

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 February 2010

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

Summary

The complainant made 7 requests to the BBC for a series of information relating to its handling of his complaint about an edition of the programme 'Panorama'. The BBC stated that some information was not held, some was outside the scope of the Act, other material constituted the complainant's personal data and was therefore exempt under section 40(1) and for the remainder refused to comply on the basis that the cost of locating and retrieving relevant information would exceed the section 12(1) limit. The Commissioner's investigation and decision is limited to requests 1 and 2. In view of two High Court decisions handed down on 2 October 2009 the BBC amended its original position and argued that all of the information relevant to requests 1 and 2 was outside the scope of the Act. The Commissioner's decision is that the BBC correctly determined that the information relevant to requests 1 and 2 is all held to a significant extent for the purposes of art, journalism or literature and therefore the BBC is not obliged to comply with Parts I to V of the Act.

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. The complainant has explained that the BBC broadcast an edition of 'Panorama' ('What's Next For Craig?') on 12 November 2007. The programme concerned the

use of stimulant medication to treat children with attention-deficit hyperactivity disorder (ADHD).

3. The complainant submitted complaints to the BBC about the content of the programme on the basis that it was misleading and in breach of editorial standards and the Ofcom broadcasting code. The complaint was investigated by the BBC's Editorial Complaints Unit, and the complainant has subsequently appealed part of the findings to the BBC's Editorial Standards Committee. He has subsequently submitted a series of requests for information about the BBC's handling of his complaint, including correspondence exchanged or obtained in the course of considering the complaints, the actions and processes of the Editorial Complaints Unit, and staff involved.

The Request

4. The complainant wrote to the BBC on 6 May 2009 and submitted 7 requests for information. The full requests are listed in Annex A of this Decision Notice.
5. The BBC responded on 4 June 2009 and stated that generally complaints related information was considered to fall outside of the Act and that a considerable amount of the requested material fell into this category. However it had concluded, applying the dominant purpose test, that there was one exception. It stated that material held by the BBC Trust regarding the complaint fell within the Act because it was held primarily for the purpose of enabling the Trust to undertake a regulatory function under the Charter. It explained that where such information was held by the Trust it was refusing to comply with the request because locating and retrieving that material would exceed the appropriate limit in section 12(1).
6. The BBC also explained that some of the information was the complainant's own personal data and was therefore exempt from disclosure under the Act by virtue of section 40. It invited the complainant to complete a Subject Access Request form and supply the relevant fee and identification in relation to that material. It also confirmed that some of the requested information was not in fact held.
7. On 4 June 2009 the complainant wrote to the BBC and requested an internal review of its response to the requests. He also stated that he had complained to the Commissioner about the BBC's decision that relevant to request 1 and some material within the scope of request 2 fell outside the Act because no internal review was offered by the BBC in that regard.
8. The BBC provided its internal review response on 27 July 2009. It concluded that the BBC had correctly relied upon section 12(1) of the Act.

The Investigation

Scope of the case

9. On 4 June 2009 the complainant contacted the Commissioner to complain about the way his requests for information had been handled.
10. During the initial stages of the Commissioner's investigation he noted that all the information relevant to requests 3, 4, 5, 6 and 7 appeared to constitute the complainant's personal data because it related to his own complaint to the BBC and his subsequent requests for information. The Commissioner advised the complainant that an applicant's own personal data is exempt from disclosure under section 40(1) of the Act. However he explained that he would separately consider whether or not the complainant had a right of access under the Data Protection Act 1998. The complainant agreed to this course of action and therefore the complaint under the Act in relation to the aforementioned requests has been informally resolved and will not be considered further in this decision.
11. The Commissioner's investigation has therefore considered whether the BBC correctly responded to requests 1 and 2 which were as follows:
 1. "What has the ECU [Editorial Complaints Unit] been doing since 29th January 2009 in connection with deciding what should be the consequences of its decision that the Panorama broadcast "What's next for Craig" (BBC 1, 12th November 2007) ("the Broadcast") was inaccurate? What communications have there been with whom and when? Produce all emails or other documents relating to such communications. Produce all internal notes emails or other documents.
 2. What communications have there been within or with or by (1) the Editorial Complaints Unit or (2) the BBC Trust or (3) the BBC (including but not limited to Panorama or its editors, the Director General or his office, or Helen Boaden), about what should be the consequences of the decision by the ECU that the Broadcast was inaccurate? Produce all emails or other documents relating to such communications."

Chronology

12. On 2 October 2009 the High Court considered two appeals BBC v Steven Sugar and the Information Commissioner¹ (EW2349) and the BBC v the Information Commissioner² (EW2348) which addressed the application of the derogation by the BBC. Both judgments found in favour of the BBC. The Commissioner has applied the findings of the two judgments to the facts of this case.
13. In view of the aforementioned High Court decisions, which are binding on the Commissioner, he reverted to the BBC and requested clarification about its

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

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

position in respect of request 2. He asked whether it was seeking to maintain its position that some material relevant to that request fell within the Act but that it was not obliged to provide it by virtue of section 12(1) or if the BBC was now seeking to argue that all of the relevant material fell outside the scope of the Act.

14. On 8 February 2010 the BBC confirmed that in light of the High Court judgments it now considered that all of the information relevant to request 2 was in fact outside of the Act because it was held to a significant extent for the purposes of journalism, art or literature. The Commissioner has therefore considered whether all of the material relevant to requests 1 and 2 falls outside of the Act.

Analysis

Substantive Procedural Matters

Jurisdiction

15. 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.

16. This issue has been considered by the House of Lords in the case of *Sugar v BBC*³. 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:

³ *Sugar v BBC* [2009] UKHL 9

“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. 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”.

17. 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.
18. 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

19. 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]⁴ and the BBC v the Information Commissioner [EW2348].⁵ 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

⁴ BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)

⁵ BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

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).

20. 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 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.

21. 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.

22. 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)

23. 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.

24. 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.

25. The Commissioner recognises that the High Court cases did not specifically consider information related to complaints about broadcast content. 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. The information requested in this case is details of actions taken and copies of correspondence and other documents connected with discussing or deciding what should be the consequences of the Editorial Complaints Unit's decision that aspects of an edition of 'Panorama' were inaccurate.

26. The Commissioner considers that complaints received about the content of programmes provide the BBC with a source of feedback about the content of its programming. Information relating to complaints is used to inform future creative decisions, including decisions about programme content, scheduling, and the BBC's overall editorial direction. The Commissioner therefore considers that information about complaints is held to a significant extent for the purposes of journalism, art or literature because it is information used to inform creative and editorial decisions.

27. The Commissioner further considers that information relating to the outcome of complaints about programme content, including any actions taken as a consequence of the complaint, is also held for the derogated purposes. Any communications made or actions taken as a result of complaints is related to the process of receiving feedback from viewers and future editorial decisions, in addition to the content of the initial broadcast itself.

28. In view of the above, the Commissioner has found that requests 1 and 2 are for information held to a significant extent for the purposes of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of the Act.

The Decision

29. The Commissioner's decision is that as the request is for information held to a significant extent 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

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 First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 11th day of February 2010

Signed

**Jo Pedder
Senior FOI Policy Manager**

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

Annex A

On 6 May 2009 the complainant wrote to the BBC to request the following information (BBC reference RFI20090661):

1. What has the ECU been doing since 29th January 2009 in connection with deciding what should be the consequences of its decision that the Panorama broadcast "What's next for Craig" (BBC 1, 12th November 2007) ("the Broadcast") was inaccurate? What communications have there been with whom and when? Produce all emails or other documents relating to such communications. Produce all internal notes emails or other documents.
2. What communications have there been within or with or by (1) the Editorial Complaints Unit or (2) the BBC Trust or (3) the BBC (including but not limited to Panorama or its editors, the Director General or his office, or Helen Boaden), about what should be the consequences of the decision by the ECU that the Broadcast was inaccurate? Produce all emails or other documents relating to such communications.
3. Have there been any communications within the BBC concerning the requests for disclosure made by [the complainant] in the period from Friday 25th April to 2nd May 2008, to the ECU (commencing with his email dated 25th April 2008 to Philip Abrams), Helen Boaden (his email dated 29th April 2008 to her) and the Chairman of the BBC Trust relating to the Broadcast (see email dated 25th April 2008 and response from Victoria Finney dated 29th April 2008)? What communications have there been with whom and when? Produce all emails or other documents relating to such communications.
4. Has the BBC Trust Chairman or anyone else in the Trust or the BBC had any communications concerning the Freedom of Information Act request ("the FOI Request") dated 15th February 2009 made by [the complainant] concerning or relating to the Broadcast? What communications have there been with whom and when? Have there been any communications about how the FOI Request should be handled by the BBC? Produce all emails or other documents relating to such communications.
5. Has the BBC Trust Chairman or anyone else in the Trust or the Director General or anyone else in the BBC had any communications with anyone concerning any of the requests for disclosure made by [the complainant] dated 4th February 2009 (letter to the Chairman and the Director General), and emails dated 18th and 19th March to both of them? What communications have there been with whom and when? Produce all emails or other documents relating to such communications.
6. Has the Chairman of the BBC Trust or the Director General of the BBC communicated with anyone in the Trust or the BBC concerning the complaints made by [the complainant] to them on 18th and 19th March 2009 that the BBC is not acting in accordance with its Royal Charter or the Agreement with the Secretary of State dated July 2006? What communications have there been

with whom and when? Produce all emails or other documents relating to such communications.

7. Has the Chairman of the BBC Trust or anyone on his behalf communicated with anyone concerning the email to him dated 20th March 2009 from [the complainant]? What communications have there been with whom and when? Produce all emails or other documents relating to such communications.

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”.”