



ON APPEAL FROM:

**The Information Commissioner's Decision Notice No:
FS50544882**

Dated: 22nd. October, 2014

Appeal No. EA/2014/0288

Appellant: M. Mehdizadeh ("MM")

Respondent: The Information Commissioner ("the ICO")

**Before
David Farrer Q.C.
Judge**

and

**Pieter De Waal
and
Paul Taylor**

Tribunal Members

Date of Decision: 28th. April, 2015

The Appeal was determined on written submissions

Subject matter:

FOIA ss.1(1), 3(2)(b) and 84

Whether the public authority held the requested information.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that, on a balance of probabilities, the BBC did not hold the requested information. It therefore dismisses the appeal.

Dated this 28th. day of April, 2015

David Farrer Q.C.

Judge

[Signed on original]

Abbreviations

FOIA	The Freedom of Information Act, 2000
The DN	The ICO's Decision Notice.

REASONS FOR DECISION

The Background and the Request

1. MM visited the BBC's offices at Wood Lane, White City on 14th. February, 2012 to complain about a faulty digital box installed on his TV two months earlier. An argument with a receptionist apparently ensued, in the course of which she refused to give MM her name or that of her manager. It was evidently a fairly trivial incident, whatever the language used by the receptionist.
2. MM took great exception to her conduct, it seems and pursued a complaint as far as the BBC's Board of Trustees, which involved lengthy and evidently, on MM's side, highly - charged correspondence. He was deeply affronted by every aspect of the handling and rejection of his complaint . At the end of a letter dated 28th. January, 2014, which was couched in offensive terms, MM made a request for information as follows -

'Under the Freedom of Information Act 2000 I have the right to know the names of that woman and her manager. I therefore request that the information I am seeking is provided to me to assess my next option'.
3. The BBC responded substantively on 28th. February, 2014. It stated that it had searched its records and taken all reasonable steps to locate the information but had not been able to do so. It further stated that, had it held the information, it would have been exempt

from disclosure because it was personal data to which FOIA s.40(2) applied. The Tribunal does not intend to consider or rule on that second conditional response.

4. In a letter dated 26th. March, 2014 of a similar character to the request, MM demanded an internal review. That review, dated 6th. May, 2014, acknowledged a failure to comply with a 20 working day time limit for the initial response, recorded that the BBC denied holding the information but otherwise provided a somewhat inaccurate analysis of the issues that would have arisen under s.40(2), despite the fact that it was not relying on that exemption.
5. MM complained to the ICO on 12th. June, 2014 in similarly immoderate terms to those that he employed when writing to the BBC.
6. The ICO investigated his complaint and received from the BBC a letter dated 4th. August, 2014 setting out the searches which, it said, had been made for the requested information and referring to problems encountered. That was evidently the source of much of the information as to inquiries which appeared in the DN.
7. The DN concluded that, on a balance of probabilities (which is, of course the appropriate standard of proof) the BBC did not hold the information, namely the names of the receptionist and the manager, at the date of the request. It referred to the passage of time since the incident, the changes of staff, and the involvement of a facilities management company in the provision of temporary staff.
8. Before embarking on a brief review of the evidence, the arguments and the Tribunal's reasons for its findings, we wish to deprecate in the strongest terms the deplorable, indeed defamatory style of correspondence employed by MM both with the BBC and the ICO. If there is material evidence of dishonesty by lying or otherwise, then the Tribunal will, of course, investigate it with the greatest care. However, accepting that, rightly or wrongly, MM was angry over this incident and displeased with the handling of his complaint, there was no excuse for the wild, intemperate, wholly unsubstantiated accusations of rank dis-

honesty which he so readily directed at those who, mistaken or not, treated him courteously and fairly. Those who answer requests for information or represent the ICO cannot complain at forthright disagreement with their arguments or decisions but are entitled to expect moderation and basic civility, even from the most disappointed requester or complainant.. We emphasise this concern because unrestrained and unjustified language of this kind in dealings with public authorities is an increasingly common feature of appeals that come before this judge. Of course, it makes no difference to the merits of an appeal and would never be a reason for finding against an appellant. Nevertheless, it is wholly unacceptable in this or any other jurisdiction and does nothing to promote the principle of transparency in public affairs.

MM's case on appeal

9 Drafted very much in the style described above, their substance was to this effect -

- MM had raised the question of the names of the receptionist and manager at the time of his complaint to the BBC in 2012;
- Prompt action then would have revealed who they were;
- Any subsequent delay in identifying them was the fault of the BBC; its staff had been incompetent in failing to contact MM promptly;
- No sincere attempt to identify them had been made;
- The BBC staff were guilty of trickery and dishonesty in evading the obligation to search for and secure this information;
- The ICO had, at best, allowed himself to be manipulated by the BBC and had found in its favour as part of establishment collaboration.

The grounds also contained material directed to MM's original complaint and claim for compensation from the BBC.

The ICO's response

10. This largely followed the DN. The ICO accepted that the BBC had genuinely attempted to discover who had acted as receptionist and manager on the date concerned, even though it intended to invoke s.40(2), if it succeeded. He took account of the passage of time, regardless of the reasons for the delay. He referred to the letter mentioned in paragraph 6 as containing the kernel of the BBC's response.

The Tribunal's findings

11. The issue is whether, on a balance of probabilities, the BBC held the relevant information at the date of the request, namely 28th. January, 2014. If the information was but is no longer held, it is not obliged to retrieve it. "Information" means information recorded in any form but it must be recorded (s.84). Information is held by a public authority, if it is held by another person on behalf of that authority (s.3(2)(b)).
12. The duty to provide the relevant names arose therefore, if, but only if, the BBC, at the date of the request, held a record, presumably in the form of a roster or time sheet for pay purposes, showing who were the receptionist and manager at the material time. The fact, if it was a fact, that some member of staff could recall who was on duty or could find out by further inquiry of the facilities management company is immaterial. Likewise, the existence of such a record in the information system of the facilities management company did not mean that the BBC held the information, since that company would hold it for its own purposes, not on behalf of the BBC. Section 1 of FOIA does not oblige a public authority to make inquiries as to whether a third party has the information or to act as a private detective.
13. It is far from clear that anybody concerned with the complaint or the BBC response of 4th. August, 2014 had regard to these principles when describing the searches conducted or the later ICO investigation. An outsider would suppose that the BBC could readily ascertain whether or not it had a record of which staff were on duty on a particular evening. If it did not, that was an end of the matter.

14. The letter of 4th. August, 2014 stated that a member of BBC Workplace, its estate management division, inquired of the company providing staff in 2012 who the receptionist might have been. When this inquiry was made (presumably early in 2014), major changes were taking place in the supply of facilities management services resulting in large movements of staff. Nobody who knew about staffing at the relevant date could be identified.
15. Two possible candidates for manager were identified but neither now worked with the BBC. There was no clear evidence as to which of several women might have worked in reception on 14th. February, 2012. Staff had moved to other jobs outside the BBC. The relative triviality of the original incident suggested that staff might not remember it anyway.
16. Neither the BBC's letter nor the DN refers in terms to a search of the BBC's staff records, whether electronic or in hard copy. However, the BBC's response to the request, dated 28th. February, 2014, stated "We have searched our records . . ." The Tribunal interprets that as a reference to recorded information held by the BBC at that date. Because there were no relevant records in February, 2014, inquiries were launched in other directions. If the staff were provided by the facilities management company, that company would have held any record that existed; the BBC would simply have received an invoice for the staff services provided.
17. The Tribunal cannot see any reason why the BBC should falsely deny that it held the requested information nor why it should wilfully ignore records which it held and which would answer the questions posed. Acknowledging that it held them would not harm its interests in any way. If it held the information, it would have said so and relied on s.40(2).
18. The Tribunal firmly rejects MM's allegations of evasion, trickery, and so forth. It finds that, on a balance of probabilities, the BBC did not hold the information.

19. For these reasons it upholds the ICO's decision as set out in the DN, though the DN failed to address relevant questions.

20. This Decision is unanimous.

David Farrer Q.C.

Tribunal Judge

28th. April, 2015