[GB] Information Appeals Commissioner determines that BBC did not have to disclose commercially sensitive information that may prejudice a third-party contractor

IRIS 2023-8:1/14

Julian Wilkins
Wordley Partnership

The BBC commissioned a report on diversity, which was produced by MTM, an independent research agency. On 3 May 2022, a Freedom of Information Act request was made by William Turvill, asking for the costs incurred by the BBC for this report. The BBC considered that the information was commercially sensitive and refused to disclose the details pursuant to section 43(2) Freedom of Information Act 2000 (FOIA). Section 43(2) FOIA provides that: “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)."

In a Decision Notice dated 21 October 2022, the Information Commissioner determined that the BBC was wrong to refuse disclosure of the requested information. Upon an appeal by the BBC to the Information Appeals Commissioner, it was upheld that section 43(2) FOIA did apply to the BBC’s commercial interests. In addition, Section 43(2) should be applied to prevent the disclosure of the information, as otherwise, it would also be likely to harm the commercial interests of MTM. The data was indeed commercially sensitive in the particular circumstances of the case. It therefore justified not disclosing the detail to a wider audience, even though the BBC is a public body.

The BBC submitted that it has a roster for the commissioning of the reports and a transparent tendering process, designed to ensure fairness to any tendering contractor as well as to seek value for money.

The BBC and MTM, who had written the report, considered that if the information was revealed it would give away their pricing structure. The consequence would be the undermining of MTM tenders in the future, as competitors would undercut them on price. The risk was therefore that, by undercutting them on price in future tendering competitions, some competitors would win the work, but because they had bid unrealistically low, they would then not be able to afford to do the work, or undertake the work to a poor standard or quality.

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The BBC considered that they produced sufficient information as to how their budget funded by the public was spent, and there was suitable transparency to ensure the public was aware of their expenditure, including how it was targeted.

The interests of MTM also had to be taken into account because if a certain level of detail was disclosed it would be relatively easy for someone to extrapolate their charging rates, and competitors would use that to their advantage by undercutting MTM, thus denying them a fair opportunity to tender.

The application of section 43 FOIA was dependent on the test set out in the Court of Appeal decision *DWP v Information Commissioner* [2016] EWCA Civ 758, where Lord Justice of Appeal Lloyd Jones said, when deciding prejudice to a party, to consider whether the "likelihood of occurrence of prejudice" would be "more probable than not, and secondly [whether] there is a real and significant risk of prejudice, even it cannot be said that the occurrence of prejudice is more probable than not." The threshold for the probability of prejudice was "would be likely to occur," which meant a risk of no more than fifty per cent, but still significant.

Considering all the evidence and submission by the BBC, MTM and Mr Turvill, the appeal body determined that there was a causal link between the release of the withheld information and the potential risk of commercial harm, meaning it would be likely to prejudice the commercial interests of both MTM and BBC.

The appeal body determined that the public interest test for justifying the disclosure of the information between MTM and the BBC was addressed, given that the procurement process was designed to ensure value for money in the expenditure of public money funding by the BBC. Also, there was much published detail as to how the BBC spends its income and requesting details on one bespoke report would not reveal much given the MTM report was one cost within a significant marketing budget operated by the BBC.

British Broadcasting Corporation v The Information Commissioner and William Turvill, Appeal Number EA/2022/0376, First Tier Tribunal (General Regulatory Chamber) Information Rights 6 June 2023

https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3223/BBC%20v%20ICO%20&%20William%20Turvill%20%-%20EA.2022.0374%20-informationrights.decisions.tribunals.gov.uk

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