

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2023

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

Decision (including any steps ordered)

1. The complainant has requested information from the BBC concerning a data breach. The BBC stated that it did not hold this information.
2. The Commissioner's decision is that, on the balance of probability, the BBC did not hold the requested information at the time the request was made.
3. The Commissioner does not require any steps.

Request and response

4. On 8 June 2023, the complainant wrote to the BBC and requested information in the following terms:

"Please consider this to be a request made under FOI.

I would like to know if the file which was being transferred via MOVEit which led to this breach, was itself, an encrypted file.

Please provide a brief technical description of how the file itself was encrypted before being transferred via MOVEit."

5. The BBC responded on 5 July 2023. It stated that:

"The BBC is urgently seeking confirmation from IBM and Zellis as to whether the relevant data was encrypted. The BBC is also in the process of ascertaining whether this information was password protected. Their investigations are continuing and unfortunately, we do not yet have a final position on these matters at this point.

Please be assured that the BBC places strict obligations on IBM and Zellis to encrypt data both in transit and at rest and apply passwords to BBC data. These obligations specify minimum standards of encryption that service providers are obliged to comply with."

6. The complainant asked for an internal review to be carried out on 6 July 2023 –

"I would like to request a review of the response you sent to me regarding my FOI request ref [redacted].

The response says that the BBC does not know whether the file which was being transferred was encrypted.

I do not accept that this can be the case. The BBC must surely have reported the breach to the Information Commissioner's Office, with this detail included.

I also do not accept the assertion that IBM and/or Zellis could not make this information available within the time already taken to respond to my FOI request. They must surely already have done so."

7. Following an internal review the BBC wrote to the complainant on 4 August 2023. It stated that -

"I have liaised with the teams involved in responding to the incident to confirm whether the information is held. I am satisfied that when the BBC responded to you on 5 July the information which you sought was not available. The team investigating the incident has explained to me that reviewing the data and forensic evidence relating to incidents such as these, particularly involving third party organisations, is a complex process and that it is not unusual for it take a certain amount of time to establish the relevant facts. The investigation into the incident remains ongoing and will be for some time

Based on the above, when we responded to your request on 5 July, I find that the BBC did correctly identify the relevant locations where information within the scope of the request would likely be found if it existed, and did reasonable searches of those locations. I conclude that the BBC still does not hold the information requested.”

Scope of the case

8. The complainant contacted the Commissioner on 21 August 2023 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to look at whether the BBC held this information at the time the request was made, on the balance of probability.

Reasons for decision

10. Section 1(1) of the FOIA states that:

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.
11. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.

The complainant's position

12. The complainant is concerned about the fact that a data breach (announced by the BBC on 5 June 2023) occurred when - “Files transferred by the BBC, using MOVEit Transfer software were intercepted by unauthorised parties. The breach was reported to the Information Commissioners Office.”
13. The complainant contends that the request “was a simple one”. Their view is that -

“this is data that the BBC is in control of. They must have records. They must have records, log files and so on for this file transfer. Indeed, the processes / procedures of transferring the data, be they manual or automated, must specify the encryption to be used, or absence thereof”.

14. The complainant does not accept that it can be the case “that the BBC does not have this information...given the immediate forensic investigation into the circumstances around the data breach.”

The BBC’s position

15. The BBC stated its position (see paragraphs 5 and 7) to the complainant. In short, the BBC explained that it was seeking information from the relevant parties but explained that it had placed obligations on those organisations to encrypt data (which must reach a minimum standard of encryption) and to use passwords.
16. Having liaised with the relevant team, the BBC confirmed in its review that this matter was complex and ongoing. It explained that it had not held the requested information at the point the request was made and that it still did not hold it at the time of the internal review.

The Commissioner’s view

17. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner considers the complainant’s and the public authority’s evidence and arguments. Finally, he considers any reason why it is inherently likely or unlikely that the requested information is held or not held.
18. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probability. Whilst understanding the complainant’s viewpoint, their argument is that the information must be held. However, the situation regarding this data breach was complex. The BBC describes it on its website as follows:

“The Trustee of the BBC Pension Scheme (the Scheme) is aware that the BBC has been informed by its supplier IBM that their contractor, Zellis, has been affected by a vulnerability in the third-party software it uses (MOVEit Transfer, provided by Progress

Software). This has led to a data breach affecting several organisations, including the BBC.”¹

19. The Commissioner accepts that a data breach of this nature might take time to investigate. The BBC had two opportunities to consider whether it held this information and concluded that it was not held. The Commissioner has not asked the BBC for submissions because he has no reason to doubt that it did not hold the information at the time of the request.

¹ [Zellis BBC payroll data disclosure](#)

Right of appeal

20. 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

21. 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.
22. 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

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