

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 January 2010

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

Summary

The complainant made a request to the BBC for an email it received in response to a research email during the making of an edition of 'Panorama'. The BBC stated that the requested information falls outside the scope of the Act because it is information relating to complaints about programme content and is therefore held for the purposes of art, journalism or literature. The Commissioner's decision is that the requested information relates to the journalistic and research process associated with programme content, and that the BBC correctly determined that the 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'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 1 July 2009 and submitted a series of requests for information. In its response the BBC allotted the requests various reference numbers, and this decision relates to the request under the BBC reference RFI20090977:

"In the letter dated 29th January 2009 the ECU [Editorial Complaints Unit] found that Panorama had received an answer from Professor Swanson to a research email, which was inconsistent with what Panorama subsequently published. The ECU referred to that email in its decision and relied on its contents describing what they were. Please produce that email".

5. The BBC responded on 29 July 2009 and stated that the information is information on complaints and therefore falls outside the scope of the Act. The BBC referred the complainant to a response to a previous request for a full explanation as to why it considers complaints-related information falls outside of the Act. That response, dated 4 June 2009 in relation to request RFI20090661, explained that information on complaints is held for the purpose of reviewing audience reaction to its programme content and informing decisions on how that content will be produced and broadcast in future. The BBC therefore considered that complaints-related information supports its output and falls outside the scope of the Act.
6. On 29 July 2009 the complainant wrote to the BBC and requested an internal review of its response to the request.
7. The BBC responded on 3 August 2009 and explained that it does not offer an internal review when it considers that the requested information falls outside the scope of the Act.

The Investigation

Scope of the case

8. On 3 August 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled and that he did not receive the material he requested.

Chronology

9. On 2 October 2009 the High Court considered two appeals *BBC v Steven Sugar and the Information Commissioner*¹ (EW2349) and *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. Having reviewed the nature of the request and the correspondence supplied by the complainant, the Commissioner decided that it was not necessary to contact the BBC for further information or arguments in support of its decision that the requested information falls outside the scope of the Act.

Analysis

Substantive Procedural Matters

Jurisdiction

11. 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.

12. 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,

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

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

³ *Sugar v BBC* [2009] UKHL 9

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 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”.

13. 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.
14. 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

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]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).

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 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.
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 BBC 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.
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

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.

21. The Commissioner recognises the comments made by Mr Justice Irwin in relation to the scope of the derogation and the need for a relationship between the requested information and the derogated purposes. The requested information in this case is an email received from a third party in the course of the BBC's programme research for an edition of 'Panorama'. The email was also subsequently referred to in the findings of the Editorial Complaints Unit regarding a complaint to the BBC from the complainant about the broadcast.
22. The Commissioner considers that the requested information relates to the research process of collating information to inform programme content. A response received from a third party to a research email sent by the BBC is information generated as part of the journalistic process associated with programme-making. The Commissioner therefore considers that the requested information is closely associated with the BBC's creative and journalistic activities and is clearly information held for the purposes of journalism, art or literature.
23. The BBC has also argued that the requested information relates to its Editorial Complaints Unit and is therefore information on complaints received by the BBC. It explained that information on complaints is held for the purpose of reviewing audience reaction to its programme content and informing decisions on how that content will be produced and broadcast in future. It therefore considered that complaints-related information supports the BBC's output and is therefore also held for the purposes of art, literature and journalism as a result.
24. In view of the above, the Commissioner has found that the request is 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

25. 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

26. The Commissioner requires no steps to be taken.

Right of Appeal

27. 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 25th day of January 2010

Signed

**Jo Pedder
Senior 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”.”