

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 December 2009

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

Summary

The complainant made a request for research carried out by the BBC's Marketing, Communications and Audiences Unit (MC&A) into audience attitudes, any reports by the MC&A and any communications between the MC&A and the BBC's individual channel heads. The BBC refused to provide the information in the latter two parts of the request claiming it was outside the scope of the Act as it was held for the purposes of journalism, art or literature. It stated that the BBC was not required 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. The Commissioner is satisfied that the information in question was held for the purposes of journalism, art and literature. Therefore the BBC was not obliged to comply with parts I to V of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether the BBC has complied with its duties under the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

Background

2. The MC&A is a department within the British Broadcasting Corporation (the BBC) responsible for all the BBC's marketing, communications, audience research and insight activities and the BBC's audience services department, including the BBC's customer call centres.

The Request

3. On 7 August 2007, the complainant made the following requests to the BBC:-

“Could I please request the following pieces of information. In each case I am only looking for information stretching back from the present day to January 2007.

- i. All research carried out by the MC&A into the public’s attitudes to the BBC and its output via television, radio and online. This research could be about particular programmes or genres and/or methods of delivery. Or it could be about the BBC as a whole.*
- ii. All communications between individual channel heads and the MC&A. By channel heads I mean the heads of the BBC’s four television stations and the heads of Radios 1, 2, 3 and 4.*
- iii. Copies of all reports and briefing documents produced by the MC&A for individual channel heads at the BBC. By channel heads I mean those listed above.”*

4. On 17 September 2007 the BBC issued a refusal notice to the complainant. The BBC refused to supply the information relevant to the first request on the basis that to do so would exceed the appropriate limit and therefore section 12 of the Act applied. In relation to the second and third requests the BBC stated that it was not obliged to supply the relevant information as it was held for the purposes of journalism, art or literature and therefore fell outside the scope of the Act.

The Investigation

Scope of the case

5. On 24 September 2007 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. He specifically asked the Commissioner to consider whether the information relevant to requests 2 and 3 fell, as the BBC claimed, outside the scope of the Act. The complainant stated that he did not wish to pursue a complaint in relation to the BBC’s application of the cost limit in section 12 to the first request. Therefore, the Commissioner has limited his investigation and decision to requests 2 and 3.

Chronology

6. Unfortunately due to the volume of cases he had received the Commissioner was unable to begin investigating the complaint until 22 July 2008. On that date the complainant was advised that his complaint had been allocated for investigation. On the same day the Commissioner wrote to the BBC and requested both a copy of the withheld information and further submissions as to why the information fell outside the scope of the Act.

7. The Commissioner did not receive a response to his letter dated 22 July 2008 from the BBC. However on 19 March 2009 the Commissioner wrote to the complainant and explained that his case had been transferred to a different team who had taken over responsibility for cases involving the BBC. The complainant was advised that all BBC complaints were being assessed in light of a recent judgment in the House of Lords in the case of *Sugar v BBC* [2009] UKHL 9 which was likely to have a significant impact on the way in which the Commissioner approached complaints about the BBC under the Act.
8. On 2 October 2009 the High Court handed down its judgments in relation to two appeals it had heard involving the application of the derogation by the BBC. The cases were *BBC v Steven Sugar & the Information Commissioner* [2009] [EWHC 2349] (Admin) and *BBC v the Information Commissioner* [2009] [EWHC 2348] (Admin) and both judgments found in favour of the BBC.
9. Between 9 October and 12 October 2009 there was an exchange of emails between the Commissioner and the BBC in relation to how to proceed with the complaint in light of the judgments mentioned above.
10. On 18 November 2009 the Commissioner wrote to the complainant and asked whether, in light of the judgments mentioned above he wished to pursue his complaint. He also indicated that, in his view, the information relevant to requests 2 and 3 was outside the scope of the Act. The complainant replied stating that he did wish to pursue his complaint and asked the Commissioner to issue a decision notice.

Analysis

Substantive Procedural Matters

Jurisdiction

11. Section 3 of the Act states:

“3. – (1) In this Act “public authority” means –
(b).... any body...which –
(i) is listed in Schedule 1.....”

The entry in relation to the BBC at Schedule 1, Part VI reads:

“The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature”

Section 7 of the Act states:

“7. – (1) Where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of this Act applies to any other information held by the authority”.

The BBC has argued that the construction of sections 3, 7 and Schedule 1 means that the BBC is not a public authority where it holds the requested information for the purposes of journalism, art or literature. Consequently, the Commissioner would not have jurisdiction to issue a decision notice given the wording of section 50.

12. This issue has been considered by the House of Lords in the case of *Sugar v BBC*¹. By a majority of 3:2, the Lords found in favour of the appellant, Mr Sugar, in concluding that the Commissioner does have jurisdiction to issue decision notices regardless of whether the information that has been requested is derogated. The Commissioner adopts the reasoning set out by Lord Hope at paragraphs 54 and 55 where he said:

“54. Section 7(1) says that where a public authority is listed in Schedule 1 only in relation to information of a specified description, nothing in Parts I to V of the Act applies to any other information held by the authority. What it does not say is that, in that case, the authority is a hybrid – a “public authority” within the meaning of the Act for some of the information that it holds and not a “public authority” for the rest. The technique which it uses is a different one. Taking the words of the subsection exactly as one finds them, what it says is that nothing in Parts I to V of the Act applies to any other “information” held by “the authority”. This approach indicates that, despite the qualification that appears against its name in Schedule 1, the body is a public authority within the meaning of the Act for all its purposes. That, in effect, is what section 3(1) of the Act provides when it says what “public authority” means “in this Act”. The exception in section 7(1) does not qualify the meaning of “public authority” in section 3(1). It is directed to the information that the authority holds on the assumption that, but for its provisions, Parts I to V would apply because the holder of the information is a public authority.”

55.The question whether or not Parts I to V apply to the information to which the person making the request under section 1(1) seeks access depends on the way the public authority is listed. If its listing is unqualified, Parts I to V apply to all the information that it holds. If it is listed only in relation to information of a specified description, only information that falls within the specified description is subject to the right of access that Part I provides. But it is nevertheless, for all the purposes of the Act, a public authority”.

13. Therefore, the Commissioner has jurisdiction to issue a decision notice on the grounds that the BBC remains a public authority. Where the information is derogated, the Commissioner considers that the BBC has no obligations to comply with Parts I to V in respect of that information.

¹ *Sugar v BBC* [2009] UKHL 9

14. The Commissioner will first determine whether the request is for information held for the purposes of journalism, art or literature and if therefore the BBC is required to comply with Parts I to V in respect of the request.

Derogation

15. As mentioned previously the scope of the derogation has been considered by the High Court in the cases of the BBC v Steven Sugar and the Information Commissioner [EW2349]² and the BBC v the Information Commissioner [EW2348].³ In both decisions Mr Justice Irwin stated:

“My conclusion is that the words in the Schedule mean the BBC has no obligation to disclose information which they hold to any significant extent for the purposes of journalism, art or literature, whether or not the information is also held for other purposes. The words do not mean that the information is disclosable if it is held for purposes distinct from journalism, art or literature, whilst it is also held to any significant extent for those purposes. If the information is held for mixed purposes, including to any significant extent the purposes listed in the Schedule or one of them, then the information is not disclosable.” (para 65 EA2349 and para 73 EW2348).

16. The Commissioner interprets the phrase “to any significant extent”, when taken in the context of the judgment as a whole, to mean that where the requested information is held to a more than trivial or insignificant extent for journalistic, artistic or literary purposes the BBC will not be obliged to comply with Parts I to V of the Act. This is the case even if the information is also held for other purposes.
17. For completeness, the Commissioner considers that where information is held for non-journalistic/artistic/literary purposes and is only held to a trivial or insignificant extent for the purposes listed in Schedule 1, then the BBC will be obliged to comply with its obligations under Parts I to V of the Act.
18. Thus, provided there is a relationship between the information and one of the purposes listed in Schedule 1, then the information is derogated. This approach is supported by Mr Justice Irwin’s comments on the relationship between operational information, such as programme costs and budgets, and creative output:

“It seems to me difficult to say that information held for ‘operational’ purposes is not held for the ‘purposes of journalism, art or literature.’” (para 87 EW2348)

19. The information relevant to the request need not be journalistic, artistic or literary material itself. As explained above all that needs to be established is whether the

² BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)

³ BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

requested information is held to any significant extent for one or more of the derogated purposes of art, literature or journalism.

20. The two High Court decisions referred to above related to information falling within the following categories:

- Salaries of presenters / talent
- Total staff costs of programmes
- Programme budgets
- Programme costs
- Payments to other production companies for programmes
- Payments to secure coverage of sporting events and other events
- Content of programmes / coverage of issues within programmes

21. In relation to all of the above Mr Justice Irwin found that the information was held for operational purposes related to programme content and therefore to a significant extent for the purposes of journalism, art or literature.

22. The Commissioner recognises that the High Court cases did not specifically consider information related to the BBC's communications with the MC&A. Nevertheless the Commissioner considers the comments made by Mr Justice Irwin regarding the need for a relationship between the requested information and the derogated purposes are relevant and therefore he has considered them here.

23. The information requested in this case is communications between individual channel heads at the BBC and the MC&A and any reports and briefing documents produced by the MC&A for those individual channel heads. As mentioned in the Background section of this notice, the MC&A is responsible for audience research and insight activities as well as the marketing and communication campaigns in relation to BBC output. The Commissioner notes that channel heads are responsible for editorial decisions about the content and creative direction of their channels. Furthermore he understands that audience feedback, which may be obtained via specifically commissioned research, is used to inform the BBC's editorial choices about future programme content, scheduling and marketing of the BBC's creative output. The Commissioner recognises that the information could also be retained for non-derogated purposes but, given that the requested information is used to inform editorial decisions, he is of the view that it is nevertheless held to a significant extent for journalistic, artistic or literary purposes.

24. In view of the above, the Commissioner has found that the request was for information held to a significant extent for the purposes of journalism, art or literature and that the BBC was not therefore obliged to comply with Parts I to V of the Act.

The Decision

25. The Commissioner's decision is that as the request was for information held to a significant extent for the purposes of journalism, art or literature the BBC was not therefore obliged to comply with Parts I to V of the Act in this case.

Steps Required

26. The Commissioner requires no steps to be taken.

Right of Appeal

27. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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 served.

Dated the 8th day of December 2009

Signed

**Jo Pedder
Senior Policy Manager**

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

Legal Annex

General Right of Access

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 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Cost limit

Section 12 - Exemption where cost of compliance exceeds appropriate limit

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.