

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 December 2014

**Public Authority:** British Broadcasting Corporation (BBC)

**Address:** Broadcast Centre  
201 Wood Lane  
London  
W12 7TP

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about severance payments made by the BBC. The BBC refused to provide the names, job titles, severance payment or date individuals left the BBC under section 21 and 40(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the BBC was correct to apply section 21 to the requested information relating to one data subject. The Commissioner considers that section 40(2) FOIA was correctly applied to the withheld names and positions but was incorrect to apply this exemption to the payments made and the dates of departure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose a list of all the payments made and a list of the dates of departure (although the BBC should not link the amount paid to the date of departure).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 4 March 2014 the complainant made the following request for information under the FOIA for:

*"Specifically, in its report of June 2013, the National Audit Office said it had reviewed 150 senior managers who received severance payments in the three years to December 2012. These names were requested by the Public Accounts Committee. In a letter to the PAC dated October 16, Andrew Scadding, the BBC's head of corporate affairs, said that of this group, there were 35 individuals who received more than they were contractually entitled to receive.*

*Of those, nine individuals had made representations relating to personal circumstances that would make disclosure a matter of "considerable concern". Of the 26 remaining, 5 had been part of the Senior Managers' Publication Scheme because they received more than £150,000. Mr Scadding said the BBC would write again to these 5 individuals to give them an opportunity to make further representations.*

*Separately, there were another 14 individuals to whom the BBC had written who said they would consent to their details being disclosed to the PAC.*

*Please provide the following information based on the above:*

- 1. the names of the 26 individuals who received more than their contractual entitlements and did not make representations against disclosure, along with their positions, dates they left the BBC, and the amount they received;*
  - 2. the names of the 5 individuals within this group who were part of the Senior Managers' Publication Scheme, along with their positions, dates they left the BBC, and the amount they received;*
  - 3. the names of the 14 individuals approached by the BBC who consented to having their details being disclosed to the PAC, along with their positions, dates they left the BBC, and the amount they received."*
6. On 1 April 2014 the BBC responded. It refused to provide the requested information under section 40(2) FOIA.
7. The complainant requested an internal review on 1 April 2014. The BBC sent the outcome of its internal review on 2 May 2014. It upheld its original position.

## Background information

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8. The BBC explained that in November 2012, the Committee of Public Accounts (PAC) and the BBC Trust asked the National Audit Office (NAO) to carry out a review of severance payments and wider benefits made by the BBC to a number of its senior managers. The NAO examined a sample of 60 of the 150 severance payments made by the BBC to senior managers in the three years to December 2012. This investigation looked at the BBC's approach to setting severance conditions and wider benefits for senior managers. Following the NAO's investigation, the BBC Trust published the NAO's Report on 20 June 2013.
9. The NAO report concluded that the BBC had breached its own policies on severance payments and that payments made to a number of individuals exceeded their contractual entitlement.
10. In response, the BBC Trust set out a number of actions to ensure there would be no repeat of the failures of oversight and control identified by the NAO. These measures required BBC management to report publicly in the BBC's Annual Report and Accounts on any exceptions to the BBC's policy on severance. In response to a further request from the BBC Trust and PAC, the NAO agreed to examine the remaining 90 severance payments and provide a supplementary note on its findings. This was published on 2 September 2013.
11. On 10 July 2013, oral evidence was heard before PAC from BBC witnesses as part of its investigation into the severance payments made to BBC senior managers. At the Hearing the Public Accounts Committee (PAC) requested that the BBC provide the names and details of 150 recipients of severance payments examined by the NAO.
12. A letter dated 16 October 2013 from the BBC to PAC stated that the NAO had concluded that 35 individuals (in addition to another 5 whose details were already in the public domain) were in receipt of payments beyond their contractual entitlement.
13. PAC published its report on 16 December 2013.
14. It said that the NAO was able to fulfil the full scope of its investigation into severance payments made to senior managers at the BBC, (and accurately and substantively report on its findings) without publishing the identities of any of the senior managers in question (NB. save for 3 individuals identified in the NAO report, whose details were already in the public domain).

## Scope of the case

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15. The complainant contacted the Commissioner on 1 July 2014 to complain about the way his request for information had been handled.
16. During the course of the Commissioner's investigation the BBC applied section 21 FOIA to some of the withheld information.
17. The Commissioner has considered whether the BBC is correct when it says it is entitled to rely on sections 21 and 40(2) FOIA in this case.

## Reasons for decision

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18. The BBC explained that the request can be split into three categories:

### Category 1:

The '5' individuals who appeared on the Senior Managers' Publication Scheme (SMPS), received over contractual entitlement, and whose details are not in the public domain.

'1' individual who appeared on the SMPS, received over contractual entitlement, and whose details have been placed in the public domain by third parties, but not by the BBC. It proposes to apply section 21 FOIA to the details for this individual (information accessible by other means).

### Category 2:

The '20' individuals who received over contractual entitlement, and whose details did not appear on the SMPS (19 of whom did not consent to disclosure of their details to PAC).

### Category 3

The '14' individuals who received in line with contractual entitlement, and who consented to disclosure to PAC.

## Section 21

19. The BBC explained that it has become clear, that the 'name' 'position', 'date of departure' and 'amount received' by 1 individual within category 1 is reasonably accessible to the complainant by other means.
20. Section 21 states that, "Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."
21. The BBC highlighted that the ICO's guidance on S.21 states that;  
*'An assessment of whether the section 21 exemption can be successfully applied will be dependent upon whether or not the requested information is reasonably accessible to the particular applicant who requested it.'*
22. The BBC explained that the information requested is available online through a 'google' search. It said that all of the information is contained in a previous publication of The Sunday Times, dated 7 July 2013, ( 'BBC boss's £5.8 million pension' Paras, 3, 20, 21 and 23). It provided a link to this article. It clarified that in order to access the full Sunday Times article a Times subscription is required.
23. Section 21(2) provides that, "For the purposes of subsection (1)- information may be reasonably accessible to the applicant even though it is accessible only on payment.
24. Based upon the BBC's submissions, and viewing the article referred to, the Commissioner is satisfied that the information relating to this 1 individual is readily accessible to the complainant and therefore exempt from disclosure under section 21 FOIA.

## Section 40(2)

25. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
26. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:  
"data which relate to a living individual who can be identified –
  - (i) from those data, or
  - (ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the

individual and any indication of the intention of the data controller or any other person in respect of the individual.”

27. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
28. The BBC confirmed that the withheld information is the names of 40 relevant individuals along with their positions, dates of departure and amounts received. The BBC argued that the names, individual's position, the date the individual left and the amount received on severance, is information that, when combined, can be 'clearly linked' to the relevant individuals. It argued that using a combination of job title, 'the BBC', the date of an individual's departure, and the amount they received it may enable a 'motivated intruder' to 'jigsaw identify' a number of the relevant individuals. The BBC provided the Commissioner with further arguments contained within the Confidential Annex attached to this Notice.
29. The Commissioner considers that the withheld names and positions is information from which the data subjects would be identifiable. However the Commissioner does not consider that the BBC has explained how disclosure of the amount of each of the severance payments and the dates payments were made (although not linked to the amounts) could identify the data subjects to whom the payment was made. The Commissioner does not therefore consider that a list of amounts paid and a separate list of dates of departure, without any other identifiable information, would constitute the personal data of the relevant individuals as they could not be identified from this information alone.
30. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met. The Commissioner has followed the approach to the first data principle set in out in his

guidance on section 40<sup>1</sup>, in particular the factors on fairness (page 13). He has addressed the most relevant factors below.

### **Likely expectation of the data subject**

31. The BBC explained that the relevant individuals were all senior managers at the BBC (albeit at different grades of senior management), with responsibility and accountability for the expenditure of public money. As part of the BBC's drive for transparency, it was agreed with the BBC Trust in 2009 that the BBC would publish the salaries, total remuneration, declaration of personal interests, expenses, and gifts and hospitality for all senior managers who have a full time equivalent salary of £150,000 or more or who sit on an operational board. It said that only six of the 40 individuals had an expectation that their salary details would be published on the BBC's senior managers publication scheme, but argued that they certainly had no expectation that details of private severance arrangements would be made public.
32. It said that in early September 2013 the BBC contacted the 40 individuals whose details have been requested by the complainant, as part of a wider communication by letter to 150 senior managers seeking consent for disclosure to the Committee of Public Accounts (PAC) pursuant to its investigation into severance payments and wider benefits for senior managers.
33. For the purposes of these submissions, the BBC recently contacted the individuals again to obtain an up to date picture as to whether or not they are now willing to consent to disclosure of their details into the public domain, and to provide their representations against disclosure where they do not consent to release. It said that this exercise was carried out in order to ascertain the reasonable expectations of the relevant individuals concerned.
34. In relation to category 1, despite the seniority of the 5 remaining individuals on the SMPS and the presence of payments considered by the NAO to be beyond contractual entitlement, the BBC argued that the fact these payments related to redundancy or termination means that

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<sup>1</sup> ICO. Freedom of Information: section 40. <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>



the relevant individuals could not reasonably expect such payments to be placed into the public domain in conjunction with their identity.

35. Of category 2, 18 individuals made representations against disclosure of their personal details into the public domain and 2 individuals provided no response to the BBC's letter. The BBC considers that they are not sufficiently senior to appear on the BBC's SMPS. Therefore they held no reasonable expectation that details of their salaries would ever be made public (a common thread that runs through several representations in this group).
36. Although the NAO found that the payments made to these individuals were above their contractual entitlement, these were payments relating solely to redundancy or termination, (as opposed to salary). These payments signalled the end of the employment relationship and it considers that this information falls under the category of personal finances rather than a professional salary paid in consideration for an ongoing relationship between employer and employee. Furthermore, it said there are no aggravating factors present on their part such as misconduct or financial impropriety.
37. The BBC argued that the relevant individuals could not reasonably expect these payments to be placed into the public domain in conjunction with their identity. Moreover, it said only one of these individuals consented to disclosure of their details to PAC, (being a more limited disclosure than disclosure into the public domain).
38. In relation to the third category, of the 14 individuals, 5 consented to disclosure, 8 individuals made representations against disclosure and 1 individual did not respond to the BBC's letter. The BBC considers that the 8 who did not consent and the 1 individual that did not respond, are not sufficiently senior to appear on the BBC's SMPS. Therefore they hold no reasonable expectation that details of their salaries would ever be made public (a common thread that runs through several representations in this group). Secondly, the payments made to them were all within their contractual entitlement, and related to redundancy or termination, as opposed to salary.
39. The relevant individuals could not reasonably expect these payments to be placed into the public domain in conjunction with their identity. There are no aggravating factors present such as misconduct or financial impropriety. Moreover, all of these individuals consented to disclosure of their details to PAC on the understanding that disclosure was to be made solely to PAC, and not in the expectation that such details would be made public.



40. In relation to the 5 that consented, the BBC has said that all of the requested information relating to these individuals has now been disclosed. The Commissioner has not however has sight of this disclosure.

### **Damage and distress**

41. The potential for disclosure to cause significant harm was made clear by those who submitted personal representations in response to the BBC's letters of September 2013 and September 2014. A particular concern was that disclosure may have a negative impact upon obtaining future employment. The BBC therefore argued that disclosure of the withheld information in relation to all individuals who did not consent to disclosure would be unfair and in breach of Section 40(2) FOIA. Having considered the context of the information and impact on individuals who could who have now left the BBC the Commissioner accepts that harm or distress to individuals is possible and whilst not at the most severe end of the spectrum it is significant.

### **The legitimate public interest**

42. The BBC said that there is a legitimate public interest in disclosing information which provides an understanding of how public money is spent by the BBC. The Commissioner acknowledges the significant general public interest about how the BBC spends its money on severance payments for senior managers and the significant public debate about these issues.
43. However it argued that the public interest with regard to severance payments made to senior managers at the BBC has been fully served by publication of the two NAO Reports, PAC's investigation into severance payments and wider benefits for senior BBC managers, and the BBC's publication from 2013-2015 of independent reviews into severance payments at the BBC.
44. As stated earlier, the Commissioner does not consider that the data subjects would be identifiable from a list containing the amounts of payments made, and separately a list containing the dates of departure. The Commissioner considers that disclosure of this information, along with the information already in the public domain as highlighted by the BBC, goes a significant way to meeting the legitimate public interest. The Commissioner does not consider that disclosure of names and job titles would be necessary meet the legitimate public interest in any significant way. Disclosure to meet the public interest would be disproportionate. Therefore where data subjects have not consented to disclosure, their reasonable expectations and the potential damage or

distress that would be caused must be given due weight. The Commissioner does not consider that the legitimate public interest would outweigh the rights of the data subjects in this case.

45. Disclosure would therefore breach the first data protection principle. The Commissioner therefore considers section 40(2) FOIA was correctly applied to withhold the names and positions of the data subjects who did not consent to disclosure.

## Right of appeal

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46. 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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