

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 November 2009

Public Authority: British Broadcasting Corporation
Address: 2252 White City
201 Wood Lane
London
W12 7TS

Summary

The complainant requested information regarding the British Broadcasting Corporation's (the "BBC"s) decision to dismiss Carol Thatcher from *The One Show*. The BBC initially withheld some of the requested information, citing section 12 of the Freedom of Information Act (the "Act") as it was claimed that the request exceeded the fees limit. However, the BBC subsequently relied on the derogation. The Commissioner is satisfied that the information in question is held for the purposes of journalism, art or literature. Therefore the BBC was not required to comply with Parts I to V of the Act in relation to this request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether the BBC has complied with its duties under the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. Carol Thatcher was dropped from *The One Show* by the BBC after referring to an unnamed person in what was considered to be a racist manner in a conversation which took place off-air.

The Request

3. On 13 May 2009 the complainant wrote to the BBC to request the following information:

"I would like to make a freedom of information request regarding the BBC's decision to dismiss Carol Thatcher from The One Show.

I would like to request all correspondence held by the BBC regarding the issue, including correspondence between The One Show's presenters and programme makers, and Ms Thatcher herself."

4. The BBC replied on 30 June 2009 apologising for missing the 20 day deadline. At that point the BBC relied on section 12 of the Act:

"I estimate that to deal with your request would take more than two and a half days. This is because in order to find the information we would need to contact every member of the BBC who was involved in the incident and ask them to conduct searches to locate and retrieve information relevant to the incident."

The BBC went on to say that it would normally suggest narrowing the request but that it had had a recent very similar request and the documents retrieved from that were provided to the complainant in a redacted form.

5. The complainant was unhappy with the redactions that had been made and requested an internal review on 1 July 2009, stating that the most important information requested had been redacted:

"1. The email from [named person] to [second named person], [third named person and [fourth named person], dated 02 February 2009 subject '[fifth named person] chat'.

2. The email from [second named person] dated 03 February 2009 to [fourth named person],[third named person], [sixth named person],[first named person] and [seventh named person] subject 'Notes on tel conversation with [fifth named person]'

3. The draft note to Carol Thatcher contained within the email from [second named person] dated 03 February 2009 to [fourth named person],[first named person], [seventh named person] and [third named person] subject 'URGENT'

4. The email from [second named person] to Carol Thatcher dated 03 February 2009 subject 'Private and confidential'.

I do not require any personal contact details contained within these emails. However, I do not believe that any of the above are subject to legal privilege in this instance, nor do I believe their publication would further damage the relationship of the BBC with a third party, which I can only assume must be Carol

Thatcher, as the BBC has already damaged that relationship itself by firing her from The One Show.

I therefore cannot agree with your statement that maintaining these exemptions outweighs the public interest in disclosing them, particularly amid a climate of greater transparency promised by the BBC.”

6. Emails were exchanged on 2 and 3 July 2009 between the BBC and the complainant regarding the redactions which had been made on the requested information to the previous requestor whose information had been supplied to the complainant. Several exemptions had been quoted: section 40(2) – third party personal information, section 42(1) - legal professional privilege and section 43(2) – commercial prejudice.
7. An internal review was carried out by the BBC on the basis of the exemptions that had been invoked regarding the previous information requestor. All the application of the exemptions were upheld by the BBC except for one email which had been withheld under section 42 and which the BBC now considered should have been disclosed.

The Investigation

Scope of the case

8. On 9 September 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the response of the BBC to her request for information.

Chronology

9. In light of recent High Court decisions relating to Schedule 1 of the Act which were handed down on 2 October 2009, on 10 November 2009 the Commissioner asked the BBC to consider whether it now believed the information requested was held for the purposes of journalism, art or literature and therefore whether or not the BBC was obliged to comply with Parts I to V of the Act.
10. On the same date the BBC confirmed that in light of the High Court decisions, it did indeed believe the requested information was held for the purposes of journalism, art or literature. The Commissioner has therefore applied the findings of the two judgments to the facts of this case.
11. The complainant declined to withdraw her complaint in the light of the High Court decisions.

Analysis

Substantive Procedural Matters

Jurisdiction

12. Section 3 of the Act states:

“3. – (1) In this Act “public authority” means –
(b)... any body...which –
(i) is listed in Schedule 1.....”

The entry in relation to the BBC at Schedule 1, Part VI reads:

“The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature”

Section 7 of the Act states:

“7. – (1) 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 authority”.

The BBC has argued that the construction of sections 3, 7 and Schedule 1 means that the BBC is not a public authority where it holds the requested information for the purposes of journalism, art or literature. Consequently, the Commissioner would not have jurisdiction to issue a decision notice given the wording of section 50.

13. This issue has been considered by the House of Lords in the case of *Sugar v BBC*¹. By a majority of 3:2, the Lords found in favour of the Appellant, Mr Sugar, in concluding that the Commissioner does have jurisdiction to issue decision notices regardless of whether the information that has been requested is derogated. The Commissioner adopts the reasoning set out by Lord Hope at paragraphs 54 and 55 where he said:

“54. Section 7(1) says 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. What it does not say is that, in that case, the authority is a hybrid – a “public authority” within the meaning of the Act for some of the information that it holds and not a “public authority” for the rest. The technique which it uses is a different one. Taking the words of the subsection exactly as one finds them, what it says is that nothing in Parts I to V of the Act applies to any other “information” held by “the authority”. This approach indicates that, despite the qualification that appears against its name in Schedule 1, the body is a public authority within the meaning of the Act for all its purposes.

¹ *Sugar v BBC* [2009] UKHL 9

That, in effect, is what section 3(1) of the Act provides when it says what “public authority” means “in this Act”. The exception in section 7(1) does not qualify the meaning of “public authority” in section 3(1). It is directed to the information that the authority holds on the assumption that, but for its provisions, Parts I to V would apply because the holder of the information is a public authority.”

55.The question whether or not Parts I to V apply to the information to which the person making the request under section 1(1) seeks access depends on the way the public authority is listed. If its listing is unqualified, Parts I to V apply to all the information that it holds. If it is listed only in relation to information of a specified description, only information that falls within the specified description is subject to the right of access that Part I provides. But it is nevertheless, for all the purposes of the Act, a public authority”.

14. Therefore, the Commissioner has jurisdiction to issue a decision notice on the grounds that the BBC remains a public authority. Where the information is derogated, the Commissioner considers that the BBC has no obligations to comply with Parts I to V in respect of that information.
15. The Commissioner will first determine whether the request is for information held for the purposes of journalism, art or literature and if therefore the BBC is required to comply with Parts I to V in respect of the request.

Derogation

16. The scope of the derogation has been considered by the High Court in the cases of the BBC v Steven Sugar and the Information Commissioner [EW2349]² and the BBC v the Information Commissioner [EW2348].³ In both decisions Mr Justice Irwin stated:

“My conclusion is that the words in the Schedule mean the BBC has no obligation to disclose information which they hold to any significant extent for the purposes of journalism, art or literature, whether or not the information is also held for other purposes. The words do not mean that the information is disclosable if it is held for purposes distinct from journalism, art or literature, whilst it is also held to any significant extent for those purposes. If the information is held for mixed purposes, including to any significant extent the purposes listed in the Schedule or one of them, then the information is not disclosable.” (para 65 EA2349 and para 73 EW2348).

17. The Commissioner interprets the phrase “to any significant extent”, when taken in the context of the judgment as a whole, to mean that where the requested information is held to a more than trivial or insignificant extent for journalistic,

² BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)

³ BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

artistic or literary purposes the BBC will not be obliged to comply with Parts I to V of the Act. This is the case even if the information is also held for other purposes.

18. For completeness, the Commissioner considers that where information is held for non-journalistic/artistic/literary purposes and is only held to a trivial or insignificant extent for the purposes listed in Schedule 1, then the BBC will be obliged to comply with its obligations under Parts I to V of the Act.
19. Thus, provided there is a relationship between the information and one of the purposes listed in Schedule 1, then the information is derogated. This approach is supported by Mr Justice Irwin's comments on the relationship between operational information, such as programme costs and budgets, and creative output:

"It seems to me difficult to say that information held for 'operational' purposes is not held for the 'purposes of journalism, art or literature.'" (para 87 EW2348)

20. The information relevant to the request need not be journalistic, artistic or literary material itself. As explained above all that needs to be established is whether the requested information is held to any significant extent for one or more of the derogated purposes of art, literature or journalism.
21. The two High Court decisions referred to above related to information falling within the following categories:
 - Salaries of presenters / talent
 - Total staff costs of programmes
 - Programme budgets
 - Programme costs
 - Payments to other production companies for programmes
 - Payments to secure coverage of sporting events and other events
 - Content of programmes / coverage of issues within programmes

In relation to all of the above Mr Justice Irwin found that the information was held for operational purposes related to programme content and therefore to a significant extent for the purposes of journalism, art or literature.

22. The Commissioner recognises that the High Court cases did not specifically consider information related to the correspondence regarding the dismissal of a journalist from a BBC programme. Nevertheless the Commissioner considers the comments made by Mr Justice Irwin regarding the relationship between the requested information and the derogated purposes are relevant and therefore he has considered them here. The information requested in this case focuses on a decision related to a specific programme, this decision clearly had an editorial basis. The request is for information held to a significant extent for the purposes of art, journalism and literature.
23. In view of the above, the Commissioner has found that the request is for information held for the purpose of journalism, art or literature and that the BBC

was not obliged to comply with Parts I to V of the Act. He has therefore not considered the application of any of the exemptions under the Act cited by the BBC

The Decision

24. The Commissioner's decision is that as the request is for information held for the purposes of journalism, art or literature the BBC was not obliged to comply with Part I to V of the Act in this case.

Steps Required

25. The Commissioner requires no steps to be taken.

Right of Appeal

26. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 16th day of November 2009

Signed

**Steve Wood
Assistant Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

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

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”