



Information Policy & Compliance
bbc.co.uk/foi

Paul Jakma
By email to: paul@jakma.org

17 June 2010

Dear Mr Jakma,

Freedom of Information requests– reference numbers RFI20100703 and RFI20100713

Thank you for your requests to the BBC of 17 and 19 May 2010 seeking information under the Freedom of Information Act 2000 (the "Act") as follows:

RFI20100703:

"I would like to request the following ERTG paper: "A pan-BBC approach to combating piracy"

And all other ERTG papers relating to "content protection" and/or "piracy", for the period 2007 to the present."

RFI20100713:

"I am interested in the following:

Whatever documents, easily to hand, that detail any which organisations have obliged the BBC or any which organisations the BBC has considered the interests of when deciding, to implement content protection for Freeview HD and iPlayer services.

For the purposes of this request, "easily to hand" may be construed to mean: Those documents that have been passed to the ERTG, and/or to the BBC Direction Group since 1st Jan 2007. However, if you happen to know of or identify other documents I would expect you to make those available as well.

*Further, note that my interest is in the entirety of any documents identified in this manner. That is, the request should guide the selection of the documents, and no more - it should *not* be used as reason to redact within those documents."*

In responding we have combined our response to both requests, as you kindly suggested in your email of 24 May 2010.



1. ERTG paper: "A pan-BBC approach to combating piracy"

Please find attached the information you have requested. Please note that we have redacted certain sections under section 43(2)(commercial interests) of the Act for the reasons set out in point 4 below.

2. All other ERTG papers relating to "content protection" and/or "piracy", for the period 2007 to the present.

We hold a large number of ERTG documents covering the period April 2008 to May 2010. Information relevant to your request may be contained in any number of these documents and in order to ascertain whether any relevant information is held, we would need to read each document in its entirety. With some of the documents running to over one hundred pages in length, we estimate this would take more than two and a half days. Moreover, given the range of terminology associated with the subject matter and the file formats within which such information may exist, we estimate that automated text searches would not reliably locate this information within this timeframe.

Under section 12 of the Act, we are allowed to refuse to handle the request if it would exceed the appropriate limit. The appropriate limit has been set by the Regulations (SI 2004/3244) as being £450 (equivalent to two and a half days work, at an hourly rate of £25).

Nevertheless, we have been able to locate one ERTG paper entitled "Public Press Reaction to introduction of SWF Verification on iPlayer" which is attached as a disclosure document. Please note we have made redactions to this document under section 43(2)(commercial interests), section 42 (legal professional privilege) and section 40 (personal information) as explained in point 4 below.

3. Whatever documents, easily to hand, that detail any which organisations have obliged the BBC or any which organisations the BBC has considered the interests of when deciding, to implement content protection for Freeview HD and iPlayer services.

The information you have requested relates to the BBC's agreements with rights holders or their terms and, as such, is excluded from the Act because Part VI of Schedule 1 to the Act provides that information held by the BBC and the other public service broadcasters is only covered by the Act if it is held for 'purposes *other* than those of journalism, art or literature". The BBC is not required by the Act to supply information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities.

However, you may be interested to know that the BBC is currently considering publishing a blog post on bbc.co.uk to expand on the subject of content protection which may address some of the issues covered in this response.

4. Redactions have been made under exemption from the Act as follows:

Section 43(2)(commercial interests)

We have redacted certain sections under section 43(2)(commercial interests) of the Act. This is because disclosure would be likely to prejudice the commercial interests of the BBC by:

- potentially putting the BBC in breach of its agreements with content suppliers and rights holders; and
- damaging the BBC's business reputation or the confidence that customers, suppliers, rights holders or investors may have in it; and
- harming the ability of the BBC to obtain goods and services in the future.

As section 43 is a qualified exemption, in accordance with section 2(2) of the Act, we have considered the public interest factors in this case. Specifically, whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

In favour of disclosure, we recognised that there is a public interest in the following:

- that the BBC's commercial activities are conducted in an open and honest way; and
- that the BBC is using public money effectively, and that the BBC is getting value for money when purchasing goods and services.

On the other hand, in considering factors that might weigh in favour of the public interest in withholding, we took into account:

- that use of content protection mechanisms is necessary to ensure the ongoing protection of the content which the BBC makes available on its services such as the BBC iPlayer from unauthorised use; and
- that the BBC has to comply with its agreements with rights holders and suppliers where on-demand access to programming may be subject to the BBC taking appropriate means to protect that content from unauthorised use; and
- that the use of digital rights management technology is key to the provision of our programmes and enables the BBC to provide licence fee payers with as wide a range of content as possible; and
- that the BBC maintains a strong bargaining position vis-à-vis suppliers and rights holders during contractual negotiations in order to ensure that the licence fee is spent effectively.

Section 42 (legal professional privilege)

Section 42 (legal professional privilege) ("LPP") covers among other things confidential communications between lawyers and their clients for the purpose of seeking and obtaining legal advice, or communications between lawyers and third parties which come into existence after litigation is contemplated and are made for the dominant purpose of such litigation.

As section 42 is a qualified exemption, in accordance with section 2(2) of the Act, we have considered the public interest factors in this case. Specifically, whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

In favour of releasing the information:

- The BBC accepts that there is a public interest in accountability of the BBC for public funds.

On the other hand, in considering factors that might weigh in favour of the public interest in withholding, we took into account:

- The seeking of legal advice by all persons in order to enable them to order their affairs in a lawful manner is strongly in the public interest. That public interest is perhaps at its strongest where the client seeking and receiving legal advice is a public body or quasi-public body whose decisions have the potential to affect large numbers of people. In order for the seeking of advice to take place and for the advice given to be valuable, it is crucial that the seeking and giving of such advice be carried out with absolute candour. This requires that clients be secure in the knowledge that the information that passes between them and their lawyers in the course of seeking and giving legal advice will be free from scrutiny by outsiders. As the Information Tribunal recognised in *Bellamy v Information Commissioner* EA/2005/0023:

“There is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.”

We are satisfied, in terms of section 2 of the Act, that in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 40(2) (personal information)

We have redacted the names of some members of staff. Personal information about living individuals is exempt if disclosure to a third party would breach one or more principles of the Data Protection Act 1998. As individuals who work at the BBC would not expect their identities to be disclosed in this way, to do so would be unfair. Therefore, disclosure would breach the First Data Protection Principle, fair and lawful processing.

Appeal Rights

The BBC does not offer an internal review when the information requested is not covered by the Act. If you disagree with our decision you can appeal to the Information Commissioner. For parts of the request covered by the Act, you may request an internal review of our decision. Please contact us at the address above, explaining what you would like us to review and including your reference number. If you are not satisfied with the internal review, you can appeal to the Information Commissioner. The contact details are: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF telephone 01625 545 700. <http://www.ico.gov.uk>

Please note that should the Information Commissioner's Office decide that the Act does cover this information, exemptions under the Act might then apply.

Yours sincerely

Kate Leece
Head of Legal and Business Affairs
Future Media & Technology