

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 February 2010

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

Summary

The complainant made an information request to the British Broadcasting Corporation (the "BBC") for information about complaints from viewers, victims and insiders made to it in connection with a Panorama investigation. The BBC refused to provide the requested information claiming that it was outside the scope of the Freedom of Information Act ("the Act") because it was held for the purposes of journalism, art or literature. The Commissioner is satisfied that the information in question was held to a significant extent for the purposes of journalism, art or 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 BBC broadcast a *Panorama* programme entitled *Dirty Secrets* on 23 April 2007. The programme reported the outcome of its investigations into the use of phone-in competitions and found that a company working for GMTV had been finalising shortlists of potential winners before the phone lines closed.

The Request

3. On 14 July 2009 the complainant requested the following information from the BBC:

“I would like to request all complaints from viewers, victims and insiders (personal info redacted) from Panorama dated monday (sic) 23rd April - TV's dirty secrets at <http://news.bbc.co.uk/1/hi/programmes/panorama/6583111.stm>”

4. The BBC responded by email on 15 July 2009 refusing to disclose this information, giving the reason that it was “held for the purposes of creating the BBC’s output or is closely associated with these creative activities.” It was also pointed out that the BBC did not release “feedback” because of its “desire to maintain [its] independence and impartiality”. The limited application of the Act to public service broadcasters for reasons of freedom of expression was explained and the BBC claimed support for this view from the European Court of Human Rights and the Information Commissioner’s Office.

The Investigation

Scope of the case

5. On 19 July 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- that the BBC had a duty to “impart information and ideas on all matters of public interest and the importance of this function has been recognised by the European Court of Human Rights”;
 - that he felt there was a distinction between audience feedback and the information he had requested.
6. On 23 November 2009, during the investigation the Commissioner contacted the complainant to clarify the information he had requested. The complainant confirmed that he was seeking details of complaints made by victims, viewers or insiders that they had been defrauded by phone-in companies. He explained that this included complaints received as part of the pre-programme investigation and after the *Panorama* programme was broadcast. The Commissioner has therefore considered whether that information falls within the derogation as the BBC has asserted.

Chronology

7. 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. Both

judgments found in favour of the BBC. The Commissioner has applied the findings of the two judgments to the facts of this case.

8. Having reviewed the request and the correspondence supplied by the complainant the Commissioner decided that it was necessary to contact the BBC for further information. The Commissioner emailed the BBC on 23 November 2009 and 19 January 2010 to request further information to assist him in making a decision in this case including details of why it considered the information fell within the derogation.
9. On 21 January 2010 the BBC responded with further argument in support of this view. The BBC held that the requested information constituted “source material” because it related to an investigation undertaken by the BBC which ultimately led to “a piece of journalistic output”. The BBC further added that the protection of journalistic sources was fundamental and that this view had precedence in case law.
10. The BBC suggested that the derogation for journalistic purposes was designed to protect freedom of expression under Article 10 of the European Convention on Human Rights, citing *Bergens Tidende v Norway* [(2001) 31 EHRR 16, para 49]. The BBC also cited the Commissioner’s own statement that:

“...the ultimate purpose of the derogation is to protect journalistic, artistic and literary integrity by carving out a creative and journalistic space for programme makers free from the interference and scrutiny of the public” (FAC0070848).
11. Additionally the BBC quoted from *Goodwin v UK* [(1996) 22 EHRR 123, paragraph 39] claiming that a “chilling effect” would ensue if the space that was required for journalistic freedom was encroached upon by the interference and scrutiny of the public.
12. On 27 November 2010 the Commissioner asked the BBC why allegations that victims continued to make after the broadcast were held as he did not feel that this question had been fully addressed.
13. The BBC explained that any allegations would be held on the programme file. The victim’s complaint or allegation would be considered as a ‘source’ and would be used to consider if there was any merit in making any follow up programmes on the issue. Any allegations are held by the journalist who conducted the original investigation who would decide whether or not the further allegations warranted any follow up. Journalists working on *Panorama* might also work on other programmes – radio, television and on line. Any subsequent programmes could materialise in radio, television or online content.
14. Allegations made at any time in relation to this kind of issue would always be considered source material and would be held only to inform further programme content. The BBC stated that during the making of such programmes as *Panorama*, allegations would be made on an ongoing basis and it was very hard to draw a line to say that a complaint or allegation made before the broadcast

was different to one made subsequently as the journalists would hold it only as source material which would inform journalistic and editorial decisions.

Analysis

Substantive Procedural Matters

Jurisdiction

15. 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.

16. 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

¹ *Sugar v BBC* [2009] UKHL 9

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”.

17. 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.
18. 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

19. 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).

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

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

20. 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.
21. 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.
22. 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)
23. 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.
24. 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

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.

25. 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.
26. As source material used when creating the Panorama programme the information requested in this case is clearly linked to the content of that broadcast. Moreover the Commissioner is satisfied that any allegations received after the programme

was broadcast were also held by the BBC to inform journalistic and editorial decisions about whether to make follow up programmes and if so, what content to include. Therefore that material was also linked to the BBC's output. In view of this the Commissioner has concluded that all of the requested information was clearly held by the BBC to a significant extent for the purposes of journalism, art or literature and therefore it was not obliged to comply with Parts I to V of the Act in this case.

27. In his representations the complainant referred to the fact that there was a public interest in the requested information being made available. The Commissioner wishes to point out that the BBC's listing in Schedule I, known as the derogation, is not an exemption and is not subject to the public interest test. Therefore this is not a relevant consideration in this case.

The Decision

28. The Commissioner's decision is that as the request is for information held by the BBC to a significant extent 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

29. The Commissioner requires no steps to be taken.

Right of Appeal

30. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 3rd day of February 2010

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”.