

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 November 2010

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

Summary

The complainant requested the details of all the evidence considered by the Governors' Committee of the BBC (now the BBC Trust Editorial Standards Committee) in coming to a decision regarding a Radio Stoke broadcast in February 2006. The BBC stated that the requested information fell outside the scope of the Act because it is information held for the purposes of journalism, art or literature. The Commissioner's decision is that the requested information is genuinely held for the purposes of journalism. Therefore the BBC is 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.

The Request

2. On 5 February 2010 the complainant requested the following information to be provided in accordance with the Act:

"Radio Stoke Broadcast 16th February 2006 and repeated 18th February 2006"

I have not done this before so I am uncertain of what to tell you. My complaint has been going on now for 4 years and a large part of the correspondence (90 or so letters in all) has been dealt with by [named person] as [named post] (reference number quoted) and more recently by [second named person] of BBC Trust (Reference number).

My complaint was considered by the Governors' Committee in September 2006 and either [named person] or [second named person] can explain to you (if you need any explanation) why the complaint is still 'alive'.

What I need is details of all the evidence considered by the Governors' Committee in coming to it's (sic) decision."

3. On 23 February 2010 the BBC issued its response stating that the information was held for the purposes of 'journalism, art or literature' and therefore derogated from the Act. It was further argued that disclosing complaints information could lead to judgements having to be made about apparent impartiality, "tit-for-tat escalation of complaints" and charges of ignoring public opinion.
4. On 10 March 2010 the complainant appealed against the withholding of the requested information and asked either that he receive an "unambiguous statement" that he had no right to the information or that the BBC supply it to him.

The Investigation

Scope of the case

5. On 30 April 2010 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:
 - Compliance with the law
 - That the information he requested is not a creative activity or connected with journalism, art or literature
 - That the complainant was a relevant party but that nothing had been shared with him
 - That it was not fair to withhold the information as he did not know if his evidence had been considered

- That the BBC had not denied that he was entitled to the information and that it was a waste of licence fee payers' and tax payers' money to continue to withhold that information

Chronology

6. On 21 June 2010 the Commissioner wrote to the BBC concerning whether the Governors' Committee's decision related to a complaint made by the requester and whether any of the requested information would fall under the Data Protection Act (the "DPA").
7. The BBC responded by stating that the Governors' Committee was now known as the BBC Trust Editorial Standards Committee. The BBC made it clear that it had not searched for the requested information because it fell under the derogation. However, if the information had fallen within the Act it was not considered to be the personal data of the complainant or fall under the DPA. The BBC stated that the complainant was not a contributor to the programme, that it did not refer to him as an individual and that he was not entitled to information merely because he had taken an interest in it. The Commissioner was referred to another response to a different complaint where the BBC argued that the Act does not apply to information on editorial complaints because the information is held to support BBC content by reviewing audience reaction to content and informing the production of future content.

Analysis

Substantive Procedural Matters

Jurisdiction

8. Section 3 of the Act states that:

"3. – (1) In this Act "public authority" means –
(b)... any body...which –
(i) is listed in Schedule 1....."
9. 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"
10. 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”.
11. This means that the BBC is a public authority for the purposes of the Act but only has to deal with requests for information which are not held for the purposes of journalism, art or literature. The term ‘derogated’ is used to describe information that falls outside the Act, i.e. information that **is** held by the BBC for the purposes of journalism, art or literature.
 12. The House of Lords, in the case of *Sugar v BBC [2009] UKHL 9*, confirmed that the Commissioner has jurisdiction to issue a decision notice in respect of any request made to the BBC regardless of whether or not the information is derogated. 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.
 13. 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

14. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another [2010] EWCA Civ 715*. The leading judgment was made by Lord Neuberger of Abbotsbury MR who stated that:

“ once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes.” (paragraph 44), and that
“....provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA.” (paragraph 46
15. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to the Act.
16. With regard to establishing the purpose for which the information was held Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of

journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgement the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.

17. The Court of Appeal adopted the Tribunal's definition of journalism in *Sugar v IC and the BBC EA/2005/0035* at paragraphs 107 to 109 which set out that journalism comprised of three elements:

"107. The first is the collecting or gathering, writing and verifying of materials for publication.

108. The second is editorial. This involves the exercise of judgement on issues such as:

- * the selection, prioritisation and timing of matters for broadcast or publication,*
- * the analysis of and review of individual programmes*
- * the provision of context and background to such programmes.*

109. The third element is the enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleague, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

18. In considering whether the information is held for the purposes of journalism (or art or literature) the Commissioner has considered the following factors:

- * the purpose for which the information was created;*
- * the relationship between the information and the programme content which encompasses all types of output that the BBC produces; and*
- * the users of the information.*

19. The information that has been requested in this case was created as a result of a broadcast by Radio Stoke in 2006. The BBC described the editorial complaint as the central theme of the information requested; investigating whether the broadcast resulted in a breach of the BBC's editorial standards and, if this was the case, what actions would result as a result of any breach. The complaints information that arose from that broadcast would also be likely to be utilised by the BBC to trigger

and inform reviews by the BBC of its output and overall editorial direction.

20. Based on the explanation contained in the BBC's refusal notice, dated 23 February 2010, and having considered submissions made by the BBC in previous cases the Commissioner understands that the consideration of complaints is an important tool, used by the BBC to monitor, maintain and enhance its journalistic, artistic and literary output and to ensure the impartiality of that output.
21. In reaching this view the Commissioner has also been guided by The Master of Rolls' comments in the Court of Appeal case regarding the media's right to freedom of expression (paragraph 45) as one of the purposes behind the derogation. If the BBC was obliged to provide information relating to its consideration of complaints this could undermine the integrity of a process used to ensure the independence and impartiality of the BBC's output.
22. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism 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 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 sent.

Dated the 8th day of November 2010

Signed

**Pamela Clements
Group Manager, Complaints Resolution
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"."