

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 February 2011

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

Summary

In response to a BBC news article, the complainant made a request to the BBC for a copy of communications sent to and from Carter-Ruck LLP with regards to the making of a Panorama programme about Scientology. The complainant also requested that the BBC release any other communications sent to or from Carter-Ruck LLP or any other Scientology representative that concerned John Sweeney, Panorama, or Scientology. The BBC responded by stating that the requested information fell outside the scope of the Freedom of Information Act 2000 (the "Act") because it is information held for the purposes of journalism, art or literature and is therefore derogated. The Commissioner's decision is that the information is genuinely held for the purposes of journalism. Therefore the Commissioner finds that the BBC was 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 a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. In the run-up to the BBC broadcast of the Panorama programme "Secrets of Scientology" in September 2009, the reporter John Sweeney wrote an article¹ about the making of the programme. In his article, Mr Sweeney referred to communications received from the UK law firm Carter-Ruck, in its position as the legal representative of Scientology.

The Request

3. On 26 September 2010 the complainant submitted by email the following information request to the BBC:

"This BBC news article [referenced at paragraph 2] refers to communications received by the BBC from 'Scientology's UK lawyers at Carter-Ruck'.

- 1) *Please release these communications.*
- 2) *Please release any reply made by the BBC.*
- 3) *Please release any other communications to or from Carter-Ruck or any other Scientology representative concerning John Sweeney, Panorama, or Scientology."*

4. The BBC responded to the request on 8 October 2010 by stating that the requested information was excluded from the Act because it is held for the purposes of "journalism, art or literature." The BBC explained that Part VI of Schedule 1 to the Act provides that information held by the BBC and the other public service broadcasters is only covered by the Act if it is held for "purposes other than those of journalism, art or literature." It further noted that the BBC is not required to supply information held for the purposes of creating the BBC's output or information that supports, and is closely associated with, these creative activities. The BBC therefore refused to provide any information in response to the request for information.

¹ http://news.bbc.co.uk/panorama/hi/front_page/newsid_9032000/9032278.stm

The Investigation

Scope of the case

5. On 8 October 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically questioned whether the requested information would be held for the purposes of "journalism, art or literature."

Chronology

6. The Commissioner has not deemed it necessary to see the withheld information in this case or to receive further submissions from the complainant or the BBC.

Analysis

Substantive Procedural Matters

Jurisdiction

7. Section 3 of the Act states:

*"3. – (1) In this Act "public authority" means –
(b)...any body...which –
(i) is listed in Schedule 1..."*

8. 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."

9. 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 – V of this Act applies to any other information held by the authority."

10. This means that the BBC is a public authority for the purposes of the Act but only has to deal with requests for information which is not held for the purposes of journalism, art or literature. The term 'derogated' is

used to describe information that falls outside the Act, ie information that is held by the BBC for the purposes of journalism, art or literature.

11. The House of Lords in the case of *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has jurisdiction to issue a decision notice in respect of any request made to the BBC regardless of whether or not the information is derogated. 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.
12. The Commissioner will first determine whether a 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 that request.

Derogation

13. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment was made by Lord Neuberger of Abbotsbury MR who stated that:

"...once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes" (para 44) and that *"...provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA."* (para 46)

14. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – ie journalism, art or literature – it is not subject to the Act.
15. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.

16. The Court of Appeal adopted the Tribunal's definition of journalism in *Sugar v IC and the BBC* [EA/2005/0032] at paragraphs 107 to 109 which set out that journalism comprised of the following three elements:

"107. The first is the collecting or gathering, writing and verifying of materials for publication.

108. The second is editorial. This involves the exercise of judgement on issues such as:

**the selection, prioritisation and timing of matters for broadcast or publication,*

**the analysis of, and review of individual programmes,*

**the provision of context and background to such programmes.*

109. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced colleagues by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

17. In determining whether the requested information is held for the purposes of journalism the Commissioner has considered the following factors:

- The purpose for which the information was created;
- The relationship between the information and the programmes content which covers all types of output that the BBC produces; and
- The users of the information.

18. The requested information in this case is, broadly speaking, copies of correspondence exchanged between the BBC and any representative of Scientology in relation to the BBC series Panorama.

19. The Commissioner is required to determine whether this information was genuinely held for the purposes of journalism on 26 September 2010. It is not material whether the information is also held for other purposes too, provided it is genuinely held for the purposes of journalism.

20. The Commissioner considers that the purpose for which the requested information was created was to put forward, or to respond to, the

views of Scientology concerning the content of broadcasts that had been, or were planned to be, broadcast on the BBC. The Commissioner is satisfied that there would be a direct link between the information and the editorial analysis and review of the output of the BBC.

21. The Commissioner further considers that the requested information would be retained as a resource by which an editorial decision would be made about the content of any future programme on Scientology. This is because the BBC would need to consider any potential complaints or legal challenges that may arise from its future output and if and how this should affect the editorial content of a programme on Scientology.
22. For this reason, the Commissioner has determined that the BBC continues to genuinely hold this information for the purposes of journalism. The Commissioner has concluded that the information would serve to inform the editorial process referred to at paragraph 16 and would be used by those involved in the production of future output.
23. As a result, the Commissioner finds that the requested information to be derogated and that the BBC was not obliged to comply with Parts I to V of the Act.

The Decision

24. The Commissioner's decision is that as the request is for information which is held for the purposes of journalism, the BBC was not obliged to comply with Part I to V of the Act in this case.

Steps Required

25. The Commissioner requires no steps to be taken.

Right of Appeal

26. 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 sent.

Dated the 14th day of February 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution**

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

Legal Annex - Relevant Statutory Provisions

Section 1(1) states that –

“Any person making a request for information to the 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 the information communicated to him.

Section 3(1) states that –

“in this Act ‘public authority’ means –

- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
- (b) a publicly-owned company as defined by section 6.”

Section 3(2) states that –

“For the purposes of this Act, information is held by a public authority if –

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.”

Section 7(1) states 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 this Act applies to any other information held by the authority.”

Schedule 1, Part VI reads:

“The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature”