



Tribunals Service
Information Tribunal

Information Tribunal

Appeal Number: EA/2006/0052

Freedom of Information Act 2000 (FOIA)

Decision Promulgated on:

Decision On Paper: 5.4.2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Mr David Marks

and

LAY MEMBERS

Rosalind Tatam

Michael Hake

Between

ALISTAIR KEITH CAMPSIE

Appellant

and

INFORMATION COMMISSIONER

Respondent

THIS DECISION IS MADE WITHOUT AN ORAL HEARING

Decision

The Tribunal upholds the Decision Notice of 4 July 2006.

Reasons for Decision

General

1. The Appellant appeals against the Decision Notice made by the Information Commissioner (the Commissioner) dated 4 July 2006. The Appellant who has throughout the history of this matter acted on his own behalf contends in this Appeal that the disputed decision in the Decision Notice is that the Commissioner did not find the BBC to be in breach of section 16 of the Freedom of Information Act (FOIA). The Appellant draws specific attention to paragraph 5.3 of the Decision Notice.
2. The grounds of the Appeal are therefore extremely narrow although the background is, to some extent, complicated and in order to understand fully the motives behind and the purpose of the Appeal, it is necessary to go into some degree of history.
3. For present purposes, it is sufficient to set out section 16 of FOIA which places a duty upon public authorities to:

“... provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”

Subsection (2) states that any public authority which in relation to the provision of advice or assistance conforms with the code of practice prescribed by section 45 of FOIA is to be taken as complying with the duty. For reasons which will become apparent, it is not necessary to refer any further to either section 45 or, as has been done in the history of this case, section 46: the latter section relates to the issuance of a code of practice by the Lord Chancellor in connection with the management of records. This is mainly because the facts in this case occurred, for all material purposes, at a time before the provisions of the FOIA came into force. It is fair to note however that the Appellant has contended that the provisions of FOIA did apply, given his belief that his complaint had not been closed when FOIA came into force. As will be explained below, the Tribunal finds that this belief is misplaced.

The Request and its Background

4. By the terms of an email dated 8 May 2005, the Appellant asked the British Broadcasting Corporation (the BBC) to forward to him “copies of all papers and decisions by BBC [sic] regarding my serious complaint made on or around 1 September 1996 to its then director general, John Birt, forwarded to him through an MP, Roger Gale, then chairman of the Back Bench Media Committee.” In addition,

the request sought “copies of all papers relating to Baroness Young of Old Scone’s intervention on my behalf and especially its outcome should also be included along with the reasons why BBC [sic] has always refused to answer the complaint”.

5. The Appellant is the author of a work apparently entitled “The MacCrimmon Legend or The Madness of Angus MacKay” which was in effect an investigation into the conclusions of an earlier work apparently published in 1883 edited by an individual called Angus MacKay in which it was contended that an ancient and particularly Celtic form of music called pibroch had been perpetuated by a group or family of pipers called the MacCrimmons. Prior to the publication of his own work, which occurred it seems in 1980, the Appellant claims that the BBC put out a radio programme relating to the above to which the Appellant took great exception, as it did not refer to or acknowledge his own work or research.
6. The above is no more than a very shortened précis of the background which led to considerable resentment and indeed anger that the Appellant claims he experienced as a result of what he called a campaign mounted or instigated by the BBC in effect to discredit him. The Tribunal feels there is no need to go further into the extremely sad and somewhat complicated series of events that led to the request in May 2005.
7. The Appellant claims that the strain and stress brought about by these events contributed to a heart attack and to an overall decline in his health as well as to his overall perception that the BBC refused to answer or in any way deal with his criticisms.

The 1996 Complaint

8. The original complaint (“the 1996 Complaint”) about the matters which are only briefly described in the preceding section was made on or about 1 September 1996. No copy of this complaint has been provided. However the gist of it was a complaint about the manner in which the Appellant claims to have been dealt with at the hands of the BBC.

Request of 8 May 2005

9. The above explains the reason for the request being made in May 2005, effectively by letter dated 8 May 2005. The BBC stated that it could not respond to the request “as the BBC no longer holds the information you have requested”. Reference was then made to section 46 of FOIA, it being added that “records about complaints are kept for five years”. However, as indicated above, reference to section 46 was misplaced since at the time the alleged destruction occurred it was at a period prior to

the enactment of FOIA, when the BBC's own rules applied to the destruction of records.

10. By letter dated 31 May 2005, the Appellant wrote what has proved to be an important letter to Rachel Hallett of the Information and Policy Compliance Unit, dealing with Freedom of Information affairs at the BBC. The letter is significant because it has since been reviewed by the Commissioner in his Decision Notice and regarded as in fact constituting a separate request being a request as to the details relating to the destruction or alleged destruction of the original complaint and the files relating thereto, in particular, the identity of the person responsible. However, at page 2 of the letter, the Appellant stated as follows:

"I am therefore forced to repeat my request to you to transmit to me all the papers concerned as a matter of great urgency – I am not in good health – and certainly within the 20 working days limit specified by BBC and dating from 8 May 2005 when you received my request."

In the penultimate paragraph in the letter, the Appellant stated that he was repeating "that you appear to have informed me the BBC can keep a complaint about its conduct and which it has not replied to and destroyed five years later without informing the complainant who is left in limbo, unaware that the final shock is still to be administered." The issue of the handling of the 1996 Complaint was a matter for the BBC and is not a matter for the Tribunal on this Appeal.

11. The Tribunal would agree that there is perhaps a limited scope for arguing that the letter of 31 May 2005 in effect represents a fresh request dealing with the matter relating to the destruction of the original complaint and the files relating to that complaint. On the other hand, the Decision Notice and that part of it against which an appeal is made relates to an alleged failure to provide advice and assistance under section 16 of FOIA. The Decision Notice states that the failure is predominantly with regard to the manner in which the BBC in fact interpreted the letter, i.e. its understanding that the letter of 31 May 2005 related purely to the request that had previously been made on 8 May 2005, and to nothing further.
12. It is on that basis that the subsequent correspondence should be revisited. By letter dated 6 June 2005, a Glenn Del Medico, on behalf of the BBC, emailed the Appellant apologising for what he called "the BBC's failure to respond to your original complaint", i.e. the 1996 Complaint. He then added the following:

"Extensive searches have been made in the BBC's records and continue to be made, but I am afraid that little success has resulted. We have recently traced a letter written by John Birt to Roger Gale MP on 27 September 1996 stating that your

complaint had been passed to Programme Complaints Unit. However, nothing else has been found. We are continuing our search, and in this connection, it would be of assistance if you are able to provide me with a copy of your communication to the BBC of on or around 1 September 1996.”

The letter then continued in the form of an assurance that “every effort is being made to trace these documents ...”. Mr Del Medico appeared to treat the letter of 31 May 2005 as a request for an internal review. The Tribunal is not invited, and does not propose, to revisit that decision. Meanwhile, the Appellant was unable to provide the letter which was requested of him by Mr Del Medico, but provided several cuttings from 1988 and 1997 which represented letters which he had written to the press regarding his difficulties with the BBC, and one published letter from the BBC in response. The Appellant wrote again to the BBC on 21 June 2005 and reiterated that he had not received “the papers” concerned revealing “who had authorised their destruction, when, where and why.” On 14 July 2005, the Appellant wrote to the head of the Information Policy and Compliance Unit, a Mr James Leaton Gray, stating that he could not provide any correspondence other than the press cuttings from the period of the original complaint in September 1996, although he did provide a copy of a letter sent to John Birt, the then director general of 22 October 1996 and an answer to that letter of 29 October 1996.

By letter dated 27 July 2005, Mr Del Medico wrote further to the Appellant expressing regret that the documents which had been forwarded by the Appellant “still do not offer us a great deal of hope in tracing the information. Apart from the documentation you have kindly provide and one letter we have already disclosed, we still have insufficient hard information about the complaint(s) you made in the 1980’s and 90’s to enable us to trace the documents you require.”

13. There then followed a note of the internal review decision arrived at by the BBC and dated 10 August 2005. That note stated that the BBC could not “provide information that it no longer holds”. The relevant file was stated as having been recorded “within the BBC Records Management database DAISY as being first closed and subsequently destroyed having passed the five year retention period”. The review continued that had the file been “active, then it would not have been destroyed”. The author of the review, a Mr Gregory, stated that he was “satisfied that the BBC has directly followed its retention schedule”.
14. This Internal Review notification prompted the Appellant to contact the Commissioner’s office. He did this by letter of 28 August 2005, which was accompanied by a detailed analysis of what he called the “FOI request”, being a reference, it seems reasonably clear, to the original request of 8 May 2005 and its

background. In the analysis he quoted portions of his correspondence and stressed what arguably could be viewed as the further request for details, namely the facts about the manner in which the file was destroyed.

15. The Commissioner wrote to Mr Gregory by letter dated 26 January 2006 alluding only to the content of the original request of 8 May 2005. He did however ask for dates and an explanation as to the “normal procedure for the destruction of such data” and also an explanation as to how the handling of the filing in question was managed in accordance with the then BBC’s record policy and management standards. By letter dated 2 February 2006, the Appellant communicated with the officer dealing with his complaint at the Commissioner’s office, a Dr Jean Adams, stating that “the most vital part of the request turns out to be the identity or identities of the person or person who authorised destruction of the 1996 complaint and when it was done.” The Tribunal notes that this is perhaps the first time that the Commissioner came to view the proper interpretation of the earlier letter of 31 May in totally unequivocal terms.

16. By a lengthy letter of 27 February 2006 addressed to Dr Adams, the BBC reported on its search with regard to the original request. There is no need to set out this letter save to say that it reflects two searches having been conducted by the BBC in a number of distinct areas, the conclusion of the letter being as follows, namely:

“Having searched all of the above sources of information held by the BBC, re-searched all the original areas and extended our search to cover new areas, we believe that we have searched all relevant areas where information about Mr Campsie’s complaint could be stored.”

The letter ended with the BBC’s belief that it did not hold any information covered by the original request except a particular letter from John Birt to Roger Gale disclosed to the Appellant on 6 June 2005. The letter pointed out that the section 46 code of practice did not apply given the fact that the BBC’s own practices and policy of document destruction applied at the time. The letter referred to a records management retention schedule which was in place at the time of the destruction of the 1996 Complaint, again concluding that it was consistent with BBC policy “at the time the information relating to Mr Campsie’s correspondence ... should have been destroyed within five years of the complaint being closed.” The letter had appended to it a list of the relevant correspondence, some of which has already been referred to in this judgment.

17. There then appears to have been some confusion about the scope for further review which caused concern to the Appellant. Dr Adams reported the results of the BBC’s findings to the Appellant and by letter dated 11 April 2006 stated that she assumed

that since she had by then heard nothing further from the Appellant, he was satisfied with the response and the Commissioner therefore closed the file. By letter dated 18 April 2006, the Appellant protested, and a reply was (as Dr Adams had apparently left the employment of the Commissioner) sent to him by Dr Adams' line manager, a Ms Webb, by letter dated 26 April 2006. Ms Webb pointed out that she recognised that there had been a request for the identity of "the person or persons who authorised destruction of the 1996 Complaint and when it was done" being a reference to the earlier letter of 2 February 2006 sent to Dr Adams by the Appellant. Ms Webb also recognised that Dr Adams had failed to communicate that particular request to the BBC. However, she stressed that "the fact of the matter" was that the information relating to the 1996 Complaint could not be found. Ms Webb then, perhaps quite rightly, pointed to the essential difference of opinion between the Appellant and the BBC namely that whereas the BBC had explained that the complaint had been destroyed in line with the records management policy then in place, the Appellant had expressed his continued belief that his complaint should not have been destroyed because he believed at least that it was still open. In this letter, Ms Webb said she would contact the BBC again to clarify further the circumstances surrounding the destruction of the 1996 Complaint, and in particular to determine who was involved or responsible.

18. In due course, a formal Decision Notice was issued, but not before the BBC in a letter to Ms Webb of 8 May 2006 dealt with a specific additional query about the identity of the person who destroyed the complaint, stating that "the BBC does hold this information". The letter added that not only was the destruction of records at the time prior to FOIA coming into force carried out in accordance with the retention schedule to which reference has been made, but also that "the identity of the individual who destroyed the records was not recorded".

The Decision Notice

19. In paragraph 5 of his Decision Notice, the Commissioner expressed his satisfaction with the assurance of the BBC that the file, i.e. the file stemming from the 1996 Complaint was not held. However, in respect of information relating to the destruction of the complaints file, the Commissioner found that by not confirming or denying to the Appellant whether information relating to the destruction of the complaint was held, the BBC was in breach of Part I of FOIA. At paragraph 5.3, being the paragraph quoted in the Appellant's Grounds of Appeal, the following appears, namely:

"Although it is clear that the BBC misunderstood the letter of 31 May, the Commissioner does not find the BBC to be in breach of section 16. It remained in contact with the complainant throughout the course of the complaint and appears to

the Commissioner to have advised and assisted the complainant to a reasonable extent. The correspondence of both parties was open to interpretation.”

20. The action required therefore was that the BBC should within 30 days of the notice provide to the Appellant “any information relating to the destruction of his complaint that has not already been disclosed to the complainant ...”. In practice, this was no more than an echo of the confirmation by the BBC to which reference has been made above that it did not hold the information relating to the identity of the person or persons who had been responsible for the destruction of the files.

The Issues

21. It can therefore be seen that the ambit of the Appeal is extremely narrow. No appeal is made against the finding that the Commissioner, despite finding the letter of 31 May as constituting a separate request, was in effect upholding the manner in which the BBC had responded to its understanding of that letter, namely a reiteration of the original request of 8 May 2005. The question is therefore, whether in all the circumstances, the BBC did provide advice and assistance “so far as it would be reasonable to expect [it] to do so” to the Appellant who had by that stage made the request.

Findings

22. The Tribunal finds on balance that the BBC was entitled to interpret the letter of 31 May 2005 as a repetition of the original request of 8 May and that the BBC did enough to satisfy its obligations to provide advice and assistance so far as it was reasonable to do so in all the circumstances of the case. In support of its findings, the Tribunal refers in particular to the letters of 27 July 2005 and 26 February 2006 with its helpful detail as to the searches in fact carried out with regard to that request. The Tribunal also notes, whilst the original complaint does not in any way feature as part of this appeal, that Mr del Medico apologised to the Appellant in his letter of 6 June 2005 “for the BBC’s failure to respond to your original complaint”.
23. The Tribunal has the power to challenge the Commissioner’s decision on two grounds, namely first, that the notice on which the decision was made was wrong in law, and second, that in so far as any decision involved any exercise of a discretion by the Commissioner, the discretion should have been exercised differently; see generally section 58 of FOIA. The Tribunal has little hesitation in saying that the notice was in accordance with the law, namely it was issued in accordance with due consideration of the operation of section 16. Alternatively, insofar as the Commissioner exercised his discretion in considering whether and to what extent the public authority had fulfilled its obligations to comply with section 16, then the Tribunal

finds such exercise was entirely reasonable and should not have been exercised differently.

24. In the extremely unlikely event that any further information in this matter comes to light, the Tribunal respectfully draws the BBC's attention to another of its decisions comprising a differently constituted Tribunal. In *Peter Quinn v Information Commissioner* (Appeal No EA/2006/0030), a Decision promulgated on 15 November 2006, the Home Office formally informed the Appellant in that case that should the requested information "turn up, we would of course immediately inform you ..." (see paragraph 65)

25. For the above reasons, the Tribunal dismisses the Appeal.

Signed

Mr David Marks

Deputy Chairman

Date: 16 April 2007