

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2024

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 on complaints received by the BBC about a specific named employee. The BBC relied on section 40(5B) to refuse to confirm or deny whether it held any information falling within the scope of the request.
2. The Commissioner has concluded that the BBC is entitled to rely on section 40(5B) to refuse to confirm or deny whether it holds any information falling within the scope of the request.

Request and response

3. On 3 May 2024 the complainant made a request for information to the BBC in the following terms:
 1. "How many complaints have been made by BBC staff or freelancers about the employee [name redacted] since he joined the BBC?"
 2. How many complaints have been made by BBC staff or freelancers about [name redacted] since the publishing of the [redacted] story in [date redacted]?"
 3. What is the breakdown of types of complaints for Q1 (i.e. break down by bullying, physical abuse etc?)

4. The BBC responded on 4 June 2024 refusing to either confirm or deny if information was held on the basis of section 40(5B)(a)(ii) as to do so would reveal personal data about the individual. The BBC upheld this position at internal review on 28 June 2024.

Scope of the case

5. The complainant contacted the Commissioner on 4 July 2024 to complain about the BBC's refusal to either confirm or deny if information was held.
6. The Commissioner considers the scope of his investigation is to determine if the BBC has correctly relied on section 40(5B)(a)(ii) to refuse to confirm or deny if the information is held.

Reasons for decision

7. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
8. Therefore, for the BBC to be entitled to rely on section 40(5B)(a)(i) of FOIA to refuse to confirm or deny it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

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

"any information relating to an identified or identifiable living individual".
10. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

11. 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.
12. The Commissioner is satisfied, from reviewing the request, that if the BBC were to either confirm or deny it held the information, it would involve the disclosure of personal data. It would reveal whether complaints had been submitted about a named individual. The first criterion set out is therefore met.
13. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent the BBC from refusing to confirm whether it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
14. The Commissioner considers that the most relevant data protection principle is principle (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

15. Article 5(1)(a) GDPR states that:

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

16. In the case of a 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 – or as in this case, the public authority can only confirm whether or not it holds the requested information – if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair and be transparent.

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

17. 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.
18. 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”.

19. 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) (ii) Necessity test: Whether confirming or denying that the requested information is held is necessary to meet the legitimate interest in question;
 - (iii) (iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject(s).
20. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

21. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sake as well as case specific interests.
22. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
23. The complainant argues that knowing if complaints have been made about [name redacted] and the nature of these complaints is important as the individual remains working for the BBC and the BBC must be seen to be taking allegations of the nature identified in the media article seriously. The complainant points to what they describe as failings by the BBC in handling complaints about other BBC employees such as Tim Westwood and Huw Edwards as reason for wanting to scrutinise if complaints were made in this case.

24. The Commissioner is satisfied that the complainant has a legitimate interest in this information and that there may be a wider legitimate interest, i.e. transparency about the BBC's procedures when handling complaints.

Is confirming whether or not the requested information is held necessary?

25. '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 confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less intrusive?
26. Confirmation or denial under FOIA that the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
27. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified. There have been a pattern of complaints not seeming to be dealt with seriously until the media has become involved¹. This suggests confirmation or denial would be a proportionate means of achieving the legitimate interest in this case.

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

28. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if a data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

¹ [Police submit file to CPS over Tim Westwood sexual abuse allegations | Tim Westwood | The Guardian](#)
[Russell Brand: Informal concerns 'not adequately addressed' - BBC News](#)
[Savile and Hall: BBC 'missed chances to stop attacks' - BBC News](#)

29. Disclosing whether the requested information was held would reveal whether or not an individual, who could be identified, has been the subject of complaints and the nature of these complaints.
30. The BBC has referred to the Commissioner's decision in [FS50854236](#) where he stated that employees (and ex-employees) have a reasonable expectation that details of any complaints made against them would not be disclosed in response to a FOIA request. The BBC also points to the Commissioner's own guidance on '[Requests for personal data about employees](#)' that sets out there is a greater expectation that public authorities not disclose information that may be held in a personnel file, such as disciplinary records.
31. On this basis the BBC concluded that the named individual has a reasonable expectation that confirmation or denial of whether or not a complaint has been made against them, and the nature of any such complaints, would not be disclosed to the world at large via a FOIA request.
32. The BBC is aware of the existing and continuing media interest in complaints against public media figures and argues that confirming or denying if the information is held in this case raises a significant possibility of media attention which would cause real and actual distress to the named individual.
33. The BBC has added that the named individual is not listed on the BBC Senior Leader webpage and their salary is below the threshold required for it to be published by the BBC. This demonstrates they are not at a level where disclosure of personal data would be reasonably expected. The media article referred to in the request is, to the best of the BBC's knowledge, the only article or press report relating to this. The BBC has seen no evidence of any other public concerns raised. As such it considers there are no exceptional circumstances justifying a deviation from the Commissioner's guidance on the use of section 40(5B)(a)(i).
34. The complainant argues that the named individual cannot reasonably expect the BBC to block disclosure of the information following the press article and the restriction of the request to only complaint numbers, basic categorisations and findings. The complainant believes the public interest strongly lies in establishing if there is a pattern in the behaviour of the named individual to allow for more scrutiny of the BBC's response to any such behaviour.
35. In the decision notice referred to at paragraph 30 the Commissioner considered a request made to a public authority for information on whether Dominic Raab had been the subject of any complaints when he was employed there. The public authority refused to confirm or deny if

the information was held, a position the Commissioner did not agree with. The circumstances of this case have been used by both the complainant and the BBC to argue their points.

36. The complainant considers this shows that where an individual has been promoted (as is this case with this individual) there is a strong public interest in knowing if complaints have been raised against them.
37. The BBC see things differently and consider the individual is not of sufficient seniority to justify infringing on his rights and freedoms.
38. The Commissioner considers the Dominic Raab case to be an exception rather than the rule. That case involved a MP, who had already held several ministerial roles (including a cabinet post) and was, at the time of the request, a candidate for leadership of the Conservative Party. A high-profile public figure, particularly one seeking public office, has a much-reduced expectation of privacy and the need to scrutinise their past performance is of much greater public interest.
39. The Commissioner does not consider the individual in this case is particularly well known by the wider public, seeking public office or of a significant level of seniority to have the expectation that details of any complaints made or not made against them should be made public.
40. The Commissioner has not dismissed the media article. Several staff clearly felt that they had been badly treated and were frustrated with the way the BBC had, at least until that point, dealt with their concerns. They obviously felt strongly enough about the matter to approach a rival news organisation. However, it cannot be discounted that this article was from several years ago (2020) and was not picked up by the wider press, nor did it result in any follow-up articles or any other reference to this individual in a negative way since that the Commissioner has been able to find. The evidence does not point to an ongoing issue that the BBC is failing to manage.
41. Also, the fact that an allegation has been made should not automatically mean that the individual concerned should lose their right to privacy.
42. It is without doubt that the BBC is under increased scrutiny in light of several high-profile employees' behaviour. However, the Commissioner does not consider that this means that any and all BBC employees should expect their personal data to be disclosed. The Commissioner will consider any requests for information about complaints naming specific individuals on their own merits.
43. In this case, he considers that there is a real risk that confirming or denying if complaints existed and their nature, is likely to cause unjustified distress to the individual. Given the relative lack of seniority

of the individual, the age and limited evidence of a wider or ongoing issue, the Commissioner has determined there is insufficient legitimate interest to outweigh a data subject's fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.

44. The Commissioner has therefore decided that the BBC was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of the FOIA.

Right of appeal

45. 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

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Jill Hulley
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