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The Rt.Hon. the Earl of Gowrie  
Minister for the Arts  
Office of Arts and Libraries  
Great George Street  
London SW1P 3AL

9 May 1985

Dear Gary,

EC ACQUIRED RIGHTS DIRECTIVE AND THE SOUTH BANK

Thank you for sending to me a copy of your letter of 1<sup>st</sup> May to Patrick Jenkin concerning the transfer of employees of the South Bank Concert Halls to the Arts Council.

In deciding not to apply the regime laid down by the Directive, you derive comfort (a) from the fact that an argument has recently been aired in cases before the European Court of Justice that the Directive is not concerned with transfers which are not based on agreement and (b) from the reasoning that if the South Bank activities are to be classified as being economic, the same would be true of many other local government activities. As for (a), I think that you should bear in mind that the Court was concerned with cases which were not even remotely connected with the situation with which we are now faced and that, in any event - as you recognise - the Court was silent on the argument advanced that the Directive is concerned only with consensual transfers. As regards (b), I am not convinced that we would not be accepting a greater risk with South Bank staff than with various other groups. Whether any particular service or activity will be regarded by the European Court as amounting to economic activity for the purposes of the Directive - if the Court is prepared to introduce this limitation at all - may depend in my view on a number of factors, including the statutory or non-statutory basis of the activity, the way in which it is financed, the extent to which it is or can be provided only by local authorities, whether it is in the nature of a regulatory or governmental function and the motive and purpose of the local authority

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in carrying it out. On the basis of these factors, I would think that the Court, if it is prepared to accept the economic activity limitation, would be more likely to regard the South Bank Halls as "undertakings" for the purposes of the Directive than, for example, the fire service (the only one of the activities you mention on which I have received any instructions).

I am copying this letter to all members of MISC 95, to Kenneth Cameron and to Sir Robert Armstrong.

Yours etc.  
Michael.

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