

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 27 March 2007

Public Authority: British Broadcasting Corporation (BBC)
Address: MC3 D1,
Media Centre,
Media Village,
201 Wood Lane,
London W12 7TQ

Summary

The complainant requested a copy of a programme broadcast on Radio 4 in July 2005 called "The Moon Trees". The BBC refused to provide a copy of the broadcast on the basis that it was not a public authority in relation to the complainant's request because the information was held for the purpose of journalism, art or literature within the meaning set out in Schedule 1 of the Act. After a careful evaluation of the nature of the request, and the relevant provisions of the Act, the Commissioner's decision is that the requested information is held for the purpose of journalism. Therefore the BBC has correctly relied upon the Schedule 1 derogation and is not obliged to supply the requested information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). In the particular circumstances of this complaint, this duty also includes making a formal decision on whether the BBC is a public authority with regard to the information requested by the complainant. This Notice sets out his decision.

The Request

2. On 12 September 2005, the complainant made a request to the BBC for "a copy of a BBC radio programme. The programme in question is *The Moon Trees*, broadcast on Radio 4 on 20th July this year. I missed the broadcast but have been told by the BBC help line that it is not possible to obtain a copy. This seems unreasonable to me, since as a licence payer I funded the making of it, and I

understand that not only has it been broadcast but it was on Listen Again for some time as well."

3. The BBC responded on 13 September 2005. It advised that the request "*fell outside the scope of the Act because the BBC, Channel 4 and S4C are covered by the Act only in respect of information held for purposes other than journalism, art or literature*". Consequently, the complainant was informed that the BBC is not obliged to supply information held for the purposes of creating its output (i.e. its programmes) or information that supports and is closely associated with these creative activities.
4. The BBC further advised the complainant that no internal review procedure was available to him although he was advised of his right to make a complaint to the Commissioner.

The Investigation

Scope of the case

5. On 13 September 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - Whether the requested information had been correctly withheld - the complainant argued that it seemed remarkable that the public would be denied access to programmes which had already been broadcast.
 - The complainant further argued that it seemed likely that the reason for archiving programmes is as much for future repeat broadcasting or for later sale, as for "journalism, art and literature".

Chronology

6. On 18 August 2006, the Commissioner wrote to the BBC and requested further arguments to support the BBC's position that the requested information is held for the purposes of journalism, art and literature. In a second letter dated 7 November 2006, the Commissioner asked the BBC to confirm the purpose for which it held the requested information on the 12 September 2005.
7. The BBC responded to the second request on 8 November. It advised that the test applied by the BBC is whether the dominant purpose for holding the information is to support BBC content and output. The BBC also confirmed that as at 13 September 2005, the programme *Moon Trees* was held by the BBC for the dominant purpose of supporting content and output.
8. A further response from the BBC on 14 November 2006 addressed the reasons for relying on the derogation in Schedule 1. In this letter the BBC expressed the view that the term in Schedule 1 "journalism, art or literature" was intended to

- capture all BBC content of any genre (factual, comedy, entertainment, news etc) on any platform (TV, radio, online etc.).
9. On 22 January 2007, the Commissioner contacted the BBC stressing that, in order to make a final decision, he needed to be satisfied that at the time of the request the purpose for which the information was held had not changed. The Commissioner asked the BBC to facilitate this decision by explaining and demonstrating (with evidence if possible) how and why the requested programme content is held for the dominant purpose of journalism, art or literature.
 10. The BBC responded to this request on 21 February 2007. It confirmed that the type of information requested in this case, i.e. a copy of a programme, is always held for the dominant purpose of supporting BBC content and output. It further confirmed that the BBC retains copies of transmitted programme material and untransmitted rushes for a number of reasons, e.g. so that they can be used in future broadcasts and as a source of research material for content creators producing new BBC output. Content creators may be BBC employees, or independent production companies ('independents') who have been commissioned to create BBC content. Figures included in this correspondence demonstrate that BBC employees make 95% of all requests for archived programme footage. Of the total number of requests for archived programme footage 91% are made by BBC employees involved in programme creation. In addition, 4% of the material was requested by independents producing BBC content. The BBC state that in total 96% of the loans of archived content made in the sample period (May 2006) were made to content-creators.

Findings of fact

11. The requested information, the *Moon Trees*, is a documentary originally broadcast on BBC Radio 4 about seeds which were taken into space by NASA and planted in 1976 as part of America's bicentennial celebrations.
12. The primary users of archived programme content are involved in the creation of programme content.

Analysis

13. Section 3 of the Act states that a public authority is any body which is listed in Schedule 1 of the Act.
14. Under Part VI, Schedule 1 of the Act, the BBC is a public authority only "*in respect of information held for purposes other than those of journalism, art or literature*", ("the Schedule 1 derogation").
15. Section 7 of the Act provides that where "*a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of the Act applies to any other information held by the authority*".

16. It is the Commissioner's view that sections 3, Part VI and section 7 combine to make the BBC a public authority for the purposes of the Act in relation to all the information that it holds - except that Parts I to V of the Act do not apply to information held for the purposes of the Schedule 1 derogation.
17. Therefore in order to establish if the BBC has correctly withheld the requested information the Commissioner would need to determine two issues. The first is whether the requested information falls within the Schedule 1 derogation. The second issue – which only arises if the first question is answered in the negative – is whether the BBC has complied with the requirements of parts I to V of the Act.
18. In establishing the purpose for creating the requested information, the Commissioner has applied the test of 'functional journalism' as utilised by the Information Tribunal in its decision in the matter of Steven Sugar-v-The Information Commissioner and the British Broadcasting Corporation (Appeal Number EA/2005/0032; (the "Sugar appeal").
19. In the Sugar appeal, the Information Tribunal identified three elements which in its view constituted functional journalism.
 - The first is the collection or gathering, writing and verifying of materials for publication.
 - The second is editorial.
 - The third is the maintenance and enhancement of the standards and quality of journalism, particularly with respect to accuracy, balance and completeness.
20. The Commissioner finds that the requested information clearly falls within the definition of functional journalism because:
 - The creation of the programme involved the collection or gathering, writing and verifying of materials for broadcasting.
 - It would also involve editorial decisions and the exercise of judgement which may have had an impact on the selection and timing of the programme's broadcast.
 - It is also very probable that the fulfilment of the activities detailed above would engage the third element of functional journalism.
21. Consequently, the Commissioner is satisfied that the requested information was created for the dominant purpose of journalism.
22. In his email to the Commissioner on 13 September 2005, the complainant states that "*it seems likely that the reason for archiving the programme is as much for future repeat broadcasting or for later sale, as for journalism, art or literature*".
23. However, the BBC asserts that the requested information was held on 12 September 2005 for a dominant journalistic purpose because the information supported its programme content and output.

24. In response to the Commissioner's request, contained in his letter of 22 January 2007, that the BBC facilitate the Commissioner's decision by explaining and demonstrating (with evidence if possible), how and why the requested programme content is held for the dominant purpose of journalism, art or literature, the BBC replied "*The type of information requested, in this case, a copy of a programme, is always kept for the dominant purpose of supporting BBC content and output. This purpose is unchanged by the amount of time that has passed since the original creation of the material..... The primary users of this material are content creators, who use it for research or to include it in programme or web pages they are producing*".
25. The Commissioner recognises that while the purpose for the creation of programme materials is set in time, the purposes for which the finished programme is held may change over time. However, in the Commissioner's view, before such a change can occur there should be an intervening event capable of transforming the original journalistic purpose for creating the requested information into a different dominant purpose for holding the requested information, (the "intervening event").
26. Reviewing the information submitted by the parties to this complaint, there is nothing to indicate that such an intervening event had occurred in respect of the information requested by the complainant. The Commissioner is therefore satisfied that the requested information is held for the dominant journalistic purpose because it is now stored in an archive. In the Commissioner's view, mere storage of the requested information into an archive is not on its own capable of transforming the dominant journalistic purpose behind the creation of the requested information into another different purpose for holding the information; such as a management purpose.
27. The Commissioner appreciates the fact that the requested information had been stored after the programme had been broadcast. However, he believes that in spite of this fact, the requested information still retained its journalistic qualities which enable it to be obtained from storage and used for future journalistic activities that will engage the three elements of functional journalism listed in paragraph 19 above.
28. Consequently, the Commissioner finds that the BBC held the requested information for the dominant purpose of journalism.

The Decision

29. The Commissioner's decision is that the requested information is held by the BBC for the purpose of journalism. Therefore the BBC is not required to comply with Parts I to V of the Act in respect of this information.

Steps Required

30. The Commissioner requires no steps to be taken.

Right of Appeal

31. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 27th day of March 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Relevant Statutory Obligations and Provisions under the Act.

Section 1 provides that –

“Any person making a request for information to the 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 the information communicated to him.

Section 3(1) provides that –

“in this Act ‘public authority’ means –

- (a) subject to section 4(4) anybody which, any person who, or the holder of any office which –
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
- (b) a publicly owned company as defined by section 6”

Section 7 provides that –

- (i) Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts 1 to V of this Act applies to any other information held by the authority.
- (ii) An order under section 4(1) may, in adding an entry to Schedule 1, list the public authority only in relation to information of a specified description.