

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 14 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 access to the transcripts, editorial or presenter interview notes and all other documents that were used in preparation for a BBC interview that was broadcast on 19 January 2006. The BBC refused to disclose the requested information 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 derogation set out in Schedule 1 of the Act ("Schedule 1"). After a careful evaluation of the nature of the request, the submissions of the parties, and the relevant provisions of the Act, the Commissioner's decision is that the BBC has correctly relied upon the Schedule 1 derogation. Therefore by virtue of section 7(1) of the Act, the requested information is excluded from Parts I to V of the Act. The Commissioner also finds that the BBC as a public authority did not breach section 10 of the Act.

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 I 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 9 February 2006, the complainant made a request to the BBC for the *"transcript of the interviews dealing with the CSA that were conducted throughout the Breakfast time programme on 19 January [2006]...[and] any BBC editorial or*

presenter interview notes or all the other documents or papers prepared for use with those interviews"; (the requested information).

3. The complainant alleges that the BBC failed to respond to his complainant within the period stipulated under the Act. He contacted the BBC's complaints helpline on 20 March 2006, and then sent a copy of his request by email to the BBC on 3 April 2006.
4. The BBC responded on 11 April 2006. 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.
5. 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

6. On 12 April 2006 the complainant contacted the Commissioner to complain about the manner that his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - Whether the information had been correctly withheld – the complainant argued that as the programme which was the subject of the request had been broadcast, the information was in part already in the public domain and therefore it was no longer held for the purposes of journalism, art or literature but was instead archive material.
 - The delay in providing a response to the request for information which fell outside the 20 working days time limit provided for by the Act.

Chronology

7. On 23 August 2006, the Commissioner wrote to the BBC and requested further arguments in support of its refusal to provide the complainant with access to the requested information. In a second letter dated 3 November 2006, the Commissioner asked the BBC to confirm the purpose for which it held the requested information as at the date of the original request from the complainant (i.e. 9 February 2006).
8. The BBC responded to the above requests on 8 November 2006. It advised that transcripts "*and any notes relating to the interviews are held for the dominant*

purpose of supporting BBC content and output. Not all BBC programmes are transcribed, and no transcript is held for this programme. Supporting presenters' notes are held on the BBC's Electronic News Production System ENPS...as at 9 February 2006 [the date of the complainant's request] these notes were held by the BBC for the purpose of supporting content and output".

9. In a telephone conversation on 6 February 2007, the ICO caseworker made a request to the BBC to provide him with further information on the ENPS.
10. This information was provided by the BBC on 7 February 2007. The BBC states that: *"ENPS is used for core TV and Radio production in News, World Service, Nations and Regions...approximately 13,000 people. The system enables BBC journalists to share scripts and to link to a wide range of broadcast devices, including television prompters and character generators, all with a view to transmitting TV and radio programmes. It is used to*
 - *write scripts*
 - *distribute agency wire copy to all journalists*
 - *distribute BBC material to all journalists*
 - *build running orders for programmes*
 - *provide editorial teams with assignments and news gathering diaries*
 - *provide a single site for a core body of administrative material such as rotas*
 - *store an archive of final editorially approved broadcast BBC material for production and audit purposes*
 - *provide an internal messaging system vital for live broadcasting., allows editors to communicate with production staff in the galleries when programmes are on air..."*
11. The Commissioner has not felt it necessary to view the requested information because in this case the request is sufficiently specific and detailed that the individual nature of each piece of information sought by the complainant is clearly and readily apparent by consideration of the wording of the request itself, i.e. *"transcript of the interviews dealing with the CSA...[and] any BBC editorial or presenter interview notes or all the other documents or papers prepared for use with those interviews".*

Findings of fact

12. The Commissioner's own investigation reveals that the BBC's Electronic News Production System (ENPS) is a software application for producing, editing, timing, organising and running news broadcasts. The ENPS was developed jointly by the BBC and Associated Press.

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 Schedule 1 Part VI of the Act (“Schedule 1”), the BBC is a public authority only “*in respect of information held for purposes other than those of journalism, art or literature*”. This is often referred to as the derogation. It is accepted that the purpose of the derogation is to protect journalistic, artistic and literary integrity and to preserve a “creative space” in which programme makers can continue their core activities free from outside interference.
15. Section 7 of the Act states that Parts I to V of the Act would not apply to the BBC if the requested information is held for the “*purposes of journalism, literature or art*”. Therefore in order to establish if the BBC has correctly withheld the requested information the Commissioner would need to determine whether the requested information falls within the description specified in Schedule 1 and therefore whether the Act has been validly applied by the BBC.

The Schedule 1 derogation

16. In dealing with the Schedule 1 derogation, the Commissioner has to establish two matters. The first is whether the requested information was created for the dominant purpose of journalism. The second is whether on the 9 February 2006 (the date of the complainant’s request), the information was held for the dominant purposes of journalism, or some other purpose(s).

Purpose for creating the requested information

17. 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”).
18. 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.
19. The Commissioner finds that the requested information clearly falls within this definition of functional journalism because:
 - it was created in the course of collecting or gathering, writing and verifying of materials for conducting, and broadcasting the CSA interview on Breakfast Television on 19 January 2006.
 - it would also involve editorial matters and the exercise of judgement which may have had an impact on the selection and timing for broadcasting the

interview, and would also have provided a background context to the interview.

- It is also very probable that the fulfilment of all the above would engage the third element of functional journalism.

20. Consequently the Commissioner is satisfied that the requested information was created for the dominant purpose of journalism.

Dominant purpose on the 9 February 2006

21. In his email to the Commissioner of 12 April 2006, the complainant states that the *“information sought is in part already in the public domain as it was broadcast on 19 January 2006 and... it is no longer held by the BBC for the purposes of journalism, art or literature. The BBC would have a case if I asked for the information before the programme was broadcast as it could rightly argue that it held the information for the purposes of journalism. The information I seek is archive material...”*

22. However, the BBC asserts that the requested information was held on 9 February 2006 for a dominant journalistic purpose because the information supported its programme content and output.

23. In response to the Commissioner's request for further information on the post-broadcast application(s) of the requested information, the BBC stated that after *“a programme has gone out, the information relating to that programme continues to be stored in ENPS, and can be accessed and used by content-producers to support the production of further content. For example, if a programme-maker wished to produce some content about the CSA, he or she could use ENPS to refer back to this previous interview and find out details about the interviewees, the questions asked and subjects covered, in order to inform his or her own programme production. The information held on ENPS therefore continues to be held for the dominant purpose of supporting BBC output”*

24. The Commissioner recognises that while the purpose for the creation of a document is set in time, the purposes for which the document 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”).

25. In taking this view, the Commissioner notes the Information Tribunal decision in the Sugar appeal (which held that the original journalistic purpose for creating the Balen Report had now changed into a dominant management purpose for holding the report). In the decision, the Information Tribunal attached importance to the fact that, *“when elevated to the Journalism Board [of the BBC]...as a formal report, it [the Balen Report] was being used for, and hence held for, wider purposes of strategic policy and resource allocation”*. The Information Tribunal also took into account the ‘seniority’ of the Journalism Board,

and the strategic and resource consequences of its consideration of the report, such as the allocation of resources to appoint a new Middle East Editor.

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 to the information requested by the complainant. The Commissioner therefore does not agree with the complainant's contention that the requested information is not 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 in an archive is not on its own sufficiently 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. In any event, the Commissioner does not accept that it is correct to describe the status of the requested information within ENPS as "archive" material, which carries a strong historical connotation. The Commissioner appreciates the fact that the requested information had been stored in ENPS after the CSA interview has been produced and 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 within ENPS and used for future journalistic activities that will engage the three elements of functional journalism listed in paragraph 18 above.
28. The Commissioner is also mindful of the fact that only 3 weeks had elapsed between the date the CSA interview was broadcast on Breakfast TV (19 January 2006) and the date of the complainant's request (9 February 2006). Therefore it was very probable that the controversy surrounding the activities of the CSA, and the issues highlighted by the interview were still very active news worthy items, which may require an immediate follow-up by the BBC. Therefore it would be very important for the BBC to be able to have efficient and quick access to the requested information. In the Commissioner's view storage within ENPS would facilitate the performance of the BBC's journalistic functions.
29. In addition, the Commissioner's own investigations reveal that the primary users and beneficiaries of the information stored within ENPS are journalists, editors, writers or artists. The Commissioner is also aware that ENPS is also used to train journalists. For example, familiarity with ENPS is an essential part of the curriculum for the Post Graduate Diploma in Broadcast Journalism offered by the London Communication College, (www.lcc.arts.ac.uk).
30. Consequently, the Commissioner finds that the BBC held the requested information for the dominant purpose of journalism. In reaching this decision the Commissioner has also attached significant importance to the fact that the requested information is stored within ENPS, which in his view is integral to the BBC's broadcasting functions.
31. The BBC had informed the Commissioner that it does not hold transcripts of the CSA interview. However, the Commissioner's position would still remain the same even if the BBC did hold the transcript for the CSA interview.

Part I to V of the Act

32. Section 10 of the Act imposes an obligation on a public authority to inform an applicant in writing whether it holds the information requested and if so, to communicate that information to the applicant promptly not later than 20 working days after the receipt of the request.
33. The complainant has requested that the Commissioner consider the issue of the BBC's delay in responding to his information request. However, section 7 of the Act states that Parts I to V of the Act would not apply to the BBC if the requested information is held for the *"purposes of journalism, literature or art"*.
34. In the Sugar Appeal, the Information Tribunal held that the *"BBC remains a public authority within the meaning of FOIA whatever request for information anyone may make to it. It is particular information that is excepted by the derogation and s. 7(1) from the provisions of Parts I to V, not the public authority itself"*.

The Commissioner agrees with this analysis and accordingly has dealt with the complainant's request that he investigate the alleged delay in his receiving a response.

35. In his email to the Commissioner of 12 April 2006, the complainant states that he had received a response to an *"email from the BBC ... I emailed a response to the mail address identified as the sender on Thursday, February 09, 2006 ... this email also contained a request for information under FOI Act and the timescale of 20 working days for reply passed without response. I then spoke to the BBC Northern Ireland Complaint Call Centre on the 3 April to be told that the email address used by the BBC is not monitored for incoming mail. My request for information therefore sat in the BBC from the 9 February to 3 April 2006 without any action or indeed without anyone knowing it was in their system. I quite naturally replied to the named BBC employee using the email address that he used to send the message to me. There was no information to warn me not to reply to that address..."*
36. In response the BBC has stated that the email address the complainant sent his request to i.e. info@bbc.co.uk, was no longer monitored and as a result they did not respond to him because they did not receive his Freedom of Information request. They further explained to the complainant that they had a process to send an automated response informing the sender that the particular email address is no longer monitored and directing them to a 'webform' where the BBC can be contacted directly. The BBC also stated that its own IT department confirmed that the process was working.
37. The Commissioner sent an email to the email address used by the complainant (above) on 5 December 2006 to check whether the automated response was active. He found that a response was provided; this automated response informed him that the address was not monitored and redirected him to another email address where he could contact the BBC.
38. However due to the period that had elapsed between the 9 February 2006 and the date of the Commissioner's attempt to verify the automated response, it is not

possible to independently determine with any certainty whether or not the automated response was sent by the BBC; and whether or not the automated response was received by the complainant.

39. Therefore, the Commissioner is unable to come to a conclusion on this issue because of the complete conflict between the statements of the parties. This should not be taken to infer that the Commissioner prefers one side's version of events, but simply that he has insufficient evidence to reach a conclusion either way.
40. However, in dealing with the established facts before him, the Commissioner notes that when the complainant's request for information finally came to the attention of the BBC on 3 April 2006, a response was provided 8 days later on 11 April 2006. As this was less than 20 working days, the Commissioner finds that the BBC has not breached the requirements of section 10 of the Act.

The Decision

41. The Commissioner's decision is that the requested information is held by the BBC for the dominant purpose of journalism. Therefore the BBC has validly applied Schedule 1; and by virtue of section 7(1) of the Act, the requested information is excluded from Parts I to V of the Act.
42. The Commissioner also finds that the BBC as a public authority did not breach Section 10 of the Act.

Steps Required

43. The Commissioner requires that no steps to be taken.

Right of Appeal

44. 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 14th day of March 2007

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Section 3(1) provides that –

“in this Act “public authority” means –

- (a) subject to section 4(4), any body which, any other 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(1) 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 this Act applies to any other information held by the public authority.”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”