

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 30 January 2008

Public Authority: British Broadcasting Corporation
Address: MC3 D1
Media Centre, Media Village
201 Wood Lane
London
W12 2TQ

Summary

The complainant sought access to any documentation relating to the case of Dr David Kelly that had been considered by the BBC Board of Governors. The BBC identified four documents falling within the ambit of that request. Two of those documents were minutes of meetings of the Board of Governors, which were subsequently released to the complainant: the Commissioner considered that one sentence redacted from one of those sets of minutes had been correctly withheld under section 40 of the Act. The other two documents were papers prepared for the first of those two meetings. The BBC took the view that both of these papers were covered by the derogation and therefore outside the terms of the Act: the Commissioner accepted that view. However, he criticised the BBC for breaching sections 10 and 17 of the Act by not informing the complainant, within the timescale specified, either that information was being withheld from the set of minutes or of the relevant exemption concerned.

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.

The Request

2. On 20 January 2005 the complainant wrote to the Director General of the British Broadcasting Corporation (the BBC) to ask, under the Act, for *"all documentation, records and relevant minutes of meetings, including the BBC's Governors,*

relating to Dr David Kelly as the source of information on the Government's presentation of its case for war against Iraq, and of the subsequent repercussions in particular on the interaction on the matter between the BBC and Government representatives."

3. On 9 February 2005 the BBC replied to the complainant to the effect that the request as it stood was likely to exceed the cost limits set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations). The BBC invited the complainant to identify more specific material. On 7 March 2005 the complainant replied. He said that he was content to limit his request to minutes and supporting documentation of meetings of the Board of Governors which had considered the matter, other than information that had already been placed in the public domain.
4. On 17 March 2005 the BBC replied. It told the complainant that, on 26 November 2003, the Board of Governors had been briefed on events leading up to the Hutton Inquiry and, on 28 January 2004, that the Board had considered the publication of Lord Hutton's report. The BBC said that it was withholding those parts of the minutes of both of those meetings which had dealt with these matters, as well as a background briefing paper prepared for the November meeting (P(03)23). This information was being withheld under section 36 (2) (b)(ii) of the Act as disclosure would inhibit free and frank discussion. This decision had been taken by the Board of Governors on behalf of the BBC, who constituted the qualified person as required under that section of the Act. As the decision had been taken by the Board the BBC felt unable to offer the complainant an internal review: instead, it invited the complainant to refer the matter to the Commissioner.

The Investigation

Scope of the case

5. On 4 April 2005 the complainant contacted the Commissioner to appeal against the decision of the Board of Governors.

Chronology

6. The Commissioner's investigation of this matter began on 1 November 2005. The BBC subsequently provided the Commissioner with the relevant documentation. However, at the time of receipt of the complainant's letter of 4 April 2005, the Commissioner was already considering three separate requests for copies of the minutes of the Board of Governors' meeting held on 28 January 2004. In decisions published in February 2006 the Commissioner upheld the BBC's original decision not to release those minutes. Subsequently, two of the complainants appealed to the Information Tribunal against the Commissioner's decision. The Commissioner therefore decided not to take his investigation into this complaint any further until the decision of the Tribunal was known, and he so informed the complainant.

7. In the interim, the BBC wrote to the Commissioner on 17 March 2006 to say that an error had occurred in its original Refusal Notice to the complainant. The Refusal Notice had indicated that the Board of Governors had taken a decision to withhold the minutes of the 26 November 2003 meeting, and the relevant associated document, under section 36 of the Act. This was not actually the case: the Board had only ever taken a decision in respect of the minutes of the meeting of 28 January 2004. The BBC was in fact of the view that both of these documents fell within the derogation and, therefore, outside the terms of the legislation. On 11 May 2006 the BBC wrote to the complainant to inform him of its view of the status of the documents requested and to apologise for the earlier mistake.
8. On 8 January 2007 the Information Tribunal published its judgement on the appeals (*EA/2006/0011/0013*), which was to overturn the decisions of the Commissioner. As a result, the minutes of the meeting of 28 January 2004 were released not only to the appellants but also to the complainant. The Commissioner was then able to reopen his investigation, which now related to the relevant section of the minutes of the meeting of the Board of Governors on 26 November 2003 and one background briefing paper provided for that meeting. Following further discussion, the BBC accepted that another briefing paper provided for that meeting (P(03)24) also fell within the parameters of the complainant's request but pointed out that this paper formed part of the subject of a separate information request to the Commissioner which he was currently considering.
9. On 17 May 2007 the BBC made a further submission to the Commissioner. This confirmed the BBC's position that the complainant's request now encompassed two sets of minutes and two briefing papers provided for the November 2003 meeting (there were other papers submitted to the November meeting but these were not considered relevant to the request). The BBC confirmed its view that the two briefing papers, being directly related to matters concerned with journalism, fell outside the terms of the Act in accordance with Schedule 1 Part VI (the derogation). In respect of the minutes, the BBC confirmed that it had released to the complainant the minutes of the Board of Governors meeting on 28 January 2004. In respect of the minutes of the meeting of 26 November 2003, the BBC argued that these were held for the dominant purposes of journalism and were therefore also covered by the derogation. The BBC went on to say that, if the Commissioner was unable to accept that view, it would wish to apply sections 36(2)(b)(ii) and (2)(c) of the Act.
10. On 30 May 2007 the Commissioner completed his investigation into the complaint referred to in the final sentence of paragraph 8 above (ICO reference: FS50086152). In his report the Commissioner referred to the fact, which had recently been confirmed through a decision of the High Court, that if he decided that information held by the BBC was held for the purposes of journalism, art or literature (in effect, that it was covered by the derogation) then he had no powers to issue a Decision Notice. The Commissioner took the view that the information requested in this case was so held: this information did, of course, include one of the two briefing papers sought through the request currently under consideration.

11. On 10 July 2007 the Commissioner wrote to the BBC. In that letter the Commissioner confirmed that, in case FS50086152, he had already concluded that P(03)24 fell within the terms of the derogation and he told the BBC that he thought it likely that he would reach a similar conclusion in respect of P(03)23. However, he told the BBC that he thought it unlikely that he would come to the same view in respect of the minutes of the meeting of 26 November 2003 as he was not of the view that the dominant purpose of those minutes brought them within the definition of the derogation. On that basis, he invited the BBC to consider whether it now wished to apply sections 36(2)(b)(ii) and 36(2)(c) to the relevant section of those minutes and, if it did, to invoke the qualified person procedure.
12. Following further discussion the BBC wrote to the complainant on 19 December 2007 and released to him that part of the minutes of 26 November 2003 meeting which fell within the parameters of his request. One sentence was redacted from those minutes on the grounds that release of the information contained in it would breach the first data protection principle in that it would not constitute fair and lawful processing.

Analysis

Procedural matters

13. The BBC has stated that its original Refusal Notice of 17 March 2005 was inaccurate. In that letter the BBC said that the Board of Governors had decided to withhold all the information requested on the basis of section 36 of the Act. Subsequently, however, the BBC discovered that the Board had only made that decision in respect of the minutes of the meeting of 28 January 2004: the Board had never formally considered the minutes of the meeting of 26 November 2003 and the associated documents. In any event the BBC now believed that those documents fell within the derogation and therefore outside the terms of the Act altogether. On that basis, the subsequent letter to the complainant of 11 May 2006 setting out this view falls outside the scope of the Act.
14. As indicated in paragraph 12 above, the BBC subsequently released the relevant section of the minutes of the meeting of 26 November 2003 to the complainant, minus one sentence redacted on the grounds that the information contained in it fell within section 40 of the Act. The BBC therefore acted in breach of sections 10 and 17 of the Act in not informing the complainant, within the timescale specified in the legislation, that information was being withheld from him and the exemption under which it was being withheld.

Derogation

15. As indicated earlier in this Decision Notice, the Commissioner is unable to issue a Decision Notice in any case where the information sought falls within the derogation as in such cases the matter falls outside the scope of the Act. However, in this case it is the Commissioner's view that only some of the information is of that kind and that the remainder does fall within the terms of the Act. This Decision

Notice deals only with that information considered to fall within the terms of the Act: a separate letter deals with the information that the Commissioner believes is covered by the derogation.

Exemption - Section 40

16. The BBC has now released the relevant section of the minutes of the meeting of 26 November 2003 to the complainant. However, one sentence from that section was redacted by the BBC on the grounds that release of it would breach section 40 of the Act in that it would constitute fair and unlawful processing. Before the Commissioner can consider that matter, though, he needs to have satisfied himself that the minutes of the meeting of 26 November 2003 are, in fact, covered by the Act and do not fall within the terms of the derogation. The BBC told the Commissioner, in its letter of 17 May 2007, that the minutes of that meeting contained direct references to its editorial decision-making policies and reflected specific discussion as to what the editorial guidelines should include. While recognising that the minutes of a meeting of the Board of Governors may serve other purposes, including that of regulation, the BBC suggested that in this case, because of their content, the dominant purpose of holding the minutes related to journalism.
17. The Commissioner does not accept that view. It is inevitable that the minutes of meetings of a body such as the BBC's Board of Governors are going to cover a very wide range of issues. Some of those issues will be directly related to matters falling within the scope of the derogation, others will not. However, it seems to the Commissioner that the content of the minutes is essentially immaterial when considering the issue of purpose. The fundamental purpose of a set of minutes, whatever the organisation, is the same: it is to record, in a greater or lesser degree of detail, the discussion that took place, the decisions that were reached, and the action points that were identified for particular departments or individuals. Minutes, first and foremost, are a document of record and identify what was agreed: all other purposes, and the Commissioner accepts that there may be many, are necessarily subordinate. On that basis, the Commissioner believes that the minutes do fall within the Act and that he may therefore consider the one sentence redacted from those minutes when they were released to the complainant.
18. The relevant text of section 40 of the Act can be found in the Legal Annex. The Commissioner has considered the information contained within the redacted sentence: it contains direct references to a number of named individuals. The Commissioner is of the view that these references, which contain personal information relating to those individuals, were clearly intended to be made on a confidential basis and that further processing of that information would not be fair and lawful within the definition of the Act. The Commissioner therefore believes that the BBC correctly applied section 40 of the Act to the information in question.

The Decision

19. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it issued an incorrect Refusal Notice in accordance with the requirements of sections 10 and 17 of the Act. In other respects, the Commissioner's decision is that the public authority dealt with the request in accordance with the requirements of the Act.

Steps Required

20. The Commissioner requires no steps to be taken.

Failure to comply

21. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

19. 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

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 30th day of January 2008

Signed

**Jane Durkin
Deputy Commissioner**

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

Legal Annex

Section 10 - (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Section 17 - (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which-

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not be otherwise apparent) why the exemption applies.

Section 40 - (2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or the second condition below is satisfied.
- (3) The first condition is-
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the data protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and....