

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 June 2010

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

Summary

The complainant made a series of requests to the BBC for information relating to members of the BBC Trust's Editorial Standards Committee and independent editorial adviser regarding a complaint about an edition of the programme 'Panorama'. The BBC withheld some of the requested information under section 40(2) of the Act and stated that some of it is not held. 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 the requests was outside the scope of the Act. The Commissioner's decision is that the BBC correctly determined that the requested information is 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 subsequently appealed part of the findings to the BBC Trust's Editorial Standards Committee. He also subsequently submitted a series of requests for information about the BBC's handling of his complaint, including records and correspondence exchanged or obtained in the course of considering the complaints, and the actions and processes of the Editorial Complaints Unit and Editorial Standards Committee.

The Request

4. The complainant wrote to the BBC on 3 June 2009 and submitted a series of requests for information.

"Schedule 1 – the "independent editorial adviser"

1. The "independent editorial adviser":
 - (i) who this is and his curriculum vitae;
 - (ii) his e mail and telephone number;
 - (iii) on the basis of what information relating to the appointee he was selected and appointed as the independent editorial adviser;
 - (iv) all emails, notes and other documents, including all internal emails, relating to considering and making his selection and appointment;
 - (v) all information relating to any connections which he has or may have had with Panorama;
 - (vi) all information relating to any connections which he has or may have had with the BBC or anyone else involved in or connected with the Panorama Broadcast ("What's Next for Craig?" on 12th November 2007), or this appeal.
2. I would be grateful for any instructions given to or communications with the "independent editorial adviser" in relation to this investigation.

3. I would also be grateful for all information obtained by the "independent editorial adviser" in relation to the investigation, my complaints and/or the appeal.

4. I would like to see all communications or correspondence from Panorama which are held by the adviser in connection with my complaints, the investigation or the appeal.

Schedule II – The Committee

1. The names of those on the Committee dealing with the appeal.

2. In relation to each member:

(i) all information relating to any connections which he has or has had with Panorama;

(ii) all information relating to any connections which he has or has had with the BBC or anyone else involved in or connected with the Panorama Broadcast ("What's Next for Craig?" on 12th November 2007), or this appeal."

5. The BBC responded on 29 June 2009 and stated that it was withholding information relating to the requests at Schedule I, 1 (i), (ii) and (iii) under section 40(2) of the Act because disclosure of the personal data of the independent editorial adviser would be unfair and would contravene the first data protection principle. It stated that it did not hold information relating to the remainder of the requests in Schedule I. The BBC also stated that it did not hold information relating to the requests listed under Schedule II, except the names of the members of the Editorial Standards Committee who were dealing with the complainant's appeal, which were provided to the complainant.

6. On 29 June 2009 the complainant requested an internal review of the BBC's response.

7. The BBC provided its internal review response on 4 August 2009. The BBC stated that it does not in fact hold a copy of the independent editorial adviser's curriculum vitae requested at Schedule I, 1(i) or any information relating to the basis of their appointment requested at Schedule I, 1(iii). The BBC had initially withheld this information under section 40(2). The remainder of the BBC's initial response was upheld by the internal review.

The Investigation

Scope of the case

8. On 5 August 2009 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant did not specifically complain about the element of the request the BBC answered. Therefore the Commissioner has only considered the requests the BBC refused to comply with.

Chronology

9. On 2 October 2009 the High Court considered two appeals *BBC v Steven Sugar and the Information Commissioner*¹ (EW2349) and the *BBC v the Information Commissioner*² (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.
10. In view of the aforementioned High Court decisions, which are binding on the Commissioner, he reverted to the BBC and requested clarification about its position in respect of the requests. He asked whether it was seeking to maintain its position that some of the information was exempt under section 40(2) and some was not held, or if the BBC was now seeking to argue that all of the relevant material fell outside the scope of the Act.
11. 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 the requests 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 those requests falls outside of the Act.

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

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

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*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:

"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

³ *Sugar v BBC* [2009] UKHL 9

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”.

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]⁴ and the BBC v the Information Commissioner [EW2348].⁵ In both decisions Mr Justice Irwin stated:

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

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

"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, 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 complaints about broadcast content and those involved in considering such complaints. 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 information about the BBC's independent editorial adviser and individual members of the Editorial Standards Committee and their connections with the BBC or anyone associated with a specific Panorama broadcast.
23. 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.

The independent editorial adviser

24. The information requested at 'Schedule I' of the requests relates to the independent editorial adviser and their connections with the BBC or a specific 'Panorama' programme.
25. The BBC has explained that independent editorial advisers are appointed to inform the BBC Trust's Editorial Standards Committee about the range of editorial issues relating to individual complaints. Paragraph 2.4 of the Editorial Standards Committee's Terms of Reference states:

"The [Editorial Standards] Committee is advised by one or more independent Editorial Advisors who assist on individual issues or complaint. Such advisers inform the Committee about the range of editorial issues relating to individual complaints. Advisors are appointed by the Committee for up to a three year term, renewable for a further two years by mutual agreement of the Chair of the Committee and the Advisor. Advisors usually attend meetings where relevant. The Committee may also appoint ad hoc advisors to assist on individual issues or complaints."

26. The Commissioner notes that the role of an independent editorial adviser is to assist and inform the Editorial Standards Committee in its handling of appeals against the outcome of decisions made by the BBC's Editorial Complaints Unit. The decisions relate to editorial complaints about the BBC's broadcast content. As outlined at paragraph 23, the Commissioner considers that information about complaints is held for the derogated purposes. The Commissioner considers that the role of the independent editorial adviser is closely associated with the BBC's editorial complaints handling process, and therefore information relating to the identities of those appointed as independent editorial advisers is also held to a significant extent for the purposes of journalism, art or literature.

The Editorial Standards Committee

27. The information requested at 'Schedule II' of the requests relates to individual members of the BBC Trust's Editorial Standards Committee and their connections with the BBC and a specific 'Panorama' programme.
28. The Editorial Standards Committee is responsible for assisting the BBC Trust in securing editorial standards, including the determination of editorial complaints on appeal. As such its determinations impact upon editorial decisions and future BBC programme content. Paragraph 8.17 of the Editorial Standards Committee's Terms of Reference states:
- "8.17 Consider appeals against decisions and actions of the BBC's Editorial Complaints Unit in relation to complaints about programmes transmitted or material carried by services for which the BBC has editorial responsibility. This primarily concerns the BBC's public services on radio, television and online, but may also include commercial services operated by the BBC. It includes the BBC's international services as well domestic services."
29. The individual members of the Committee are directly involved in the BBC's complaints handling process in relation to complaints about

broadcast content. In line with the Commissioner's view that information about editorial complaints is held for the derogated purposes at paragraph 24, he therefore considers that information relating to the roles, functions and identities of individual members of the Editorial Standards Committee is also held to a significant extent for the purposes of journalism, art and literature.

30. In view of the above, the Commissioner has found that the requests he has considered in this decision, as outlined at paragraph 8, 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

31. 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 BBC was not obliged to comply with Part I to V of the Act in this case.

Steps Required

32. The Commissioner requires no steps to be taken.

Right of Appeal

33. 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 sent.

Dated the 28th day of June 2010

Signed

**Jo Pedder
Group 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”.”