



Information Policy & Compliance
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[TPD]

Senior Complaints Officer

Information Commissioner's Office – NI

Via email: [TPD] ico.gsi.gov.uk

Your reference: FS50176386

Our reference: IC2007047

X July 2009

Dear [TPD]

Case Reference Number FS50176386 - Complaint from [TPD]

- I. I refer to the e-mail of 28 July 2008 regarding [TPD]'s request under the Freedom of Information Act (the 'Act') received by the BBC on 24 July 2007, which sought the following information in relation to the "Climate Change – the Challenge to Broadcasting" seminar held at the BBC on 26 January 2006:
- i. What was the name given to this seminar?
 - ii. Where and when was this seminar held?
 - iii. When did the seminar start and when did it end?
 - iv. A copy of the invitation sent to prospective participants
 - v. The agenda for the seminar together with any notes that were provided for the participants
 - vi. The names of all those who were invited to attend the seminar as participants, observers or in any other capacity together with their job

description, organisational affiliation's or any other information relation to their eligibility for being invited to be present

- vii. The names of all those who attended the seminar as participants, observers or in any other capacity together with their job description, organisational affiliation's or any other information relation to their eligibility for being present
- viii. Any minutes, notes, electronic communications, recorded material or other records of the proceedings of the seminar.

2. The BBC responded to [TPD] on 21 August 2007 explaining that the requested information was outside the scope of the Act because information relating to the seminar was held to help inform the BBC's editorial policy around reporting climate change. The only exception was certain logistical information (items 1, 2 and 3 of the request) which the BBC provided in the same letter.

3. The BBC voluntarily provided further information on the number of attendees and the names and job descriptions or titles of the seminar's hosts, chair and key speaker as well as information on the aims of the seminar. [TPD] subsequently filed a complaint with the Commissioner.

4. In an e-mail of 28 July 2008, [TPD] state that:-

Following an initial review of this case, I think it is likely that some or all of the information withheld is environmental information as defined by the Environmental Information Regulations (EIR). I have noted that the BBC's position is that it is not covered by the EIR but deals with request for environmental information under the Act. I also noticed that the BBC explained in response to a previous FOI request that it had sought legal advice on its position regarding EIR. I would be grateful if the BBC could explain in detail why it considers that it is not covered by the EIR and also comment as to whether it considers the information withheld is environmental. I would also appreciate if the BBC could consider disclosing to the Commissioner the legal advice received on the EIR and the BBC to assist us in determining the BBC's position as a public authority under the EIR.

In order to determine if the information is environmental, the Commissioner needs to be able to review the withheld information. I would therefore be grateful if a copy of the withheld information is sent to me.

In order to ensure that we can deal with this complaint as quickly as possible for the benefit of all parties I would also appreciate if you could provide me with further arguments to support the BBC's application of the derogation, and without prejudice for alternative arguments under the Act / EIR.

5. Subject to paragraph 6 we discuss each of those points below.

6. In addition to the points concerning the Act, your e-mail raises the issue of the BBC's position under the Environmental Information Regulations (the 'EIR') and whether the information outstanding under [TPD] request constitutes environmental information under the EIR. It is the BBC's view that even if there were a broader policy issue concerning the BBC's position under the EIR, it would not lend itself for consideration in the context of this correspondence. Rather, were there such an issue, it should be the subject of an appropriate consultation between the Commissioner and the BBC. Without prejudice to the foregoing, and because of your specific request for a detailed explanation, we set out in section A below certain of the BBC's arguments. The BBC reserves its right to further develop, alter, amend, substitute, add to or otherwise change its arguments.

Copy of the information held by the BBC

7. Attached to this letter for your consideration in confidence please find a copy of the information held by the BBC at the time of the request, namely:-

- a. Climate change rooms.doc, setting out information such as delegation of numbers of attendees to rooms and catering requirements;
- b. Climate change agenda.doc, setting out the agenda of the seminar and brief list of attendees;
- c. Climate change attendance.doc, setting out the list of attendees including their job titles and e-mail addresses;
- d. Final attendee list.xls, setting out the names, companies and job titles of attendees;
- e. Biogs.doc setting out names, job titles, organisations, e-mail addresses and brief biographies of the attendees;
- f. Climate change briefing.doc, a briefing document for the seminar [circulated to the participants] [awaiting confirmation from Vision];
- g. Climate change JB opening remarks.doc, the BBC Director of Television's speaker notes for her opening remarks;
- h. Climate change delegate details.doc, a sample document used for administrative purposes setting out the template in which delegate detail would be set out in the document setting out the biographies of the participants;
- i. CCBBCmtgDraftProgJS.rtf, setting out the agenda, carousel topics, allocation of participants to groups, chairs, rapporteurs and the timings of each group's attendance of a carousel;
- j. Climate change registration.doc, allocating duties to the named individuals responsible for administering the registration process;
- k. Labels with colour.doc, setting out the name tags of the participants, including their job title and organisation;
- l. Signs.doc, setting out the sign for the registration desk; and
- m. Labels – room groupings.doc setting out the room groupings.

[Awaiting confirmation from [TPD]]

Requested information not held by the BBC

8. It follows that the BBC does not hold the following information requested by [TPD]

[TPD]

- a. copy of the invitation sent to prospective participants (item 4 in [TPD] request);
- b. the names and other information of invitees (item 6 in [TPD] request); and
- c. other than the BBC Director of Television's speaker notes, any minutes, notes, electronic communications, recorded material or other records of the proceedings of the seminar (item 8 in [TPD] request).

[Awaiting confirmation from [TPD] – Vision]

Outstanding Information

9 Therefore the requested information held by the BBC and not already disclosed to [TPD] concerns items 5 and 7 as well as the BBC Director of Television's speaker notes under item 8 in [TPD] request above (the 'Outstanding Information'). The Outstanding Information is contained in items (b), (c), (d), (e), (f), (g), (i) and (k) held by the BBC (listed in paragraph 7 above).

Nature of the information

41. Without prejudice to the BBC's position that it is not a public authority for EIR purposes, in any event the requested information held by the BBC is not environmental information under the EIR.

42. As explained in section B below, the seminar was organised and the BBC holds the relevant information clearly and purely for editorial reasons.

43. The "Climate Change – the Challenge to Broadcasting" seminar did not concern the environment. It concerned editorial challenges to the reporting of climate change.

44. The information requested by [TPD] does not concern the environment. It concerns a seminar organised by the BBC in relation to editorial challenges to the reporting of climate change. More accurately, except perhaps in relation to item 8 in [TPD] request (concerning records of the seminar's proceedings[, which in any event is not held by the BBC] [pending confirmation from [TPD] – Vision]), the requested information concerns the organisation and administration of a seminar concerning editorial challenges to the reporting of climate change.

45. The information held by the BBC is set out in paragraph 7(a) – (m) above. Most of this information concerns the organisation and administration of a seminar concerning editorial challenges to the reporting of climate change. The only exceptions could be the BBC Director of Television's speaker notes (item 7(g)) and the briefing document (item 7(f)), which actually concern the seminar as opposed to the seminar's organisation or administration. In any event, none of the information held by the BBC concerns the environment.

46. Therefore the information held by the BBC is clearly not on:-

- a. the state of the elements of the environment;
- b. factors affecting or likely to affect the elements of the environment;
- c. measures and activities affecting or likely to affect the above elements or factors, or designed to protect the elements of the environment;
- d. reports on the implementation of environmental legislation;
- e. analyses and assumptions used within the framework of the measures and activities in (c) above; or
- f. the state of human health and safety.

47. We trust that your review of the attached copy of the information will enable you to agree with us that it is clearly not environmental information for EIR purposes.

Disclosure of external legal advice

48. We have set out above in relative detail arguments regarding the BBC's position under the EIR. These arguments are based on external legal advice obtained by the BBC. We trust that they will assist you in considering the BBC's position under the EIR, albeit in an inappropriate context (as discussed in paragraph 6 above). After careful consideration of your request, we have concluded that at this time we are unable to disclose the relevant legal advice, not least because of the inappropriateness of the context and because the arguments set out

above offer, in our view, sufficient assistance at this time. We, therefore, do not believe that the disclosure of the advice at this stage would have any additional benefits.

B. Freedom of Information Act

49. The "Climate Change – the Challenge to Broadcasting" seminar was organised by the BBC's Director of Television in order to achieve the following purposes:-

- To offer clear summary of the state of knowledge on the issue
- To find where the main debates lie
- To prick imagination to allow media to deal with scope of the issue
- To consider the BBC's role in public debate over a ten year period

The seminar is intended to provoke both media and specialists to think about the following questions: what do the public need to absorb and debate over the next ten years? Scepticism is a powerful tool for good science, policy and broadcasting: how should it be deployed in relation to the science and politics of climate change? What has broadcasting achieved already in terms of public understanding and debate, and what can it achieve in the next decade?

(Climate change briefing document attached to this letter).

50. The topics covered in the plenary and carousel sessions were:-

- a. Climate change – the challenge to broadcasting
- b. Climate change science, policy and the public
- c. Certainty, uncertainty and public understanding
- d. How should the world respond?
- e. Vulnerability - opportunity - equity

51. Half of the participants came from the BBC or television. The remaining participants included politicians, campaigners, academics, researchers and scientists.

Information held for purposes of journalism, art or literature

52. The Outstanding Information is held to support the BBC's output, in particular to help inform the BBC's editorial policy on reporting climate change accurately and impartially. It is therefore clearly not held for purposes other than journalism, art or literature.

53. The BBC's commitment to accuracy is a core editorial value and fundamental to the BBC's reputation.

54. Impartiality lies at the heart of the BBC's commitment to its audiences. It applies across all of our services and output, whatever the format, from radio news bulletins via our web sites to our commercial magazines and includes a commitment to reflecting a diversity of opinion.

55. The Agreement accompanying the BBC Charter requires us to produce comprehensive, authoritative and impartial coverage of news and current affairs in the UK and throughout the world to support fair and informed debate. It specifies that we should do all we can to treat controversial subjects with due accuracy and impartiality in our news services and other programmes dealing with matters of public policy or of political or industrial controversy.

56. Complex issues such as climate change offer the BBC an opportunity to engage people (both as audience and citizens) and to improve audience understanding. At the same time, however, such issues constitute a challenge to ensure that the BBC's coverage and reporting is accurate and impartial.

57. Often, the BBC is under pressure from various sides in relation to its reporting of important issues. Climate change is not an exemption. The challenge for the BBC editors is to decide how the BBC can run climate stories and how to stay impartial. The challenge for BBC journalists is to ensure that their reporting is impartial, rational and fair.

58. A further challenge lies in communicating the complexities and controversies contained by this enormous issue taking into account the realities of media decision-making and what the media know about public understanding and action on climate change.

59. Understanding the issue is, therefore, one of the prerequisites to meeting these challenges. The purpose of the "Climate Change – the Challenge to Broadcasting" seminar and holding the relevant information was precisely to enable the BBC to develop a better understanding of the issue; assess where the centre ground in the science, politics, economics, and business lies; make the necessary editorial decisions and determine the approach to reporting; face the challenges and produce accurate and impartial quality reporting of the issue.

60. The seminar and relevant information (including the Outstanding Information) was used by [decision makers, key programme-making and editorial figures, and journalists] [pending confirmation from [TPD] Vision] to determine where the consensus lies; where the opposition lies and how much of that opposition is reasonable and scientifically justified; how much space should be given to the consensus, the opposition and the extreme views; the problems and possible solutions; the politics and economics of climate change; the needs and expectations of the audience; how to best communicate the key issues to the audience; how to combine the complexity and seriousness of the topic with the responsibility to entertain and engage the audience; how to be accurate and impartial; how to offer balanced broadcasting connecting climate change to broader issues and other environmental issues; and finally, to ensure that the BBC as a public broadcaster can, in the BBC Director of Television's words:- ... play an important role in ensuring that people can access good information about the issues at a pitch appropriate to their needs. It can go further by taking people into an imaginative landscape to think through the emotional, philosophical and cultural dimensions ... (Opening remarks of BBC Director of Television, attached).

61. It therefore enabled the BBC to determine where its priorities should lie and to increase public awareness and ensure impartial and accurate quality programming on climate change.

62. The seminar and relevant information (including the Outstanding Information) were, therefore, clearly held for the purposes of guiding editorial decisions such as determining what constitutes accurate and impartial reporting, whether to broadcast a specific programme and also how to broadcast it – for example the timing of the programme, which channel it should be broadcast on, and how it should be presented in terms of announcements, warnings and contextual programming. The primary users of information concerning the seminar (including the Outstanding Information) were [those directly concerned with programme output and editorial policy, for example the Director of Television, and the Controller, Editorial Policy.] [pending confirmation from [TPD] - Vision – do we have specific examples of how and by whom the information was used; what was the impact on BBC programming and policy, eg new approach? New guidelines or policy? examples of BBC programmes? Climate Change website? College of Journalism?].

63. The fact that the seminar and the Outstanding Information enabled the BBC to achieve its editorial duties of accuracy and impartiality is evidenced by the fact that climate change was used as one of the examples showcasing the BBC's achievements in the BBC Trust's Report "From Seesaw to Wagon Wheel: Safeguarding Impartiality in the 21st Century" discussing how the seminar and relevant information held contributed in the BBC coming to a conclusion about the space that should be allocated to opponents of the consensus on climate change. In particular, the BBC concluded that the weight of evidence no longer justified equal space being given to the opponents of the consensus, however sufficient space would be afforded to them to be heard.

64. The gathering and evaluating of information about approaches to broadcasting and in order to enable editorial decisions is clearly a part of the production and editorial process. Information relating to the seminar (including the Outstanding Information) was held for the purposes of guiding editorial decisions. Such decisions clearly pertain to the 'inception, planning

and delivery of new content' which the Commissioner considers constitute 'creative decisions' and therefore information falling outside the scope of the Act.

65. The application of the Act to such information would clearly invade the "creative and journalistic space" and editorial integrity that the Schedule 1 designation seeks to protect.

66. Part VI of Schedule 1 to the Act provides that the BBC is a public authority for the purposes of the Act only in respect of "information held for purposes other than those of journalism, art or literature". This does not mean that the information need itself be journalism, art or literature to be outside of the scope of the Act; it means that the Act only applies where the dominant purpose for holding the information is other than for those purposes. As demonstrated above, the Outstanding Information was part of the editorial and programme production process and had an impact on creativity.

67. It is the BBC's position that unless the requested information is held for a dominant purpose other than journalism, art or literature, the BBC is not subject to the Act. This was the position which was initially taken in relation to [TPD] request.

68. One of the main policy drivers behind the limited application of the Act to public service broadcasters was to protect freedom of expression and the rights of the media under Article 10 European Convention on Human Rights ("ECHR") and to ensure that the Act did not place public sector broadcasters at an unfair advantage to their commercial rivals. Disclosure of this type of information would have a chilling effect on journalistic and artistic freedom and the necessary frankness of internal analysis and decision-making, such that the quality of journalistic and artistic outputs would not be enhanced. The ability of programme-makers to make editorial decisions would be damaged, as would their ability to come to their own journalistic and artistic judgment free from public scrutiny.

69. The BBC, as a media organisation, is under a duty to impart information and ideas on all matters of public interest. This "essential function" was recognised by the European Court of Human Rights in *Bergens Tidende v Norway* (2001) 31 EHRR 16, paragraph 49. Journalistic or editorial integrity is not only an aspect of Article 10 of the ECHR, but a crucial factor in enabling the media to fulfil its essential function. The significance of a potentially "chilling effect" on output where freedom of expression is curtailed was highlighted in *Goodwin v UK* (1996) 22 EHRR 123, paragraph 39.

70. You will be aware that following the recent judgement of the House of Lords, the issue of the extent to which the Act applies to the BBC is now again before the High Court in the context of the Sugar case. Since we are a party to this litigation, we do not feel it is appropriate to make full submissions on the issue of the application of Schedule 1 to the Act until the conclusion of the case.

71. However, we note that the Commissioner's position in the original appeal was that the words "journalism, art or literature" should be given a relatively broad meaning, and that Parliament should be taken to have been concerned to protect the journalistic, artistic and literary integrity of the BBC by securing a creative and journalistic space for programme-makers to produce material for broadcast free from interference by members of the public or (as regards the journalistic purposes) by e.g. anyone who might be the subject of or affected by journalistic inquiry (skeleton argument dated 13 March 2007). This reflects the Commissioner's own decision on Mr Sugar's complaint, see his letter of 24 October 2005:-

It is the Commissioner's view that the ultimate purpose of the derogation is to protect journalistic, artistic and literary integrity by carving out a creative and journalistic space for programme makers to produce programmes free from the interference and scrutiny of the public (ICO Reference: FAC0070848).

72. When construing the BBC's treatment under Schedule 1, regard may be had to its purpose. It is clear that this purpose consisted partly in protecting freedom of expression, but also partly in protecting the position of the BBC relative to its commercial rivals. This much is clear from a letter from the Home Office to Department for Culture, Media and Sport, on 13 January 2000 and in the wake of much negotiation between the BBC and the Government on the scope of the Act's application to the BBC. The letter, states:-
... the Government has sought to ensure that...including them [the public service broadcasters] in the Bill does not place them at an unfair disadvantage to their commercial rivals. The Bill therefore provides that the inclusion of the public service broadcasters does not relate to information held for journalistic, artistic or literary purposes

73. The BBC maintains that the purpose for holding the Outstanding Information is to support the production of our content and reporting of climate change and, therefore, the information is held for the purpose of "journalism, art or literature". Consequently, the BBC is not obliged to disclose it.

Alternative argument: section 40

74. Without prejudice to the BBC's position that the requested information falls outside the scope of the Act, we set out below our alternative arguments in relation to the application of the Data Protection Act exemption of the Act.

75. The information requested by [CTPD] under items 6 and 7 of his request concerns personal data of the invitees and attendees.

76. The BBC does not hold information concerning the invitees (see paragraph 8 above).

77. The BBC holds information concerning the attendees. This information comprises personal data in the form of the names, job titles, organisations, relatively detailed biographies and e-mail addresses of the 60 attendees. This information is contained in the documents held by the BBC listed as items (b), (c), (d), (e), (i), (j) and (k) in paragraph 7 above (the 'Personal Data Information'). All those documents include combinations of names, job titles, organisations, biographies and e-mail addresses, except for the documents listed as items (i) and (j) in paragraph 7 above, which include only the names of attendees.

78. It follows that all documents containing Outstanding Information (see paragraph 9 above) contain Personal Data Information, except for the documents listed as items (f) and (g) in paragraph 7 above.

79. [CTPD] has requested the names, job descriptions and organisational affiliation of the attendees or any other information in relation to their eligibility for being present. It is not clear whether the request concerns names, job descriptions, affiliation together with any other information. In any event, in order to satisfy [CTPD] request the BBC would have to disclose either (at a minimum) the names, job descriptions and organisational affiliations of the 60 attendees or (at a maximum) the foregoing information plus the biographies of the attendees.

80. Either of the above combinations of information clearly constitutes personal data under the Data Protection Act. It is biographical in a significant sense and has the data subject as its focus, in short it is information that affects the privacy of the 60 attendees - see Court of Appeal in *Durrant v. Financial Services Authority* [2003] EWCA Civ 1746; [2004] FSR 28,

paragraph 28). See further *Harcup v. ICO & Yorkshire Forward*, EA/2007/0056, paragraph 26, and the Commissioner's "Data Protection Technical guidance: Determining what is personal data", v1.0, 21.08.07).

81. We therefore believe that we are entitled to withhold the Personal Data Information even in the unlikely event that the Commissioner finds that the Outstanding Information falls within the scope of the Act.

82. Firstly, the Personal Data Information constitutes personal data of which the applicant is not the data subject (subsection 2(a) of the exemption).

83. Secondly, the first condition set out in subsection (3) of the exemption (subsection 2(b) of the exemption) is satisfied, as the Personal Data Information constitutes personal data according to the terms of the exemption and its disclosure would contravene the first data protection principle.

84. The first data protection principle requires that personal data be processed fairly and lawfully and not at all unless at least one of the conditions in Schedule 2 to the Data Protection Act is satisfied. It is the BBC's case that this principle would be contravened if the Personal Data Information were disclosed, for the reasons explained below.

Unfair processing

85. The Personal Data Information would not be processed fairly as there is insufficient public interest in the names, job titles, organisations, and biographies of the attendees of the seminar.

Processing in breach of the Schedule 2 conditions

86. The Personal Data Information would not be processed in accordance with the first data protection principle as none of the conditions set out in Schedule 2 to the Data Protection Act would be satisfied. Of these conditions, we address the only two that seem to us to be potentially relevant, namely conditions 1 and 6(1).

87. Condition 1 is not satisfied as none of the data subjects have given their consent to the processing of their personal data, bearing in mind the requirements set out in sections 1(1), 2(1)(a) and 2(3) of Part II to Schedule 1 of the Data Protection Act that must be observed if data is to be processed fairly. Although there was no explicit agreement between the BBC and the attendees that their personal data will not be disclosed:-

- a. such an explicit agreement is not required by condition 1, which states that consent must be given to the release of information and not that there must be an explicit refusal to consent to the non-disclosure of information; and
- b. in any event, the attendees would not have a reasonable expectation that their personal data would be disclosed by the BBC to third parties. To the contrary, they would have a reasonable expectation that their personal data disclosed to the BBC for the purposes of the seminar will be held in confidence. The attendees were not told that their personal data might be disclosed outside the BBC. The clearly editorial nature of the seminar meant that it was pitched to the prospective attendees as such and that they reasonably understood that their attendance and contributions to the seminar and, consequently, the purpose of the processing of their personal data concerned BBC editorial matters, in relation to which the BBC is not under public disclosure obligations. [Finally, the seminar was not covered by the press and the attendees were not provided with the [list of and] biographies of their fellow attendees] [pending confirmation from [TPD] - Vision]. Accordingly, even if consent were now sought from the attendees, it would be unlikely to be forthcoming (especially from those attendees who are not BBC staff), and if forthcoming, it would not be freely given.

88. Condition 6(1) is not satisfied because the processing of the personal data does not serve any legitimate interests pursued by the applicant. Rather, it is unwarranted, by reason of

the prejudice to the rights and freedoms or legitimate interests of the 60 individuals concerned. There is very limited value in disclosing the Data Protection Information to the public, compared with the likely harm to the 60 data subjects of such disclosure.

[Voluntary disclosure of certain information

89. Without prejudice to the arguments set out in this letter, the BBC is prepared, as a gesture of good faith, to volunteer to [TPD] the following information:-

- a. the BBC divisions and external organisations that were represented at the seminar;
- b. [the agenda of the seminar];
- c. [the briefing document [circulated to participants] (listed as item (f) in paragraph 7)];
- d. [the speaker notes of the BBC Director of Television for her opening remarks (listed as item (g) in paragraph 7).]

[awaiting confirmation from Vision whether they would object – decision in IPC what we want disclosed]

I look forward to your decision on this matter.

Yours Sincerely

[TPD]

Senior Adviser

BBC Information Policy and Compliance

Attached for your information in confidence please find copies of the information held by the BBC in relation to the "Climate Change – the Challenge to Broadcasting" seminar listed in paragraph 6 of this letter.