Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 June 2011

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

Summary

The complainant requested a series of specifications about Project Canvas. The BBC explained that the Act applied to relevant recorded information and applied section 22(1) [information intended for future publication] to the recorded information that it held. It upheld its position within its internal review.

During the course of the Commissioner's investigation the information was published and the complainant confirmed that he had received it. He confirmed that he wanted the Commissioner to focus on whether section 22(1) was appropriately applied to the information that has now been provided.

The Commissioner has carefully considered this case. He finds that section 22(1) was applied appropriately by the BBC.

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. The BBC is a public authority for the purposes of the Act but only has to deal with requests for information not held for 'the purposes of journalism, art or literature'. In respect of the information requested in this case, the BBC is required to comply with all the provisions of the Act.

3. On 13 May 2010 the complainant made the following request:

'On 22 December 2009 the BBC Trust granted provisional approval to the involvement of the BBC in Project Canvas, a proposed joint venture to develop and promote a common standard for broadband network connected television services.

A main condition of this provisional approval was that 'the core technical specification must be published well in advance of launch to allow all manufacturers to adapt to the Canvas standard'.

On 6 May 2010 it was reported that the BBC provided a number of documents describing the proposed requirements and specifications for a 'Consumer Device Platform for Connected Television' and 'Broadcast Content Delivery for Connected Television' to members of the Digital Television Group industry association under a condition of strict confidentiality.

It was also reported that additional associated documents relating to 'Consumer Device Software Management', 'IP Content Delivery' and 'System Metadata Model' would also be released on similar terms.

It is anticipated that other documents may also be necessary to defined [sic] the core technical specification.

This is a formal request under the Freedom of Information Act:

(1) To provide any such documents to the requesting party on the similar terms;

(2) To provide access to such documents to any interested party on request;

(3) To publish such documents in a form accessible to the public.'

4. On 11 June 2010 the BBC issued a response. It explained that elements **(2)** and **(3)** were not valid requests for recorded information and would not be considered further. In respect to element **(1)**, it confirmed that the request can only apply to recorded information that it holds at the date of the request. It explained that the information that it held was the information that it provided to the Digital Television Group on 6 May 2010. It explained that this information was due to be published in the autumn on the Project Canvas website and it was applying the exemption found in section 22(1) [information intended for future publication] to it. It explained that it was a qualified exemption and therefore it conducted a public interest test to decide whether the information could be released ahead of schedule. It explained that its view was that in all the circumstances of the case the public interest in maintaining the exemption outweighed that of disclosure. The BBC's position will be considered in detail in the analysis section below.

5. On 11 June 2010 the complainant wrote to the BBC again. He expressed his dissatisfaction about not receiving the information that was provided to the Digital TV Group on 6 May 2010 (which was relevant to element **(1)** of the original request). The BBC and the Commissioner regarded this as a request for an internal review. He explained that he believed that the BBC did not have the intention to publish the information in the future and that the delay in publishing the information was contrary to the intentions of the Act. He also explained that he believed that there was considerable public interest in disclosing the proposal for the standard for future television devices for both experts and licence-fee payers, particularly as it has already been disclosed to members of the trade association.

6. On 14 July 2010 the BBC communicated the results of its internal review and focussed on element **(1)** of the original request. It confirmed that it upheld its original position. It also provided a more detailed explanation in an effort to address the complainant's concerns. It provided a more detailed explanation about the application of the exemption and these arguments will be considered in the analysis section of this Notice.

7. It also reviewed its public interest determination and, although it changed its position in relation to certain specific arguments, it upheld its overall decision that the balance of the public interest favoured maintaining the application of section 22(1).

The Investigation

Scope of the case

8. On 10 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- the information requested is required by the industry and has been provided to the Digital TV Group industry association already in confidence;
- the BBC has been criticised for failing to engage with the wider industry in respect to Project Canvas;
- the application of section 22(1) undermines the intention of the Act;
- there is a legitimate public interest in wider debate about the development of a standard for future television devices and the involvement of a public body in a commercial consortium seeking to establish standards for the provision of public service programming; and
- the complainant sought immediate release of the requested information.

9. On 7 October 2010 the complainant confirmed that he had received all the relevant recorded information but that he still wanted the Commissioner to consider the operation of section 22(1) at the date of the request.

10. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. The Commissioner's role is to determine whether the BBC dealt with the specific request appropriately, not whether it ought more generally to have been more transparent or engaged more fully with stakeholders.

Chronology

11. On 16 September 2010 the Commissioner wrote to the complainant and to the BBC to confirm that this complaint was eligible. He asked the BBC for a copy of the withheld information.

12. On 7 October 2010 the BBC wrote to the Commissioner. It explained that the information had now been published on its You View website, found at (this link is still accurate on 13 June 2011): http://www.youview.com/developer-zone/resources/

13. Later that day, the Commissioner telephoned the complainant to check that he was aware that the relevant recorded information had now been released and whether he wanted the case to continue. He confirmed to the Commissioner that he had received the relevant recorded information but still wanted the Commissioner to come to a formal decision about the original application of section 22(1). The Commissioner determined that he could decide this matter without going back to the BBC again.

Findings of fact

14. Project Canvas was the creation and/or development and promotion of a set of core technical specifications to enable delivery of on-demand, interactive and web-based content to a television via a broadband connected digital device.

15. On 22 December 2009 the BBC Trust gave provisional approval to the BBC's involvement in Project Canvas[1]. Part 2.16 of the consultation document explained that the core technical specifications would be made available to third parties. In 7.4.1 the BBC Trust stated, that as a condition of its approval, Project Canvas must publish the core technical specification well in advance of the Canvas launch date. It explained that it expected that it should be published at least eight months ahead of that date.

16. On 25 June 2010 the BBC Trust confirmed that it had provided full approval of the BBC's involvement in Project Canvas subject to a number of conditions. One of those conditions was:

> '***Industry engagement****: Completed elements of the Canvas core technical specification to be published within 20 working days from this final approval, and the Canvas partners to engage with industry on these and future elements of the technical specification. The final core technical specification will be published no later than eight months before launch of the first set-top boxes. The Trust will keep this process of engagement under review*.'[2]

[1] http://www.bbc.co.uk/bbctrust/our_work/television/canvas_provisional_conclusions.shtml
[2] http://www.bbc.co.uk/bbctrust/news/press_releases/june/canvas.shtml

17. On 16 September 2010 the BBC Trust announced the final conclusions of Project Canvas and this included calling the service YouView[3].

18. YouView's proposed launch date is Summer 2011.

Analysis

Substantive Procedural Matters

Exemption: Section 22 – information intended for future publication

19. The BBC has argued that all of the information falling within the scope of this request was exempt from disclosure by virtue of section 22(1). Section 22(1) is a qualified exemption so if it is engaged, the public authority is still required to evidence that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner will first consider whether the exemption was engaged.

Was the exemption engaged?

20. Section 22(1) states that:

> *'Information is exempt information if-*
>
> *(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*
>
> *(b) the information was already held with a view to such publication at the time when the request for information was made, and*
>
> *(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).'*

21. In order to determine whether section 22 is engaged the Commissioner therefore needs to consider the following questions:

- Was the information requested held by the BBC?

[3] http://www.bbc.co.uk/bbctrust/our_work/canvas/index.shtml

- Did the BBC have an intention to publish the information at some date in the future when the request was submitted?
- In all the circumstances of the case, was it 'reasonable' that information should be withheld from disclosure until some future date (whether determined or not)?

22. Before turning to consider the questions in paragraph 21 in turn, the Commissioner wishes to make it explicitly clear that his role in considering complaints under Part I of the Act is limited to considering the circumstances as they existed at the time of the request or at least by the time for compliance with sections 10 and 17, i.e. within 20 working days following the receipt of the request. The Commissioner's approach follows that set out in a number of Information Tribunal decisions and is endorsed by the High Court[4].

Was the information requested held by the BBC?

23. The BBC did hold the recorded information that it shared with Digital TV Group on 6 May 2010 at the date of the request. This is the information that it applied section 22(1) to and was the information that was published during the course of the Commissioner's investigation. The complainant has accepted that this recorded information satisfied his request and the Commissioner finds that this requirement has been satisfied.

Did the BBC have an intention to publish the information at some date in the future when the request was submitted?

24. In the Commissioner's view in order to demonstrate that the exemption under section 22(1) is engaged, a public authority must have an intention to disclose information (not documents) at a future point and that it must be able to demonstrate what information within the scope of the request it intends to publish.

25. The information was published in Autumn 2010. However, this is not the issue here. Instead, it is necessary for the Commissioner to consider and reach a conclusion on whether the BBC had a genuine intention at the date of the request to publish the information in question at some date in the future.

[4]The Information Tribunal confirmed this principle in many cases including paragraph 110 of *DBERR v Information Commissioner and Friends of the Earth* [EA/2007/0072]. The High Court confirmed that it agreed with this approach in paragraph 98 of *Office of Government Commerce and Information Commissioner and Her Majesty's Attorney General on behalf of The Speaker of the House of Commons* [2008] EWHC 737.

26. The BBC has explained that its Trust has consistently said that one of the conditions for the participation of its staff in Project Canvas has been that the core specifications would be disclosed to the public. The BBC Trust has had this intention from December 2009 and therefore it argued that it did have the intention to publish the requested information at some date in the future at the date of the request. The Commissioner has been convinced that the BBC had the intention to publish the same specifications that it had been considered by the DTG panel, unless the input was such that they were varied, but that their publication was anticipated at the date of the request.

27. The Commissioner also accepts that the publication of the information provides support for the BBC's stated intention being genuine.

28. The Commissioner has considered whether it was necessary for the BBC to communicate its intention before it received the request and is satisfied that it wasn't. However, it is noted that this intention was communicated to the complainant during the internal review process on 25 June 2010.

29. The BBC has evidenced that there was a settled intention to publish the recorded information that was requested by the complainant. The Commissioner has therefore been satisfied that this requirement has been met.

In all the circumstances of the case, was it 'reasonable' that information should be withheld from disclosure until the autumn of 2010?

30. The main argument advanced by the BBC in support of it being reasonable for it to delay disclosure until its planned publication date in autumn 2010, related to the resource implications that disclosing information ahead of the scheduled publication date would have for the BBC and Canvas. It informed the Commissioner that it planned to publish the information together with some explanatory text that would put the information into context and make it easier for the public to understand what it was about.

31. It explained that "Publication without the necessary background and/or contextual information is likely to result in confusion by the public and is likely to result in the BBC and Canvas having to respond to and address questions and concerns from the public which would require administrative resource are currently not catered for". It argued that it would be a better use of public resources to keep to its existing publication plans, publish the information with appropriate context, and so avoid the resourcing problems of publishing without context.

32. The complainant, on the other hand, has provided detailed arguments against the situation being reasonable. He has explained that in his view the information should have been published sooner and provided as a result of his request. He explained that the Project Canvas was controversial and that other industry players outside the Digital TV Group industry association should have had this information earlier so that they can have as much time as possible to develop products that can use this medium. In addition, the complainant argued that the specifications should be open to wider consultation and that the failure to disclose the information earlier has stymied potential debate about the standards.

33. The Commissioner accepts that the argument put forward by the BBC is a valid argument which is inherent in the section 22(1) exemption The Commissioner understands that at the time of the request the relevant staff at the BBC were working hard on ensuring the success of Project Canvas and that resources were tight. He accepts the BBC's contention that publishing the information ahead of schedule, without explanatory context, would be likely to have the resource implications described by the BBC. He also accepts that there was still some work to be done on drafting and agreeing the explanatory text and that whilst the planned publication schedule would allow sufficient time for that task to be completed, the timescale for responding to the request under the Act would not. He considers that this is particularly the case in light of the fact that the technical specifications themselves were still being consulted upon as at the date of the request, and that Project Canvas is a joint project with other parties.

34. The Commissioner has also noted the BBC Trust's comments specified in paragraph 16 above. This stated that the specifications should be made available to third parties at least eight months before launch date. He accepts that this supports the complainant's view that there should be a reasonable amount of time available for interested parties to consider the specifications and for industry players to develop appropriate products. He considers however, that it is also indicative that the Trust considered a period of eight months in advance of launch to be a reasonable period of time in this respect.

35. In balancing up the factors, the Commissioner has been satisfied that the delay in the publication was reasonable in this case. He places decisive weight on the delay not being great in length, there being good reasons why explanations may have been required and the resource impact that the BBC would have experienced had it been required to pre-emptively disclose the information ahead of its planned publication date. He accepts that the complainant's argument that

providing the information in response to his request would have allowed more time for interested parties to respond and debate the specifications. He also accepts that although the BBC Trust considered publication eight months in advance of launch to be a reasonable timescale other industry players might not necessarily agree with this view. He has therefore taken account of the eight month commitment in reaching his conclusion but it is not the only or deciding factor in this case.

36. For the reasons outlined above, the Commissioner is satisfied that the section 22(1) exemption has been engaged. For the avoidance of doubt, the Commissioner has also considered whether it would be possible for some parts of the withheld information to be provided without the exemption being engaged He has concluded that the weight of the arguments favours the maintenance of the exemption to all of the information. He must now go on to consider the public interest test.

37. Section 22(1) is a qualified exemption and therefore subject to the public interest test under 2(2)(b) of the Act. Section 2(2) states that for the information not to be disclosed all the circumstances of the case must be considered and the public interest in maintaining the exemption must outweigh the public interest in disclosing the information. The Commissioner is only able to consider factors that are relevant to and inherent in the exemption being claimed when considering the maintenance of the exemption but can consider all public interest factors that relate to the disputed information when weighing the public interest factors that favour disclosure.

Public interest arguments in favour of maintaining the exemption

38. In its refusal notice, the BBC put forward a number of points to support its view that the public interest favoured upholding the exemption at section 22(1). At internal review it dropped its reliance on some of these points. The Commissioner has therefore only considered the single public interest argument that the BBC continued to rely upon in its internal review response. This was expressed in the original refusal notice as follows :

- The information, when published, will be presented in the appropriate context. There is a public interest in ensuring efficient use of BBC resource and in the general public receiving information in a way that enables them to understand and interpret it.

39. The BBC helpfully developed this argument in its internal review. It explained that by publishing in accordance with its planned timeframe, it enabled it to provide the appropriate context for the information and ensure efficient use of BBC (and/or Canvas) resources. This would enable interested operators to receive the necessary information and the public to receive information in a format that was easy to understand and interpret.

40. The BBC explained that it in considering this argument it had taken into account all the circumstances of the case including the following factors:

    1. The current economic climate;

    2. The timeframe within which the requested documents are scheduled to be published;

    3. The nature of the information – it being technical specifications;

    4. The fact the consultation process with the Digital Television Group (DTG) was ongoing;

    5. The fact the DTG's members come from all sectors of the industry; and

    6. The notion that whilst any agreed outcome would become an industry standard for connected television, manufacturers would still be able to develop products that do not conform to the Project Canvas model.

41. The BBC explained that disclosure of the information without the contextual information would be a waste of its limited resources. It would be likely to lead to public confusion and questions from the public that would require administrative resources that are currently not catered for. It explained that the development of the appropriate contextual information would be likely to avoid most of this extra work being generated. However, the development of this information was a considerable undertaking and it could not devote the resource to generate the background information before the planned timetable, because it had calibrated the use of its resources by priority. It explained that it believed the ability to efficiently allocate and use it resources was the critical consideration and amounts to the key public interest factor in this case.

42. The Commissioner accepts that this factor should be given considerable weight. This is because he appreciates that the explanation of the

standards would be necessary in this case and its development would require considered work. He accepts that it is right that publicly funded organisations should be able to organise their resources by need, and that the most efficient use of public funds should be sought. These arguments are strengthened because at the time of the request, whilst there was a settled intention to publish the specifications, they were still out for consultation and any comments on the specifications might reasonably be expected to inform the content of the explanatory text and allow the BBC and Canvas to anticipate questions.

43. He will discuss his weighting in more detail after considering those factors that favour the disclosure of the information.

Public interest arguments in favour of disclosing the requested information

44. The BBC acknowledged that the key principles that lie behind the Act are transparency and accountability. The Commissioner agrees that these are important factors in this case.

45. The complainant argued that the need for accountability and transparency were particularly pronounced in this case because:

- the information requested is required by the industry and has been provided to the Digital TV Group industry association already in confidence;
- the BBC has been criticised for failing to engage with the wider industry in respect to Project Canvas; and
- there is a legitimate public interest in wider debate about the development of a standard for future television devices and the involvement of a public body in a commercial consortium seeking to establish standards for the provision of public service programming.

46. The Commissioner acknowledges the strength of the arguments in favour of accountability in this case. The standards that were being developed were of public concern and the Trust's statement in paragraph 16 above supports the view that industry engagement was considered to be beneficial to the final outcomes of the project. In addition, the Commissioner also appreciates that some companies such as the complainant's felt prejudiced by the delay between the proposed standards being announced and the final standards being confirmed.

47. In mitigation, the Commissioner is satisfied that the Digital TV Group industry association contained enough interested members to ensure

that the standards were reviewed closely and that having limits to the consultation process was a decision taken by the BBC to enable the finalised standards to be available as soon as practicable.

48. The Commissioner also appreciates there should be opportunity for a wider debate about the involvement of the BBC and the Digital TV Group industry association. However, he does not accept that the provision of the information earlier than the proposed schedule would have meant there would have been a better standard of debate about this matter. He is not been convinced that this point makes disclosure time critical.

Balance of the public interest arguments

49. The Commissioner's guidance note on section 22 explains that because the application of this exemption presupposes that the requested information will be disclosed, in balancing the public interest the focus is not on the harm that may arise from release of the information itself. Rather the balance of the public interest must focus on whether in the circumstances of the case it would be in the public interest for the public authority to keep to its original timetable for disclosure or whether the public interest would warrant an earlier disclosure.

50. The Commissioner has carefully balanced the public interest in the earlier disclosure providing greater transparency and accountability against the significant adverse impact the BBC's resources. While there are strong arguments on both sides, he has come to the conclusion that the stronger arguments on 13 May 2010 favoured the maintenance of the exemption.

51. Therefore, the Commissioner believes that in the circumstances of this case the public interest in maintaining the exemption contained at section 22(1) of the Act outweighs the public interest in disclosing the requested information.

52. For all the reasons above, he therefore determines that the exemption found in section 22(1) has been applied correctly and does not uphold the complaint.

The Decision

53. The Commissioner's decision is that the BBC dealt with the request for information in accordance with the Act. It applied section 22(1) appropriately because the exemption was engaged and the public interest favoured the maintenance of the exemption at the date of the request.

Steps Required

54. The Commissioner requires no steps to be taken as the BBC's position was correct. In any event, it is noted that the information has already been published and the complainant has confirmed its receipt.

Right of Appeal

55. 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 28th day of June 2011

Signed ……

Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

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 2(2) provides that –

> "In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –
>
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

Section 22(1) provides that –

> "Information is exempt information if-
>
> (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
>
> (b) the information was already held with a view to such publication at the time when the request for information was made, and
>
> (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."