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 the handling of complaints received about an edition of 'Panorama', and costs associated with the programme. The BBC stated that the requested information fell outside the scope of the Act because it is information held for the purposes of art, journalism or literature. 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. 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 Trust's Editorial Standards Committee. He has 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 8 February 2009 and submitted a series of 17 requests for information. The full requests are listed in Annex A of this Decision Notice.

5. The BBC responded on 3 March 2009 and provided information relating to request 14. However, it stated that the rest of the requested information fell outside the scope of the Act because it was information held for the purposes of journalism, art or literature.

The Investigation

Scope of the case

6. On 3 March 2009 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. He specifically asked the Commissioner to consider the BBC's response that the majority of the requested information fell outside the scope of the Act. The complainant did not ask the Commissioner to investigate the response to request 14 and therefore it will not be considered further in this decision.

7. The Commissioner's investigation has therefore considered whether the BBC correctly responded to requests 1-13 and 15-17.

Chronology

8. 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) that 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.

9. The Commissioner wrote to the BBC on 4 December 2009 to seek clarification about the purpose of the report of Professor Fraser and Dr Mensah referred to in request 16. In its response of 19 January 2010 the BBC stated that the report was commissioned by the BBC's Editorial Complaints Unit to assist with its investigation of a complaint about the 'Panorama' programme 'What's Next For Craig?'. The complaint partly concerned an alleged misrepresentation of research findings in the programme, and the report was commissioned to provide guidance to the Editorial Complaints Unit about the meaning of two of the four research papers referenced in the broadcast.

Analysis

Substantive Procedural Matters

Jurisdiction

10. 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

[1] BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)
[2] BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

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.

11. 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 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*

[3] Sugar v BBC [2009] UKHL 9

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".

12. 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.

13. 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

14. 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 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).*

15. 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.

16. For completeness, the Commissioner considers that where information is held for non-journalistic/artistic/literary purposes and is only held to

[4] BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)
[5] BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

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.

17. 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)*

18. 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.

19. 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.

Programme costs

20. Requests 5 and 6 are for information about programme costs incurred by the BBC in the making of the 'Panorama' programme 'What Next For Craig?'. The requested information is details of all payments made to named individuals associated with the programme, and all expenses and payments in connection with the programme.

21. This is similar to the information considered in the High Court cases. The Commissioner accepts the finding in the High Court judgments and

in respect of requests 5 and 6 can find nothing to justify different findings to those of the High Court in this case. Therefore he is satisfied that the information relevant to those requests is held to a significant extent for the purposes of art, literature or journalism.

Complaints

22. Requests 1-4, 7-13 and 15-17 relate to information about complaints received by the BBC regarding the broadcast of the Panorama programme, and communications and documents relating to the BBC Editorial Complaints Unit's actions and decisions when handling those complaints.

23. As detailed previously, the Commissioner sought clarification from the BBC about the nature and purpose of the report referred to in request 16 on 4 December 2009. The BBC confirmed that the report was commissioned by the BBC's Editorial Complaints Unit to assist its investigation of a complaint received about the programme. The report provided the Editorial Complaints Unit with guidance about the meaning of research papers which the complaint alleged had been misrepresented during the broadcast. The Commissioner notes that the report was commissioned as a direct result of the BBC's handling of the complaint, and therefore considers that information relating to the production of the report constitutes information on complaints about broadcast content.

24. 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.

25. 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, including the report relevant to request 16, 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.

26. In view of the above, the Commissioner has found that the requests covered by this decision, as outlined in the scope of the case section,

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

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 BBC 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:

    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

Annex A

On 8 February 2009 the complainant wrote to the BBC to request the following information (BBC reference RFI20090317):

1. What communications were there within the Editorial Complaints Unit (the "ECU") concerning or relating to the complaints made by Mr Steven Gee Q.C, and/or the supportive material from Professor Anne Teeter Ellison of Chadd, ("the Complaints") concerning or relating to "What's Next for Craig?" broadcasted by Panorama on BBC 1 on 12th November 2007 ("the Broadcast")? Please produce all emails, drafts, notes and documents concerning communication within the ECU concerning or relating to the Complaints.

2. What communications did the ECU have with anyone outside the ECU concerning or relating to the Complaints? Name the individuals, give the dates and set out what communications took place. Please produce all emails, drafts, notes and documents concerning communication by the ECU with anyone outside the ECU concerning or relating to the Complaints.

3. What communications did the ECU have with or from Professor Fraser or Dr Mensah in connection with or in relation to the Complaints? Please produce all emails, drafts, notes and documents concerning such communications.

4. Did the ECU communicate with Panorama or receive communication from Panorama concerning or relating to the Complaints? What communications were there when and with whom? Please produce all emails, drafts, notes, and documents concerning or relating to such communications.

5. Have payments been made by the BBC in connection with the Broadcast to or for the benefit of or at the request of Dr Tamimi, Yaz, or Craig or his family? What payments have been made? Please produce all emails, drafts, notes and documents concerning or relating to such payments.

6. What expenses were incurred and what payments were made by the BBC in connection with the Broadcast? What were they for and to whom were payments made and in what amounts? Please produce all emails, drafts, notes and documents concerning such expenses or payments.

7. Did Helen Bowden have any communications with or from anyone relating to or connection with the Complaints or the request by Mr Steven Gee QC that there should be a new broadcast? What communications did she have with whom? Please produce all emails, drafts, notes and documents concerning such communications.

8. What complaints other than the Complaints, were received by the BBC after the Broadcast which related to the Broadcast, and what responses were made to those complaints? Please produce all emails, drafts, notes and documents concerning such communications. Were there any communications within the BBC about any of those complaints and if so what communications? Please produce all emails, drafts, notes and documents concerning such communications.

9. Panorama purported to inform the ECU that Professor Jim Swanson had changed his mind. What communications were there to and from Panorama, or within the ECU concerning this alleged change of mind on the part of Professor Swanson? Please produce all emails, drafts, notes and documents concerning the alleged change of mind.

10. What enquires were conducted by the ECU into the Complaints and with what results? Please produce all emails, drafts, notes and documents concerning the enquiries.

11. What draft documents were produced by anyone in the ECU relating to or connected with the Complaints? Please produce all emails, drafts, notes and documents concerning the production of drafts.

12. Has the Director-General of the BBC or his office had any communications with anyone in connection with or in relation to the Complaints or the Broadcast or the request by Mr Steven Gee QC that there should be a new broadcast? Please produce all emails, drafts, notes and documents concerning such communications.

13. Following the Broadcast have there been any communications to or from the journalist responsible for the Broadcast relating to or connected with the Complaints or the Broadcast or the request by Mr Steven Gee QC that there should be a new broadcast? Please produce all emails, drafts, notes and documents concerning such communications.

14. During the ECU inquiry there was a delay arising from maternity leave. Whose maternity leave and over what period? Please produce all emails, drafts, notes and documents concerning this delay.

15. Did the ECU consider whether to carry out inquiries into the cases of Craig and Yaz featured in the Broadcast? Please produce all emails, drafts, notes and documents concerning this aspect of the Complaints and how this aspect was dealt with by the ECU.

16. The report of Professor Fraser and Dr Mensah issued with the letter dated 29th January 2009 describes itself as amended on 16th July 2008. What amendment or amendments were made to this report before it was finalised when and why? Please produce all emails, drafts, notes and documents concerning or relating to the production of this report and its amendments.

17. Please state why it took the ECU from mid April 2008 until 29th January 2009, a period of over 9 months, to produce the letter dated 29th January 2009. Please give the exact chronology of what was being done by the ECU over this period. Please produce all emails, drafts, notes and documents concerning or relating to why it took the ECU over 9 months to produce the letter.

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"."