



23 January 2020

Claude Doucet
Secretary General
CRTC
Ottawa, ON K1A 0N2

via GC Key

Dear Secretary General,

Re: *Notice of hearing, Broadcasting Notice of Consultation CRTC 2019-379 (Ottawa, 25 November 2019) – Procedural request by the Forum for Research and Policy in Communications (FRPC)*

- 1 The Forum for Research and Policy in Communications (FRPC) is a non-profit and non-partisan organization established in 2013 to undertake research and policy analysis about communications, including telecommunications. The Forum will be intervening in the above-noted proceeding dealing with the renewal of CBC’s English-language and French-language audio and audio-visual programming services. The purpose of this letter is to request the publication of information for which CBC has requested confidentiality, specifically, financial information about CBC’s online services and numbers of staff engaged in the production of news.

Information for which CBC has sought confidentiality

- 2 On 9 October 2019 the CRTC wrote CBC to request additional information about the licence renewal applications it submitted to the CRTC on 23 August 2019. According to CBC’s 17 October 2019 reply, the CRTC’s letter addressed “the designation of certain information as confidential”.

CRTC regulations and policies with respect to confidentiality

- 3 The CRTC set out its regulations with respect to its practices and procedures in 2010, in the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (SOR/2010-277) [Rules]*. Part 1 of the *Rules* applies to broadcasting and telecommunications matters and includes sections 30 to 34, dealing with confidentiality. For readers’ convenience these sections are set out on the next page. In brief, the CRTC permits broadcasters and telecommunications services to ask the CRTC to keep confidential trade information that is secret, business-specific information that the services keep secret, or information whose disclosure could harm the financial position, prejudice the competitive position or “affect” contract or other negotiations.

CRTC Rules of Practice and Procedure

...

Confidential Information

Marginal note: Documents public

30 In broadcasting matters, the Commission must make available for public inspection any information submitted to the Commission in the course of proceedings before it to the extent that the information is not designated as confidential.

Marginal note: Designation subject to filing

31 (1) In broadcasting matters, a party may designate information referred to in paragraphs 39(1)(a) to (c) of the Telecommunications Act as confidential if they file it with the Commission.

Marginal note: Timing of designation

(2) The party must make the designation at the time that they file the document that contains the information.

Marginal note: Reasons for designation

32 (1) The party that designates information as confidential must provide reasons, as well as any supporting documents, why the disclosure of the information would not be in the public interest, including why the specific direct harm that would be likely to result from the disclosure would outweigh the public interest.

Marginal note: Abridged version

(2) The party must either file with the Commission an abridged version, intended to be made available to the public, of the document that contains the information or provide reasons, as well as any supporting documents, why an abridged version cannot be filed.

Marginal note: Request for disclosure

33 (1) A party that files a request with the Commission for the disclosure of information that has been designated as confidential must provide reasons, as well as any supporting documents, why the disclosure would be in the public interest, including how the information is relevant to the Commission's regulatory responsibilities.

Marginal note: Service

(2) The requesting party must serve the request on the author of the designation.

Marginal note: Reply

(3) The author of the designation may file a reply with the Commission within 10 days after the day on which the request is filed, and must serve the reply on the requesting party.

Marginal note: Reply to request from Commission

(4) If the Commission requests disclosure of the information, the author of the designation may file a reply with the Commission within 10 days after the day on which they receive the request.

Marginal note: Disclosure criterion

34 (1) In broadcasting matters, the Commission may disclose or require the disclosure of information designated as confidential if it is of the opinion that the disclosure is in the public interest.

Marginal note: Information not admissible in evidence

(2) If the author of the designation is an applicant and confirms the designation, the Commission must not disclose or require the disclosure of the information and the information is not admissible in evidence.

-
- 4 After issuing the Rules in 2010, the CRTC described the process for filing confidential information in CRTC proceedings in *Procedures for filing confidential information and requesting its disclosure in Commission proceedings*, Broadcasting and Telecom Information Bulletin CRTC 2010-691 (Ottawa, 23 December 2010), <https://crtc.gc.ca/eng/archive/2010/2010-961.htm> [*Confidentiality procedures*].¹ This Bulletin sets out the 4-step process for filing information on the CRTC's public record in confidence.
- 5 The first step set out by the CRTC's *Confidentiality procedures* is for parties seeking confidentiality to explain how the information falls into one of 3 categories:
- A trade secrets
 - B financial, commercial, scientific or technical information that is confidential and that the parties have consistently treated as confidential, and
 - C information whose disclosure could reasonably be expected to
 1. result in material financial loss or gain to any person
 2. prejudice the competitive position of any person, and
 3. affect any person's contractual or other negotiations.
- 6 The CRTC noted that parties seeking confidentiality "must provide ... an explanation of how the information falls a category of information listed in section 31" of the *Rules*.
- 7 The *Rules* also set out the process for parties that believe "the designated information should be made public pursuant to the test for disclosure".

CBC's request for confidentiality regarding financial information for its online services does not comply with CRTC's procedures

- 8 The CRTC asked CBC for information about its online services:
- 3. **Financial information regarding CBC/SRC owned and operated online services (TV Financials – Appendix 9 and Radio Financials), submitted on an aggregate basis;**
- 9 CBC's request for confidentiality concerning its answer to this question is set out below:

ANSWER

CBC/Radio-Canada submits that it would not be appropriate to publicly disclose the financial data associated with our online services for two reasons.

First, the current licence renewal process involves the exploration of possible new regulatory approaches to CBC/Radio-Canada's traditional and digital services. At this time, it is not clear what types of regulatory oversight the Commission may choose to impose on CBC/Radio-Canada's digital services, if any. Consequently, while the Commission has requested certain financial data related to our digital services, it is not clear whether any of this data will ultimately be used by the Commission in its final decision. Therefore, public disclosure of this financial information could prove misleading

¹ In 2012 the CRTC amended this bulletin with respect to confidentiality in telecommunications proceedings

to the public as it may result in unfounded expectations as to CBC/Radio-Canada's future online activities – activities that could change in response to the regulatory decisions of the Commission in this proceeding. Given the high degree of uncertainty associated with the future regulatory framework for CBC/Radio-Canada, we believe it would be premature to require public disclosure of this financial data.

Second, the aggregate financial data provided to the Commission in Appendix 9 covers both programming and non-programming activity online. The data was provided in this aggregate form given the high degree of uncertainty as to the Commission's future regulatory framework for CBC/Radio-Canada. It did not appear prudent for us to invest time and resources into developing a range of financial data templates suited to a range of possible regulatory arrangements on a speculative basis. Consequently, we submit that it would be misleading to publicly disclose the aggregated information filed with the Commission since it might easily be misunderstood by the public. If the Commission were to seek greater detail as to CBC/Radio-Canada's online programming activities within a more clearly specified regulatory framework, it would be necessary for CBC/Radio-Canada to do significant additional cost and revenue analysis – analysis which would depend upon the specifics of the Commission's requests and proposed framework. We believe it would still be appropriate to grant confidentiality to any such information given the speculative nature of any regulatory analysis and framework at the current stage of this process.

10 To summarize, CBC says that disclosing the information it filed with the CRTC would be 'inappropriate' (rather than harmful to CBC) because the regulatory framework that CRTC may or may not devise for CBC is unknown, and because the public might misunderstand the data CBC has submitted. First, according to CBC

- the type of regulatory oversight the CRTC may impose on CBC's digital services is as yet unknown
- it is unclear whether CRTC will use any of the data provided by CBC
- as it is unclear whether CRTC will use any of the data provided by CBC, the public may be misled, and
- if the public is misled, they could gain "unfounded expectations" on the part of the public "as to CBC/Radio-Canada's future online activities".

11 Second, according to CBC

- it provided the CRTC with aggregated programming and non-programming information about its online activity
- CBC provided the CRTC with aggregated data because of the uncertainty about CBC's future regulatory framework for CBC
- CBC believed it was imprudent to develop financial data templates based on speculative regulatory arrangements
- CBC would have to undertake "significant additional cost and revenue analysis" to provide more detail about its online programming activities
- the public might misunderstand the information CBC has filed, and

- the CRTC's future regulatory framework for CBC is unknown.
- 12 The Forum asks the CRTC to deny CBC's request for confidentiality for the following five reasons.
- 13 First, CBC has not met the requirements of the *Rules* with respect to confidentiality because none of the reasons provided by CBC for not disclosing financial about its online services is related to the three categories of confidential information set out by the CRTC in Bulletin 2010-691. Specifically, CBC has not shown how disclosure of aggregated online financial information about its online services would
- Disclose its trade secrets
 - Disclose financial, commercial, scientific or technical information that is confidential and that CBC keeps confidential
 - Could reasonably be expected to
 - Result in material financial loss or gain to CBC
 - Prejudice CBC's competitive position, or
 - Affect CBC's contractual or other negotiations.
- 14 Second, while CBC says that it has not invested "time and resources into developing a range of financial data templates", CBC has not argued either that it does not have the information requested by the CBC, or that it has consistently kept this information confidential. Since 2008, in fact, CBC has often published information about its online programming services including percentage changes over time whose calculation would require annual financial data.
- "CBC.ca ad banner revenue rose 18% during the fiscal year for a 2007-2008 total of \$3,119,000" (CBC, *Annual Report 2007-2008*, at 11)
 - it "increased syndication revenues from launch of Apple iTunes Canada, Olympics and wireless (CBC, *Annual Report 2008-2009*, at 35)
 - "... the media generate revenue through program sales, facilities rentals, CBC News Express/RDI Express in airports, and advertising on CBC.ca and Radio-Canada.ca (CBC, *Annual Report 2009-2010*, at 49)
 - "we will double our current level of digital investment to at least five per cent of our programming budget by 2015, which should represent about \$90 million" (CBC, *Annual Report 2010-2011*, at 13)
 - it earned
 - digital programming revenue of \$3.293 million in 2010 and \$8.376 million in 2011 (CBC, *Annual Report 2010-2011, Notes to the Financial Statements*, Note 22 (Other Income), at 94
 - digital programming revenue of \$5.736 million in 2012 and of \$10.4 million in 2013 (CBC, *Annual Report 2012-2013, Notes to the Financial Statements*, Note 21 (Revenue) at 132)

- digital programming revenue of \$10.1 million in 2013 and of \$11.244 in 2014 (CBC, *Annual Report 2013-2014, Notes to the Financial Statements*, Note 21 (Revenue) at 125)
- digital programming revenue of \$16.7 million in 2014 and of \$18.3 in 2015 (CBC, *Annual Report 2014-2015, Notes to the Financial Statements*, Note 20 (Revenue) at 111) and
- digital programming revenue of \$18.3 million in 2015 and of \$16.4 million in 2016 (CBC, *Annual Report 2015-2016, Notes to the Financial Statements*, Note 20 (Revenue) at 81), and
- digital advertising of \$42.6 million in 2018 and of \$31.0 million in 2019 (CBC, *Annual Report 2018-2019, Notes to the Financial Statements*, Note 21 (Revenue) at 116).

15 CBC currently says, moreover, that its “digital programming expenses are recognized 100% once the program is made available online”,² implying that CBC is at this time able to recognize specific online programming expenses for accounting purposes.

16 Third, CBC’s publication of this information suggests an absence of harm from its publication. Indeed, CBC commented just three years ago that it had disaggregated advertising revenue “between ‘TV and radio advertising’ and ‘digital advertising’ to provide financial statements’ users with more relevant information as the Corporation undergoes a digital shift.”³

17 Fourth, if CBC believes that reading the information submitted by CBC to the CRTC might mislead the public, the solution (and the responsibility) to ensure that the public is not misled lies with CBC. To the extent that this reason is plausible – and how can it be, as CBC has been publishing such information for nearly a decade? – the solution is not to deny the public access to this information, but for CBC to present it so as to ensure that it is not misleading.

18 Fifth, the Forum notes that maintaining the confidentiality of the information submitted by CBC would create problems for the CRTC, the public and others down the road. CBC is arguing that financial information about online services should not be disclosed because it does not know what CRTC will decide. But as few, if any CRTC decisions are known before the CRTC publishes them, all broadcasters may seek to rely on the no-data-due-to-uncertain-outcome argument. Even if the CRTC’s decisions are not necessarily precedential, it should not change its long-standing policy on confidentiality without at least inviting comment on what would be a fundamental change to that policy.

19 Finally, the Forum submits that disclosure of the information sought by the CRTC is in the public interest, as disclosure will provide interested parties with a clear, empirically based

² CBC, *Annual Report 2018-2019, Notes to the Financial Statements*, Note 6 (Programming) at 88.

³ CBC, *Annual Report 2016-2017, Notes to the Financial Statements*, note 20 (Revenue) at 98.

understanding of the financial position of CBC's online services, along with evidentiary context for discussions of CBC's shift towards the online world.

- 20 For the reasons noted above, the Forum requests that the CRTC deny CBC's requests for confidentiality with respect to its answer to the CRTC's question on CBC's online services.

CBC's request for confidentiality regarding employees allocated to produce local, regional and national news does not comply with CRTC's procedures

- 21 The CRTC asked CBC for information about the number of employees engaged in local, regional, and national news and current affairs coverage:

4. The number of employees (average full-time equivalents) allocated to the production of local, regional and national news and current affairs coverage for each of CBC and SRC's radio and television stations/services (Appendix 3 – Q31 On the Ground News and Information personnel), on an aggregate basis and on a per station basis.

- 22 CBC's request for confidentiality regarding its news employees is set out below:

...

Request for Confidentiality

We submit it would not be appropriate to publicly disclose the data setting out FTEs allocated to the production of local, regional and national news and current affairs coverage on a station-by-station basis. By its very nature, journalism draws attention from those who agree with, and those who disagree with the news coverage. CBC/Radio-Canada, like other broadcasters, actively takes measures to ensure the security and well-being of its entire personnel, including journalists. This is not simply a theoretical concern. Our security team regularly deals with threats and takes measures to ensure our employees' safety.

From a security perspective, disclosure of any information that can potentially isolate or identify individuals or group of individuals in a geographic location increases risk and overrides any public policy benefits. With increasing threats towards journalists, disclosure of the number of FTEs allocated to the production of news by station can potentially isolate or identify individuals or group of individuals and would put the privacy and potentially the health and safety of our employees at risk.

- 23 To summarize, CBC says that disclosing the information it filed with the CRTC would be 'inappropriate' because disclosure would
- threaten the security and well-being of all of CBC's "personnel, including journalists", and would
 - "potentially isolate or identify individuals or group [sic] of individuals".
- 24 The Forum asks the CRTC to deny CBC's request for confidentiality for the following five reasons.

- 25 First, CBC has not clearly stated its request for non-disclosure of its news and information employee numbers in terms of the criteria set out in the 2010 *Bulletin*. Specifically, CBC has not shown how disclosure of numbers of employees working in news would
- Disclose its trade secrets (in fact, CBC has not hidden the fact that it broadcasts news and that it employs people to do so)
 - Disclose financial, commercial, scientific or technical information that is confidential and that CBC keeps confidential (in fact, CBC already discloses its total expenditures on news for each of its English-language and French-language audio and audio-visual services through the aggregated annual returns process⁴)
 - Could reasonably be expected to
 - result in material financial loss or gain to CBC (negligence on the part of CBC for failing to protect its employees' safety and privacy may place CBC at financial risk, and this is presumably why CBC employs security personnel outside the licence renewal period)
 - prejudice CBC's competitive position (in fact, CBC is well-known by its competitors to be a news organization, and its news and information staff are known through their on-air presence) or
 - affect CBC's contractual or other negotiations (CBC has not provided evidence demonstrating that its unions have suddenly increased demands for security due solely to the possibility of CBC's disclosure in this licence renewal of the numbers of staff it employs in news and information).
- 26 Second, CBC has already said that its security team currently takes measures to ensure CBC employees' safety. CBC has not explained or provide evidence showing why publishing the number of its news and information production employees is likely to increase the risk to their safety, or to what degree (if any) this risk is likely to change.
- 27 Third, even if CBC's arguments about disclosure placing employees in harm's way were true, then CBC itself already places its employees in harm's way when it
- broadcasts the names of the people involved with the production of its news and information programs within the programs and production credits of those programs
 - posts pictures and biographies of its 'media personalities' including news program hosts online,⁵ and
 - enables its news crews to travel to locations where they may report news, in vehicles emblazoned with CBC's logo.

⁴ <https://crtc.gc.ca/eng/industr/ann.htm>.

⁵ <https://www.cbc.ca/mediacentre/bio>.

- 28 Fourth, the Forum notes that the CRTC's 2010 *Bulletin* appended a list of information that it "will generally require to be disclosed or maintain as confidential"⁶ in radio and television broadcasting proceedings. While "names of prospective employees and/or individual salaries" are shown as confidential, "number of employees and/or grouped salary" is shown as public.
- 29 Finally, the Forum submits that disclosure of the information sought by the CRTC is in the public interest, as disclosure will provide interested parties with a clear, empirically based understanding of the CBC's allocation of its employees to news and information – a critical part of CBC's role as Canada's national public broadcaster – along with evidentiary context for discussions of CBC's commitment to local, regional and national news and information, and to the reflection of Canada's regions to the nation.
- 30 For the reasons noted above, the Forum requests that the CRTC deny CBC's requests for confidentiality with respect to its answer to the CRTC's question about numbers of news and information employees. That said, with respect to the worksheet provided by CBC (DM#3733722: "9 October 2019 – Appendix_3_Q31_On_The_Ground_News_and_information_personnel-EN-FR_Abridged.xls") the Forum would prefer the location-by-location breakdown shown in the spreadsheet, but would accept provincial and territorial breakdowns of this information if CBC also provided several years of historical information.

Sincerely yours,



Monica L. Auer, M.A., LL.M.

execdir@frpc.net

Executive Director

Forum for Research and Policy in Communications (FRPC)

Ottawa, Ontario

c. Bev Kirschenblatt
Executive Director
Corporate & Regulatory Affairs
CBC

regulatoryaffairs@cbc.ca

⁶ See para. 19.