

Freedom of Information Internal Review decision

Internal Reviewer	Lawyer, BBC Legal
Reference	RFI20171253 / IR2017080
Date	18 December 2017

Requested information

On 20 August 2017 the Applicant under the Freedom of Information Act 2000 ('the Act') requested the following information:

TV Licences requested and sent by post arrive accompanied by a leaflet "Turn your TV Licence into a swan", which promotes obtaining TV Licences by email and proposes that by doing so TV Licence holders can allow the BBC more money for programmes.

Please provide recorded information about the cost of designing, publishing, printing and distributing these leaflets.

On 19 September 2017 the BBC provided background information to the leaflets but refused to disclose the requested information under section 43(2) of the Act. The BBC concluded that, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.

I have attached as **Appendix A** the BBC's response.

Request for an interview review

On 15 November 2017 the Applicant sought an internal review:

You state that you hold the information that I have requested but are refusing to disclose it. You state that the reason for your refusal to disclose this information is that to do so would prejudice the commercial interests of two external companies and yourselves, the BBC. I do not accept this as a valid reason and therefore challenge it.

In response to a simply put and straightforward question I have received a four page letter that appears to attempt to justify the production of the leaflet in the first place and then details what appear to be sub-contractor relationships. These I consider irrelevant to my request.

You then apply the public interest test and appear to consider that the public interest is served by the BBC withholding the information in order 'to maintain a strong bargaining position 'vis-a-vis' suppliers during contractual negotiations'. 'Vis-a-vis' is French word with a number of meanings but I assume you mean 'with regard to' or 'in respect of'. If you mean that then your reason number 1, that you maintain a strong bargaining position in respect of suppliers is obvious but cannot possibly be a reason for withholding the information I have requested. On the contrary, surely disclosure of the cost of this leaflet would assist the BBC in getting a competitive price for something similar. Furthermore, I have not asked for any

information about costs or relationships between suppliers, merely the overall cost to the BBC.

With regard to your reason 2, you firstly imply the information is sensitive, without explaining why, secondly, you clearly refer to 'arrangements between particular companies' when I have never asked for information about such arrangements and, thirdly, that if the cost of the leaflet was disclosed then that could be used by competitors to gain a competitive advantage. None of that makes any sense at all. Surely any commercial advantage would be a matter of lower costs, and that would be to the advantage of BBC licence payers?

Your reason 3 appears to be a compendium of the first 2 reasons. What is the cost of a 'commercial transaction'? Is that the cost of a product or the cost of buying the product? Those are two different things. Are you saying you do not wish to disclose the simple overall cost of this leaflet (being the information I have requested and which you say you consider you hold [either you hold it or you don't]) or you do not wish to disclose some other costs that were incurred in procuring this item?

In summary, my request is a simple corporate expenditure or procurement cost request. I have not requested any information about the reasons for the leaflet being produced or about the companies providing it, or indeed about any relationships between such companies. I considered my request clear and straightforward. It appears to me that you have complicated my request to find reasons to justify refusing it. I object to the use of French phrases when plain English ones would have been clearer and I object to numerous 'weasel words', including that you 'consider' you hold the information I have requested.

I would remind you that the FOIA is quite clear in the requirement for you to state whether or not you hold the information requested. If my request was not clear then you should have sought clarification, as the act allows you to do.

Issues on review

The issues raised on this review are:

- (i) Was the BBC correct to conclude that s.43(2) of the Act applies to the information in the request?; and
- (ii) If so, whether the BBC was correct to conclude that the public interest in maintaining that exemption outweighed the public interest in disclosure?

Decision

I consider that the BBC was entitled to withhold the requested information under section 43(2). I explain the reasons for my decision below.

Analysis

In this request, I must consider section 43(2), which provides:

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).

I address below the relevant factors under s43(2) in relation to the requested information.

Does the Request relate to any party's "commercial interests"?

The Information Commissioner's Office has provided useful guidance on the scope of that exemption.¹ It defines commercial interest in the following terms:

"A commercial interest relates to a person's ability to participate competitively in a commercial activity..."

The final cost relates to both parties ability to participate in their respective markets, as it will impact their revenue. Therefore, the requested information relates to both the BBC's and Proximity's "commercial interests".

Would disclosure prejudice those commercial activities?

S43(2) requires that the disclosure would prejudice commercial interests of the public authority or third parties.

The threshold for prejudice in the context of s.43 (and other relevant provisions of the Act) was set out by the Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026). The Tribunal held in that case that for the purposes of invoking an exemption within the Act, prejudice must be "*real, actual or of substance*". Furthermore, there must be a "causal link" between the disclosure sought and the risk of prejudice claimed. That link need not be concrete: what must be shown is that "*the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk*".²

In light of those principles the question that arises is this: would disclosure of the requested information prejudice either the BBC's or Proximity's commercial interests?

There is, in my view, a real and significant (as opposed to merely hypothetical) risk that disclosure of that information would likely cause damage to the BBC and Proximity. Disclosure of the requested information would provide pricing (i.e. market-intelligence) information to Proximity's competitors. That intelligence would benefit those competitors in any future tendering process (for the process or within the market) and, by the same token, disadvantage the relevant supplier.

Disclosure also presents a real risk to the commercial interests of the BBC. In order to attract competitive offers for the provision of goods and services, the BBC must maintain the faith of its commercial partners that it is able to maintain commercial confidences and protect its partner's information. If the BBC is perceived by its business partners as incapable of maintaining such confidences, it will struggle to attract competitive offers during its tendering exercises. Suppliers will expect the BBC to pay a premium to offset the risk that it will be required to disclose confidential or

¹ Freedom of Information Act Awareness Guidance No.5 "Commercial Interests", accessed at https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf.

² *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026), para 30 and 34.

sensitive information under the Act. I believe there is real risk that it would weaken the BBC's bargaining position with suppliers of goods and services in the future. Setting a precedent by publishing the requested information could significantly harm the BBC's relationship with its suppliers and deter third parties from contracting with the BBC in the future.

Accordingly, and in my view, disclosure of documentation relating to the requested information would be likely to cause real prejudice to the BBC. The causal link between the disclosure and that prejudice is plain: the disclosure will cause a loss of faith in the BBC amongst its commercial partners which will, in turn, increase the costs for the BBC in running its tendering processes.

The public interest balance

It is necessary for me now to consider whether the exemption under s.43(2) can be maintained in light of the balance of competing public interests. The public interest means the public good, not what is of interest to the public, and not the private interests of the requester.³

The competing interests were set out in detail by the BBC in its response, and there is no need to repeat these in full. I note that Applicant's comments and issues raised about the way public interest arguments in the first response.

In summary, the BBC has argued that the release of this information could prejudice its negotiating position as well as materially damage its relationship third party suppliers. As referred to in the BBC's original decision, there is a strong public interest in ensuring that the BBC maintains a strong bargaining position with suppliers during contractual negotiations in order to ensure that the licence fee is spent effectively and that the BBC obtains the best value for money from each transaction.

I consider that the BBC was correct to conclude that the balance of the public interests favours maintaining the exemption under s.43 (2).

Finally, I apologise to the Applicant for the short delay in the completion of this internal review.

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

³ *Grace Szucs v the Information Commissioner* (EA/2011/0072)