Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 October 2009

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

Summary

The complainant requested information regarding the decision not to broadcast the Disasters Emergency Committee's (DEC) appeal for Gaza. The public authority refused to provide the information claiming that it was outside the scope of the Freedom of Information Act 2000 (the "Act") because it was held for the purposes of journalism, art or literature. It was stated that the information was used for creating the public authority's output and was closely associated with creative activities. The Commissioner is satisfied that the information in question is held for the purposes of journalism, art or literature. Therefore the BBC was not required to comply with Parts I to V of the Act in relation to this request.

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. In the event of major humanitarian crises 13 UK aid agencies form the Disasters Emergency Committee. If certain criteria are met and there is a justification for a public appeal the public broadcasters are asked to consider broadcasting that appeal. On 24 January 2009 the Director General of the BBC set out his reasons for not broadcasting the Gaza Appeal saying that the decision was in line with the corporation's broader approach to impartiality and appeals.

The Request

3. The request was sent by email on 26 January 2009 and asked for the following information concerning the BBC's decision not to broadcast the Disasters Emergency Committee's (DEC) appeal for Gaza:

> " *I am writing to find out the discussions relating to broadcasting the DEC Gaza appeal from Oct 2008- Jan 26 2009.*
>
> *I would like access to memos, internal reports, emails.*
>
> *I would like to see any correspondence between Mark Thompson and the BBC trust chairman Michael Lyons…"*

4. The BBC responded on 20 February 2009:

> "*The information that you requested is not covered by the Freedom of Information Act 2000 ("the Act").*
>
> *Your request falls outside the scope of the Act because 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" (see Schedule I, Part VI of the Act). We are not therefore obliged 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. Information which is not subject to disclosure under the Act because of Schedule I might otherwise be exempt from disclosure because of the application of other provisions of the Act."*

5. The BBC went on to provide some general background information "outside the scope of the Act" which formed the basis for the decision not to broadcast. The letter stated that there were concerns over the logistics of delivering aid on the ground in Gaza and that the BBC might run "the risk of reducing public confidence in [its] impartiality in its wider coverage of the story."

The Investigation

Scope of the case

6. On 20 February 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically appealed to the Commissioner to consider the BBC's refusal to provide the requested information.

Chronology

7. The Commissioner wrote to the BBC on 9 March 2009 to inform it that the complainant had written to him asking that he investigate the refusal to provide the information requested.

8. Whilst the case was open, on 2 October 2009, the High Court promulgated its finding in relation to two appeals it had heard involving the application of the derogation by the BBC. Both judgments found in favour of the BBC. The Commissioner has applied the findings of the two judgments to the facts of this case.

Analysis

Substantive Procedural Matters

Jurisdiction

9. 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.

10. 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

[1] Sugar v BBC [2009] UKHL 9

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".*

11. 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.

12. 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

13. 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:

[2] BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)
[3] BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

> *"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).*

14. The Commissioner interprets the phrase "to any significant extent", when taken in the context of the judgement 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.

15. 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.

16. 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)*

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

Analysis

---

18. 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

19. 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.

20. The Commissioner recognises that the High Court cases did not specifically consider information of the nature requested in this case. 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.

21. The information requested in this case focuses on the decision not to broadcast the DEC Appeal for Gaza. As the information requested relates to editorial decisions about potential programme content the Commissioner is satisfied that it is held to a significant extent for the purposes of journalism, art or literature.

22. In view of the above, the Commissioner has found that the requests are for information held for the purpose of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of the Act. .

The Decision

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

Steps Required

24. The Commissioner requires no steps to be taken.

Right of Appeal

---

25. 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 20th day of October 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 –

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

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 –

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

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"."