceeds appropriate limit) of FOIA.
2. The Commissioner's decision is that section 12(1) applies and the BBC was entitled to refuse the request.
3. The Commissioner does not require further steps.

Request and response

4. On 31 October 2023, the complainant wrote to the BBC and requested:

"1 – All email messages from the account of Lesley Douglas between 1st November 2001 and 1st January 2009. Please include messages from all INBOX, SENT ITEMS, DELETED ITEMS, DRAFTS, as well as any other custom folders that exist.

2 – All email messages from the account of (Redacted) between 1st November 2001 and 1st January 2006. Please include messages from all INBOX, SENT ITEMS, DELETED ITEMS, DRAFTS, as well as any other custom folders that exist.

- 3 – All email messages from the account of Ric Blaxill between 1st January 2005 and 1st January 2009. Please include messages from all INBOX, SENT ITEMS, DELETED ITEMS, DRAFTS, as well as any other custom folders that exist.
- 4 – All email messages from the account of Bob Shennan between 1st January 2004 to 1st January 2011. Please include messages from all INBOX, SENT ITEMS, DELETED ITEMS, DRAFTS, as well as any other custom folders that exist.”
5. The BBC responded on 24 November 2023. It confirmed that, in line with its retention period, the inboxes of the three of the individuals named in the request had been deleted. It refused to provide the remaining inbox, citing section 12.
6. The complainant requested an internal review on 25 November 2023; they asked the BBC to confirm which inbox it held and which had been deleted.
7. The BBC provided the outcome to its internal review on 23 January 2024. It confirmed it only held information relating to Bob Shennan and it upheld its position to not provide this information under section 12.

Scope of the request

8. The complainant is concerned disputes the BBC’s handling of their request in its entirety.
9. Therefore, the Commissioner will consider whether the BBC is correct when it says it does not hold much of the information and whether it was entitled to refuse the remainder of the request under section 12.

Reasons for decision

Section 1 – general right of access

10. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it is likely, or unlikely, that the public authority held information relevant to the complainant’s request at the time that the request was received.
11. The BBC has confirmed it doesn’t hold the information the complainant has requested for Lesley Douglas, (Redacted) or Ric Blaxill, that is emails sent and received by these individuals between 2001 – 2009.

12. It's explained:

"Archived email data is generally not available for staff who left the BBC before 2021. The only email accounts of staff who left prior to 2012 that **may** be available are those of "senior employees" (generally, the top 150 paid staff in the BBC – which is mostly executive, director, controller level...

Of the four individuals whose email accounts were requested, only Lesley Douglas and Bon Shennan were senior staff whose emails **may** have been retained. We have received confirmation, following appropriate searches of the relevant systems, that Lesley Douglas' emails were not retained. It is not clear why this was exactly – however, the BBC is under no requirement to have retained these emails given the age and our retention policies."

13. The complainant is concerned that 'the BBC may be using their corporate retention period definition to exclude the supply of data held, when in fact it is actually still available.'

14. However, the complainant hasn't provided any evidence or rationale as to why the BBC would continue to hold information that is, at a minimum, 15 years old.

15. One of the principles of good record management is data minimisation which means public authorities shouldn't hold information for any longer than its business purpose requires. The Commissioner notes that the three individuals whose inboxes are not held are more junior than Bob Shennan, who is the one individual whose emails the BBC have retained. In the absence of any steer from the complainant, the Commissioner is satisfied that, on the balance of probabilities, this information isn't held.

Section 12 – cost of compliance exceeds appropriate limit

16. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

17. When considering whether section 12(1) applies, the public authority can only take into account certain costs, as set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'). These are set out at Regulation 4(3) and are:

"(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.”

18. If the public authority estimates that compliance with the request would exceed the appropriate limit, it is not obliged to comply with the request. There is no public interest to consider. The limit for a public authority such as the BBC is 18 hours or £450, at a flat rate of £25 per hour.
19. As discussed in paragraph 17, there are only specific activities that a public authority can take into account when considering whether section 12(1) applies. The first activity listed is determining whether or not the information is held.
20. In the majority of circumstances if a public authority holds information in a recorded form, and did so at the time that the request was received, that information will be held for the purposes of FOIA.
21. However, there are exceptions. Firstly, whilst FOIA applies to the BBC, it excludes any information held for the purposes of journalism, art or literature;¹ this is what is known as 'derogation' and a more detailed explanation can be found in a recent decision of the Commissioner's.² What this means is, any information held by the BBC, for the purposes of journalism, art or literature, isn't held for the purposes of FOIA.
22. The complainant has repeatedly told the BBC that they are happy to receive all emails. However, this isn't possible because any if of these 9000 emails relate to either journalism, art or literature, it isn't covered by FOIA and therefore can't be disclosed in response to an FOI request.
23. Whether or not information is, or isn't, held for the purposes of FOIA isn't the primary issue here. It's whether or not it would take the BBC more than 18 hours to determine what information is, or isn't held, for the purposes of FOIA.
24. The BBC has explained:

“Bob Shennan's emails are held in 2 x 10Gb pst files comprising 3048 emails in the Inbox and over 9000 emails in the 'sent items'. I understand that whilst the pst files may be downloaded from SharePoint in less than one hour, it would be necessary for someone in BBC to upload the pst files to their inbox and then go through each

¹ <https://www.legislation.gov.uk/ukpga/2000/36/schedule/1/part/VI>

² <ic-278909-p7s7.pdf> (ico.org.uk)

email (including sent and received emails) to remove all emails that are not 'held' by the BBC and so fall outside the scope of the FOI Act."

25. The Commissioner is satisfied that this is approximately 12048 emails that the BBC would have to manually review, to ascertain whether they are held for the purposes of FOIA, or fall outside of FOIA as per the derogation.
26. Even if it took the BBC one minute to review each email, it would take 200 hours to determine whether all of the information is 'held' for the purposes of FOIA. If the BBC became doubly efficient and took thirty second to review each email, it would still take 100 hours, which grossly exceeds the 18 hour limit.
27. When requesting their internal review, the complainant expressed concern that 'should redaction be required, I understand that this process is not included in the allowed budget of £450.' However, this isn't a matter of redactions, it's a matter of determining whether it holds the information, which is a permissible activity as outlined in paragraph 16.
28. The Commissioner is under no doubt that compliance with the request would exceed 18 hours. Therefore section 12 is engaged and the BBC was entitled to refuse to comply with it.

Section 16 – advice and assistance

29. Section 16 of FOIA requires public authorities to provide reasonable advice and assistance to those making, or wishing to make, information requests.
30. When a public authority refuses a request because the cost of compliance exceeds the appropriate limit, it should explain, to the requester, how they could refine their request to one that would fall within that limit. In rare cases, it will be appropriate for the public authority to explain to the requester why their request cannot be meaningfully refined.
31. In its internal review outcome, the BBC confirmed to the complainant:

"our advice is that you may consider reforming, re-focussing or narrowing your request to Bob Shennan's email account within a shorter period and you may also consider narrowing it to either sent or received emails."
32. With this in mind, the Commissioner is satisfied that the BBC complied with its section 16 obligations.

33. The Commissioner understands that the complainant went on to submit such a refined request but this was again refused by the BBC under section 12.

Right of appeal

34. 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,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF