

**Freedom of Information
Internal Review decision**

Internal Reviewer	Katherine Leslie, BBC Advisor – Freedom of Information
Reference	RFI20161510 / IR2016080
Date	8 November 2016

Requested information

On 12 August 2016 the Applicant, S Craig via www.whatdotheyknow.com, sought the following information under the Freedom of Information Act 2000 (the Act):

How many compromise (settlement) agreements did the BBC sign off between 1 April 2015 and 31 March 2016?

In how many of cases had the employee been accused of sexual harassment, bullying, fraud or other crimes or misconduct?

On 20 September 2016 the BBC responded:

Please note that from 29 July 2013, standard industry practice resulted in compromise agreements now being called ‘settlement agreements’. This response will therefore use the term settlement agreements. In addition, for the purpose of this response, ‘settlement agreements’ shall include COT3 agreements (an Acas-conciliated agreement which settles an actual or potential Employment Tribunal claim).

Settlement agreements are commonly used by employers in the UK, including the BBC, to record the terms of agreement reached between employer and individual. The reason for entering into a settlement agreement will depend upon the facts of the individual circumstances. The BBC follows normal business practice and uses settlement agreements in order to provide certainty to both parties.

We have responded to your question below. Please note:

- this response is limited to UK matters only;*
- the information provided is based on the records of the BBC’s Employment Law Department. If a settlement agreement has been entered into where the BBC’s Employment Law Department has not been involved, or any information has not been recorded in the BBC’s Employment Law Department records, this will not be accounted for below; and*

- *please note that, as set out in section 6(1)(b)(ii) of the FOI Act, our subsidiaries (including BBC Studios & Post Production Ltd, UKTV, BBC Global News Ltd and BBC Worldwide Ltd), as well as the charities BBC Media Action and BBC Children in Need, are not subject to the Act, therefore information for their personnel is not included in the figures quoted above. This response therefore relates to the BBC only.*

Between 1 April 2015 and 31 March 2016 the BBC entered into 22 settlement agreements with individuals.

We are unable to provide information in relation to how many of these agreements involved an employee being accused of 'sexual harassment, bullying, fraud or other crimes or misconduct' as the Employment Law Department does not keep a central database containing this settlement agreement data. In order to provide this information, we would need to manually check the background documentation for the Employment Law Department's files for each of the 22 settlement agreements and we anticipate that this would take more than two and a half days to complete. Under section 12 of the Act, we are allowed to refuse to handle the request if it would exceed the appropriate limit. The appropriate limit has been set by the Regulations (SI 2004/3244) as being £450 (equivalent to two and a half days work, at an hourly rate of £25).

On 26 September 2016 the Applicant requested an internal review on the basis that:

There is no central database of this information at the Employment Law Dept but you say that is where the files are held - ie in one place. Surely it would not take too long to skim 22 files. Certainly not 2.5 days.

The correspondence must set out clearly the business grounds justifying a financial case for the compromise deal.

Issues on review

The issues to be considered within this internal review are:

- (a) Did the BBC correctly apply the exemption at section 12 of the Act on the basis that compliance with the request would exceed the appropriate limit?
- (b) Did the BBC comply with its obligation under section 16 to provide advice and assistance to the applicant?

Decision

I am satisfied that compliance with this request would take more than two and a half days. Therefore, I uphold the BBC's application of section 12.

While the BBC answered the Applicant's first question in an effort to assist the Applicant, the BBC did not explicitly address its obligation under section 16 in its initial response. In the analysis below, I clarify the BBC's duties under section 16 and provide further advice and assistance to the Applicant.

Analysis

In conducting this internal review, I have had regard to the relevant sections of the Act and the Information Commissioner's guidance "*Requests where the cost of compliance exceeds the appropriate limit*".¹ I have also liaised with the relevant BBC teams who are most likely to hold the requested information.

Section 12

Section 12 of the Act allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate limit to comply with the request. The appropriate limit for the BBC is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004 (SI 2004/3244) as being £450 (the equivalent to 18 hours work at an hourly rate of £25).

Regulation 4(3) of the Fees Regulations provides that a public authority can only take into account the costs it reasonably expects to incur in relation to:

- (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.

Reliance on section 12 must be supported by a reasonable estimate of the time for compliance and other costs. The Information Tribunal has held that a reasonable estimate is one which is "*....sensible, realistic and supported by cogent evidence*"².

¹ Information Commissioner's Guidance "*Requests where the cost of compliance exceeds the appropriate limit*", accessed at https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

² *Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency*, EA/2006/0004, 30 October 2007.

In addition, regulation 5(2)(a) of the Fees Regulations provides that requests can be aggregated if they are made for the same or similar information.

The requested information

I address each of the requests below outlining estimates for searching, locating and extracting the requested information.

The first question asked how many settlement agreements the BBC signed between 1 April 2015 and 31 March 2016. As outlined in the BBC's original response, the BBC entered into 22 settlement agreements with individuals. To search, locate and extract the requested information a BBC employee had to manually check the electronic file held by the BBC Employment Law Department which holds electronic copies of final settlement agreements (which are not held in chronological order), including checking copies of settlement agreements, to determine which agreements were signed in the relevant period. This took approximately two hours.

The Applicant's second question asked in how many of these 22 cases had the employee been accused of sexual harassment, bullying, fraud or other crimes or misconduct. In his request for an internal review, the Applicant said that *"surely it would not take too long to skim 22 files. The correspondence must set out clearly the business grounds justifying a financial case for the compromise deal."*

I do not agree with the Applicant's position that the BBC could respond to the second question by skimming 22 files.

To confirm whether an employee had *"been accused of sexual harassment, bullying, fraud or other crimes or misconduct"* the BBC would be need to cross-check the records of more than one BBC department for each of the 22 individuals who entered into a settlement agreement. This would include the following departments and teams at the BBC:

- 1. Employment Law Department:** the department does not advise on all such employment matters. If the department was involved, such information, if held, may be recorded in one or more of the following, each of which would need to be checked: (i) the department's paper file for each individual - these files range in size and there may be more than one volume (some matters have several volumes), some of which may have been archived externally. It is estimated that it would take approximately one hour to review each paper file volume; (ii) the department's electronic file for each individual; and (iii) the email inbox of the lawyer(s) that advised in relation to each individual.

2. **BBC Human Resources:** The BBC would be required to review the electronic personnel filing system. The BBC maintains a central HR electronic system, which holds a copy of most correspondence and documentation relating to an employee (e.g. letters advising BBC employees of disciplinary matters, suspension, redundancy). The BBC may also need to search paper files held locally by divisional HR teams or line managers in cases where electronic records do not exist to determine whether they hold any relevant information.

Even if the BBC limited the search to the 22 electronic personnel files, it is estimated that it would take 15 – 20 minutes to review each electronic file to determine whether the relevant documentation is held. This is a modest estimate because the BBC would need to manually search each of the folders in the file and review each document (largely scanned PDFs) to check for any relevant material relating to allegations of sexual harassment, bullying, fraud or other crimes or misconduct during the entire term of the individual's employment. Further time would be required to check other sources and extract the relevant information, if held.

The BBC would also need to search the records of other specialist BBC HR teams, including Support at Work. The Support at Work team is one of the ways employees can raise a workplace issue or make a complaint at the BBC, and this team has processes in place to manage the complaint, investigate the issue, and its offer dispute resolution options. Given the role of the Support at Work team, the BBC would be required to cross-check this team's records and data held with the names of the 22 individuals at issue.

3. **Corporate Security & Investigations:** This team handle Whistleblowing complaints, which may include allegations concerning the 22 individuals. Not all allegations concerning sexual harassment, bullying, fraud or other crimes or misconduct throughout the organisation would be investigated or recorded by the Investigation Service, but this team may hold relevant information that is not recorded in the employee's personnel file. The BBC would be required to check each file and cross check whether the 22 individuals were named, and further time would be required to retrieve and extract the relevant information, if held.

As the Applicant's two questions concern settlement agreements, I am satisfied that the two requests can be aggregated under regulation 5(2)(a). Given the number of searches that are required by numerous BBC divisions, and the significant documentation that would be required to be reviewed, I am also

satisfied that this request would take more than two and a half days to complete and that the BBC's approach is supported by reasonable estimates of the time for compliance and other costs. I therefore uphold the BBC's application of section 12.

Section 16

Section 16(1) of the Act provides that public authorities are under a duty 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'*.

The BBC did not address section 16 in their initial response but choose to respond to the first question concerning the number of settlement agreements signed between 1 April 2015 and 31 March 2016. As the Applicant's two requests can be aggregated, the BBC could have considered refusing to respond to the entire request under section 12 and, under its section 16 obligation, provided an indication of what it could provide under the appropriate limit. For example, it could have indicated that it could provide the response to question one within the appropriate time limit. This approach would align with the Information Commissioner's guidance.³

Nevertheless, in respect of question two and the BBC's duty under section 16, the Applicant could consider narrowing and reforming the scope of the request. For example, the BBC could search the 22 BBC employees' electronic personnel file to confirm or deny whether a complaint of sexual harassment, bullying, fraud or other crimes had been upheld against any of the employees, where a record had been made on their HR file. I would also suggest that the request be narrowed to a time-period (i.e. the last five years). If a request was received, the BBC may need to consider whether any of the exemptions in the Act apply, in particular whether disclosure would lead to the identification of an individual (s40(2)), and/or whether the information is considered confidential. As required by the Act, this assessment would be carried out at the time of the request.

The Applicant may find it useful to note that the BBC has previously published data concerning the number of grievances raised concerning bullying, harassment or sexual harassment at the BBC between 2015 and 2016. For example, see BBC's progress report in response to the Dame Janet Smith Review (dated July 2016): http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/reports/pdf/bbc_progressreport_damejanetsmith_july2016.pdf.

³ Information Commissioner's Guidance "Refusing a request", accessed at <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

As highlighted in the BBC's initial response, and repeated here, the BBC does not tolerate misconduct of a criminal/fraudulent nature nor any form of bullying and/or harassment, including inappropriate conduct of a sexual nature, and is committed to providing a workplace in which the dignity of individuals is respected. Any allegations of the kind described by the requester would be investigated under our Bullying and Harassment and/or Disciplinary policies and in serious cases could be treated as gross misconduct leading to summary dismissal. The BBC's policies on Disciplinary, Grievances and Bullying and Harassment can be found on our publication scheme at the following address:

<http://www.bbc.co.uk/foi/publication-scheme/classes/policies-and-procedures>

If an individual plans to publish or broadcast a story using the information provided in this response please include the following statement from the BBC.

A BBC spokesman said:

"As with other businesses, the BBC uses settlement agreements where appropriate to record the terms of a settlement between the employer and employee such as for protecting intellectual property – these do not include gagging clauses. The BBC went further than most of the public sector when we capped payments at £150,000 in 2013."

Appeal Rights

If you are not satisfied with the outcome of your internal review, you can appeal to the Information Commissioner. The contact details are: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF; Telephone 01625 545 700 or www.ico.gov.uk.