

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 April 2011

Public Authority: Office of Communications (Ofcom)
Address: Riverside House
2a Southwark Bridge Road
London
SE1 9HA

Summary

The complainant made a request to Ofcom for copies of correspondence relating to a complaint it had received from Lord Ashcroft KCMG about unfair treatment in an edition of BBC Radio 4's *Today* programme. The public authority initially refused the request under section 44 of the Act (Prohibitions on disclosure) by virtue of section 393(1) of the Communications Act 2003. After carrying out an internal review Ofcom released some of the information but other information continued to be withheld under section 44, section 36(2)(b)(ii) (Free and frank exchange of views) and section 40(2) (personal information). The Commissioner has investigated the complaint and has found that section 44 applies to most of the withheld information. For the remaining information the Commissioner found that section 36(2)(b)(ii) was not engaged but that section 40(2) did apply. Therefore the Commissioner has decided that the information should be withheld. The Commissioner also found that in its handling of the request the public authority breached section 17(1) (refusal of a request) but requires no steps to be taken.

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. On 21 June 2010 the public authority published its decision on a complaint it had received from Lord Ashcroft KCMG by his solicitors Harbottle and Lewis LLP. The complaint concerned alleged unfair treatment by an edition of BBC Radio 4's *Today* programme on 17 December 2009. A copy of the public authority's decision is available on its website:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb160/issue160.pdf> (page 19)

The Request

3. On 21 June 2010 the complainant made a freedom of information request to the public authority for the following information:

"information concerning communications between Lord Ashcroft and/or his representatives with Ofcom and/or the BBC in connection with the broadcast of Radio 4's Today programme on December 17 2009".

4. The public authority responded to the request on 6 July 2010 when it informed the complainant that it held information falling within the scope of the request but that the information was exempt from disclosure under section 44 of the Act. Section 44 provides for an exemption where disclosure is prohibited under any other law or enactment. In this case the public authority said that section 393(1) of the Communications Act 2003 was the relevant statutory prohibition. The public authority pointed out that section 44 is an absolute exemption and therefore there was no requirement to carry out a public interest test.
5. On 6 July 2010 the complainant asked the public authority to carry out an internal review of its handling of his request.
6. The public authority presented the findings of its internal review on 6 August 2010. The public authority now said that having considered matters again it believed that some of the requested information could be disclosed, and this was subsequently made available to the complainant. However, it said that some of the requested information continued to be withheld under section 44 as well as the exemptions in section 36 (Prejudice to the effective conduct of public affairs) and section 40 (Personal information) which were cited for the first time.

The public authority explained why the exemptions were believed to apply and, in the case of section 36, explained what factors it had taken into consideration when balancing the public interest in maintaining the exemption against the public interest in disclosure. It also provided the complainant with a copy of the qualified person's opinion on the application of the section 36 exemption.

The Investigation

Scope of the case

7. On 9 August 2010 the complainant contacted the Commissioner to complain about the public authority's decision to refuse to disclose some of the requested information.

Chronology

8. The Commissioner contacted the public authority on 27 October 2010 with details of the complaint. The Commissioner now asked to be provided with copies of the withheld information and asked for further details on its application of the various exemptions.
9. As regards section 44 the Commissioner noted that the exemption was engaged on the basis that the statutory prohibition under section 393(1) of the Communications Act prohibits disclosure of information relating to a particular business which has been obtained in exercise of a power conferred by the Broadcasting Act 1996. The Commissioner now asked the public authority to confirm which power it was exercising in relation to the withheld information and to confirm whether section 44 was being applied to all of the withheld information. The Commissioner also noted that the public authority was seeking to rely on section 36 as well. The Commissioner said that it was his understanding that the specific exemptions being relied upon were section 36(2)(b)(i) and (ii). The Commissioner asked the public authority to confirm that his understanding was correct.
10. The public authority responded to the Commissioner on 23 November 2010. It now said that it was unable to provide the Commissioner with copies of the information withheld under section 44 because section 393(1) of the Communications Act also prevented it from releasing the information to the Commissioner. It also said that it was not certain that its position would be any different were the Commissioner minded to formally request the information via an information notice issued under section 51 of the Act. The public authority did however provide

the Commissioner with a schedule of the withheld information confirming the sender and recipient of each letter and the date it was sent. In answer to the Commissioner's query the public authority said that all of the withheld information had been collected for the purposes of section 110 of the Broadcasting Act where it is its duty to consider and adjudicate on complaints which relate to unjust or unfair treatment in broadcast programmes or to unwarranted infringement of privacy in (or in connection with) the obtaining of material included in such programmes.

11. The public authority did, however, provide the Commissioner with some of the withheld correspondence. It explained that section 44 was not being applied to all of the information and so some copies could be provided to the Commissioner. This information was instead being withheld under sections 36(2)(b)(ii) and 40(2) and the public authority explained to the Commissioner why these exemptions were believed to apply. Finally, the public authority said that it also wished to rely on section 41 of the Act which provides for an exemption for information provided in confidence. It now said that disclosure of the withheld information could constitute an actionable breach of confidence because the parties concerned have an expectation that they are dealing with the public authority on a confidential basis.
12. The Commissioner contacted the public authority again on 9 February 2011. Discussing access to the withheld information, the Commissioner said that whilst in most cases he would require to see copies of the withheld information in this case he would be satisfied with a written statement from the public authority confirming that the information withheld under section 44 was obtained in exercise of its responsibilities under section 110 of the Broadcasting Act 1996 and that all of the information can be said to be with 'respect to' the BBC as the 'particular business' concerned. The Commissioner also asked the public authority to confirm that none of the information had previously been made public.
13. As regards the public authority's application of section 36(2)(b)(ii) the Commissioner asked it to confirm on what date the qualified person had offered his opinion on the application of the exemption. The Commissioner also asked it to outline what other information or materials had been placed before the qualified person to allow him to reach a reasonable opinion on the application of the exemption.
14. For the section 41 exemption the Commissioner referred the public authority to the case of *Coco v Clark* for the most commonly cited test

of actionable breach of confidence.¹ Under this test a breach of confidence will be actionable if:

- The information has the necessary quality of confidence,
 - the information has been imparted in circumstances importing an obligation of confidence, and
 - there was an unauthorised use of the information to the detriment of the confider.
15. With this test in mind, the Commissioner asked the public authority to explain why disclosure of the information withheld under this exemption would constitute an actionable breach of confidence in this case.
16. The public authority responded to the Commissioner on 1 March 2011 and provided the Commissioner with the written statement he had referred to in his last letter. The public authority also responded to the Commissioner's questions regarding its application of the section 36(2)(b)(ii) and section 41 exemptions.

Analysis

17. A full text of the relevant statutory provisions referred to in this section is contained within the legal annex.

Exemptions

Section 44 – Prohibitions on disclosure

18. Section 44(1)(a) of the Act provides that information is exempt if its disclosure by the public authority holding it is prohibited by or under any enactment. In this case the relevant statutory prohibition is section 393(1) of the Communications Act 2003:-

(1) Subject to the following provisions of this section, information with respect to a particular business which has been obtained in exercise of a power conferred by—

(a) this Act,

¹ Coco v A N Clark (Engineers) Limited [1968] FSR 415

(b) the enactments relating to the management of the radio spectrum (so far as not contained in this Act),

(c) the 1990 Act, or

(d) the 1996 Act,

is not, so long as that business continues to be carried on, to be disclosed without the consent of the person for the time being carrying on that business.

19. In this case the public authority has explained that the statutory prohibition applies because the withheld information was obtained in exercise of a power conferred by the Broadcasting Act 1996 ("the 1996 Act"). Specifically, the information was obtained for the purposes of section 110 of the 1996 Act where it is the duty of the public authority to consider and adjudicate on complaints which relate to unjust or unfair treatment in broadcast programmes or to unwarranted infringement of privacy in (or in connection with) the obtaining of material included in such programmes.
20. In order for the statutory prohibition, and therefore the section 44 exemption, to apply it is only necessary to establish that the public authority 'obtained' the information in relation to an investigation carried out under section 110 of the 1996 Act and that the information concerns a particular business. Having reviewed the schedule of correspondence provided to him by the public authority the Commissioner has found that the withheld information consists of two letters from Harbottle and Lewis Solicitors (on behalf of Lord Ashcroft) to the public authority as well as a letter from Harbottle and Lewis Solicitors to the BBC which was passed to the public authority. Therefore it is clear that this information was 'obtained' by the public authority.
21. The public authority has confirmed that the 'business' at issue in this case is the BBC and that it has not provided its consent for disclosure. It has also provided a written statement confirming that all of the information was obtained in connection with its investigation into Lord Ashcroft's complaint regarding the *Today* programme which was carried out under the provisions of section 110 of the 1996 Act. In light of this the Commissioner is satisfied that the information to which section 44 has been applied is covered by the statutory prohibition under section 393(1) of the Communications Act and that consequently the section 44 exemption is engaged. Section 44 confers absolute

exemption from the Act and therefore there is no public interest test to apply.

Section 36 – Prejudice to effective conduct of public affairs

22. Section 44 has been applied to the majority of the withheld information. However for three items of correspondence the public authority has said that it wishes to rely on section 36(2)(b)(ii). The public authority has said that it believes that this exemption rather than section 44 is the correct exemption to apply because the substance of this particular information reflects the information contained within its adjudication decision which has been published on its website.
23. Section 36(2)(b)(ii) provides that information is exempt if, in the reasonable opinion of the qualified person, disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation. In investigating whether the section 36 exemption is engaged the Commissioner will undertake the following:
 - Ascertain who is the qualified person for the public authority
 - Establish that an opinion was given
 - Ascertain when the opinion was given
 - Consider whether the opinion was reasonable in substance and reasonably arrived at.
24. The Commissioner has been passed a copy of an email showing that the public authority's secretary, Graham Howell, has been authorised as a qualified person by a Secretary of State. The public authority has also provided a written copy of Mr Howell's opinion and has informed the Commissioner that the opinion was given on the same day as its response to the complainant's request, 6 August 2010.
25. In the case of *Guardian & Brooke v The Information Commissioner & the BBC*, the Information Tribunal considered the sense in which the reasonable person's opinion under s.36 is required to be reasonable. It concluded that:

"...in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at".²

² *Guardian & Brooke v Information Commissioner & the BBC* [EA/2006/0013], para. 64.

26. The Commissioner has first considered whether or not the qualified person's opinion was reasonably arrived at. In doing so he has taken into account the fact that the qualified person was taken through the relevant issues by the Case Officer responsible for dealing with the complainant's request and discussed those issues with the Case Officer before agreeing to use the exemption. The qualified person's written opinion was provided to the Commissioner as well as the complainant and this also included a submission outlining the factors that had been taken into consideration when deciding to withhold the information. This leads the Commissioner to conclude that the qualified person gave proper consideration to the formulation of the opinion and that only relevant factors were taken into account when applying the exemption. Therefore the Commissioner is satisfied that the opinion was reasonably arrived at.
27. The qualified person has said that section 36(2)(ii) is engaged because disclosure "would be likely in future to discourage the free and frank provision of information from companies and complainants and inhibit the free and frank exchange of views for the purposes of deliberating within an adjudication process to determine whether a broadcaster has failed to comply with the Broadcasting Code". In considering whether a qualified person's opinion can be said to be reasonable in substance the Commissioner is mindful of the findings of the Information Tribunal in *Guardian & Brooke* where it found that:
- "we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable...We do, however, acknowledge...that on such matters there may (depending on the facts) be room for conflicting opinions, both of which are reasonable."*³
28. The Commissioner has considered the qualified person's opinion but does not accept that section 36(2)(b)(ii) can extend to cover cases where disclosure would discourage parties from providing information to a public authority as part of a complaints process. In particular, the Commissioner does not believe that submissions made by complainants can be characterised as an exchange of views for the purposes of deliberation. Therefore, whilst disclosure may well discourage potential complainants and regulated bodies from providing information to the public authority the Commissioner considers that section 36(2)(b)(ii) is not the appropriate exemption to apply as the Act provides for specific exemptions which are designed to protect the regulatory process.

³ Guardian & Brooke, para. 60.

29. However, the public authority has indicated that section 36(2)(b)(ii) might also apply because disclosure would inhibit the “free and frank exchange of views within the adjudication process”. Whilst it is likely that section 36(2)(b)(ii) would apply where it could be shown that disclosure would inhibit the free and frank exchange of views through which the public authority and its officials reach a decision on the complaint, it is difficult to see how disclosure of this information which was provided by a complainant would affect what is essentially an internal process.
30. The Commissioner recognises that the public authority’s arguments have some merit but he considers that they are not suited to the exemption claimed. Therefore the Commissioner has decided in the circumstances that the qualified person’s opinion is not reasonable in substance and that consequently section 36(2)(b)(ii) is not engaged.

Section 40 – Personal Information

31. The public authority has said that the exemption in section 40(2) of the Act could also be applied to the withheld information. Therefore the Commissioner has considered whether the information which is not exempt on the basis of section 44 is covered by this exemption.
32. Section 40(2) provides that information is exempt if it constitutes the personal data of someone other than the applicant and disclosure would contravene one of two conditions. In this case the relevant condition is the first condition which is that disclosure would contravene any of the data protection principles. The public authority has argued that disclosure would prejudice the first data protection principle which requires that data be processed fairly and lawfully.

Is the information personal data?

33. In deciding whether the exemption applies it is first necessary to consider whether the withheld information constitutes personal data. Personal data is defined in the DPA 1998 as:
“...data which relate to a living individual who can be identified-
 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

34. The information which is not exempt under section 44 constitutes three letters provided by Lord Ashcroft's solicitors on his behalf in support of his complaint against the BBC. The public authority has explained that the information is personal data because it includes details such as Lord Ashcroft's full name and address as well as "his personal views of his treatment by the BBC in relation to matters of acute importance to his personal reputation". The Commissioner has reviewed the information and has found that the entirety of the information focuses on Lord Ashcroft's complaint and reflects his personal views and therefore can be said to be personal to him. The Commissioner is satisfied that all of this information is personal data.

The first data protection principle

35. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure would contravene the first data protection principle. The first data protection principle states that:

'1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.'

Fairness

36. In considering the fairness of disclosure the Commissioner has taken into account the following factors:

- The expectations of the individuals
- The possible consequences of disclosure
- Nature and content of the information

37. As regards the expectations of Lord Ashcroft as the individual to whom the information relates, the Commissioner is aware that section 115(2) of the Broadcasting Act requires that privacy and fairness hearings, are held in private and that the publication of any findings are appropriately limited. The public authority has issued guidance on the procedures for handling privacy and fairness complaints which also highlights the requirement that all parties to a complaint should treat all information related to the complaint as confidential.⁴ In this case it is clear that Lord Ashcroft, via his solicitors, only submitted his

⁴ <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>

- complaint on the understanding that it would be treated confidentially. Indeed the public authority has explained that Lord Ashcroft's solicitors referred to its guidance as the basis on which they understood they were able to engage freely and frankly with the public authority. In light of this the Commissioner is satisfied that Lord Ashcroft submitted his complaint in the reasonable expectation that the information he provided would be treated confidentially and not disclosed.
38. The Commissioner has also considered the possible consequences of disclosure and notes that the information includes sensitive details about Lord Ashcroft's complaint and perceived treatment by the BBC. Given that Lord Ashcroft is a high profile and somewhat controversial public figure it is reasonable to conclude that disclosure would at the least result in unwanted press attention and speculation. The Commissioner considers that these considerations also point to the unfairness of disclosure.
 39. However, the Commissioner's view is that, notwithstanding the data subject's reasonable expectations or any damage or distress caused to him or her by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.
 40. The Commissioner considers that in this case there is a public interest in transparency and accountability with regard to how the public authority handles complaints it receives. However, in this particular case when the request was made the public authority had already published its adjudication decision in which it clearly and comprehensively set out the steps it had taken to investigate the complaint and the reasons behind its decision. Having reviewed the documents the Commissioner has found that disclosure would not aid public understanding of the public authority's decision or shed any further light on how the public authority makes decisions in cases like this. The Commissioner has found that the arguments in favour of disclosure carry very little weight in this case and do not justify infringing the rights and freedoms of the data subject, Lord Ashcroft.
 41. For these reasons the Commissioner has decided that disclosure would not be fair and would therefore contravene the first data protection principle. Consequently the Commissioner has decided that section 40(2) is engaged in respect of this information.

Other exemptions

42. The Commissioner has decided that all of the withheld information is either exempt under section 44 or section 40(2). Therefore the Commissioner has not gone on to consider whether section 41 would apply.

Procedural Requirements

Section 17 – Refusal of a request

43. The public authority initially refused the request by relying solely on the application of section 44. It was only at the internal review stage that it informed the complainant that some of the information was actually being withheld under section 36(2)(b)(ii) and that section 40(2) was also being applied. Later on, during the course of the Commissioner's investigation, the public authority said that it believed that the section 41 exemption also applied. Section 17(1) of the Act provides that where a public authority is relying on a claim that information is exempt it must, within the time for complying with section 1(1), inform the applicant of the exemption. Therefore, by failing to inform the complainant that it was relying on section 36(2)(b)(ii), section 40(2) and section 41 within 20 working days of receiving the request the public authority breached section 17(1) of the Act.

The Decision

44. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The public authority dealt with the request in accordance with the Act by refusing to disclose some of the requested information by relying on the exemption in section 44 of the Act.
 - The public authority dealt with the request in accordance with the Act by refusing to disclose some of the requested information by relying on the exemption in section 40(2) of the Act.
45. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The public authority breached section 17(1) of the Act by failing to inform the complainant that it was relying on the section

36(2)(b)(ii), section 40(2) and section 41 exemptions within 20 working days of receiving the request.

Steps Required

46. The Commissioner requires no steps to be taken.

Right of Appeal

47. 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 19th day of April 2011

Signed

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

Legal Annex

Freedom of Information Act 2000

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 17(1) provides that -

"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 -

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

Section 36(2) provides that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (f) would, or would be likely to, prejudice-
 - 1. the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - 1. the work of the Executive Committee of the Northern Ireland Assembly, or
 - 2. the work of the executive committee of the National Assembly for Wales,

- (g) would, or would be likely to, inhibit-

1. the free and frank provision of advice, or
 2. the free and frank exchange of views for the purposes of deliberation, or
- (h) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 44(1) provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (i) is prohibited by or under any enactment,
- (j) is incompatible with any Community obligation, or
- (k) would constitute or be punishable as a contempt of court.”