

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 January 2010

Public Authority: Channel Four Television Corporation
Address: 124 Horseferry Road
London
SW1P 2TX

Summary

The complainant requested the contents of any communications between the premium rate telephone services regulator and the public authority. It initially relied on two exemptions to withhold the information held. However, following the High Court decision in *BBC v Sugar and The Information Commissioner*, the Commissioner finds that the requested information is held to a significant extent for the purposes of journalism, art or literature and that therefore the public authority is not obliged to comply with Parts I to V of the Act in respect of those requests.

The Commissioner's Role

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

The Requests

2. On 28 December 2007, the complainant made a request for the following information:

'.....the contents of any communications from the premium rate telephone services regulator (ICSTIS) (now PhonePay Plus) to Channel 4, or anyone (whether person or organisation) associated or connected with Channel 4...

'....the contents of any communications (which are held by or on behalf of Channel 4) from PhonePay Plus to any service provider which provides, or has provided, premium rate telephone services to Channel 4 or to any person or organisation commissioned by Channel 4 to supply Channel 4 with programmes.'

3. The scope of the latter request was made clear by a subsequent statement the complainant made in same letter. He stated; '[i]n the case of premium rate telephone services which are provided, or have been provided, to persons or organisations commissioned by Channel 4, the request only relates to those premium rate telephone services which are used within programmes that have been commissioned by Channel 4.'
4. On 28 February 2008, the public authority responded. However, in addressing the requests, it included correspondence that it had sent to, as well as received from, ICSTIS/PhonePay Plus (regulator). All of the information identified was however withheld on the basis of a number of exemptions under the Act.
5. On 06 March 2008, the complainant requested a review of the public authority's decision. Specifically however, he drew attention to the fact that the public authority had extended the scope of his requests.
6. On 01 May 2008, the public authority wrote back with details of the outcome of the review. It acknowledged that the scope of the requests had been extended and agreed to limit it back to the original requests. The public authority proceeded to decide nevertheless that the exemptions which it originally applied to the information within the scope of the requests remained engaged.
7. On 07 December 2008, after he had complained to the Commissioner, the complainant asked the public authority to also provide him with copies of the information which fell outside the scope of his requests as referred to by the public authority in its letter of 28 February. His exact words were;

'I would like to request all information that Channel 4 has disclosed to me the existence of during its dealing with the information request FOI/01/08 [i.e. the original requests] (whether in the original handling and/or the internal review) which does not fall within the scope of my original request.'

The Investigation

Scope of the case

8. Following an initial exchange of correspondence between the complainant and the Commissioner's case reception unit, the complainant submitted a formal complaint on 29 August 2008. The complainant specifically asked the Commissioner to consider the application of the exemptions to his request of 28 December 2007.
9. Following an exchange of correspondence between a member of the Commissioner's staff and a representative of the public authority, the authority agreed that the request of 07 December 2008 could also be included in the scope of the Commissioner's investigation.

10. The Commissioner therefore set out to determine whether the information held pursuant to the requests of 28 December 2007 and 07 December 2008 was correctly withheld under the relevant exemptions. However, as set out below, the public authority changed its position to argue that the information fell outside of the scope of the Act during the course of the Commissioner's investigation. The Commissioner has therefore considered whether, in relation to these requests, the public authority is required to comply with Parts I to V of the Act in the first instance.

Chronology

11. During the course of the investigation the public authority drew the Commissioner's attention to the High Court judgments handed down on 2 October 2009 which involved the BBC (the details of which are outlined in the paragraphs below). In those cases Mr Justice Irwin ruled on the interpretation of the BBC's listing as a public authority in Schedule 1 of the Act. The public authority's listing as a public authority in Schedule 1 is identical to that of the BBC. Therefore the High Court judgments, which are binding on the Commissioner, are relevant when considering whether or not requests made to the public authority are for information falling within the scope of the Act.
12. The public authority explained to the Commissioner that in view of the High Court judgments and the fact that the requests are for information specifically related to the public authority's programmes, the material is held for the purposes of journalism, art or literature and therefore falls outside the scope of the Act.
13. There were a number of exchanges between the Commissioner and the public authority during the investigation between 08 October 2009 and 12 December 2009 predominantly on the application of the exemptions. However, given that the Commissioner's decision below is primarily in relation to Schedule 1, Part VI, he has decided not to go into any details regarding the correspondence exchanged.

Analysis

Derogation

14. 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 public authority, at Schedule 1, Part VI reads:

"The Channel Four Television 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”.

15. 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]¹ and the BBC v the Information Commissioner [EW2348].² 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).

16. 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, artistic or literary purposes the public authority 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.

17. 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 public authority will be obliged to comply with its obligations under Parts I to V of the Act.

18. 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)

19. 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.

¹ BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)

² BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

20. 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
21. 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. Given that the derogation provision for both the public authority and the BBC are identical, the Commissioner considers the general principles applied by Mr Justice Irwin in the BBC case are also relevant here.
23. The Commissioner recognises that the High Court cases did not specifically consider information related to communications from and to the regulator regarding premium rate telephone services for programmes. Nevertheless the Commissioner considers the comments made by Mr Justice Irwin regarding the need for a relationship between the requested information and the derogated purposes are relevant and therefore he has considered them here.
24. The Commissioner is satisfied that there is a relationship between the requested information and the purposes listed in the derogation in Schedule 1. Communications between the premium rate telephone services regulator and the public authority (or its associates) and between PhonePay Plus and any service provider (supplying premium rate services for programmes commissioned by the public authority) relate to its creative output. Premium rate telephone services are used because the public authority has made the editorial decision to make programmes that require them, for example as part of a public vote to determine the outcome of a particular show or as part of a competition. Further, as a result of such decisions it communicates with the regulator of premium rate telephone services regarding this aspect of its creative content.
25. In the Commissioner's view communications regarding telephone services constitute operational information held by the public authority as part of the production of its creative output. Communications with the regulator are held as part of feedback it receives from that organisation (or its responses to that feedback) where it has decided to use such telephone services in its content and this has resulted in regulatory issues or concerns. The complainant suggested that the material may include general guidance from the regulator about the use of premium rate phone calls. The Commissioner considers that such information would be used to influence editorial decisions about when and how to use premium rate telephone services. It would therefore also be held for the purposes listed in Schedule 1. In view of the above the Commissioner is satisfied that all of

the requested information is held to a significant extent for the purposes of journalism, art or literature.

26. In light of the above, the Commissioner has found that the public authority was not obliged to comply with Parts I to V of the Act in respect of these requests.

The Decision

27. The Commissioner's decision is that as the requests are for information held to a significant extent for the purposes of journalism, art or literature the public authority was not obliged to comply with Part I to V of the Act in this case.

Steps Required

28. The Commissioner requires no steps to be taken.

Right of Appeal

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

First-tier Tribunal (Information Rights)
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 18th day of January 2010

Signed

**Jo Pedder
Senior FOI Policy Manager**

**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”.”