

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 November 2010

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

Summary

The complainant made 22 requests about the nature, presence and implementation of diversity guidelines and how they applied to the Question Time programme. The BBC stated that the requests fell outside the scope of the Act because they were for information held for the purposes of journalism, art or literature. The Commissioner's decision is that the BBC correctly determined that the requested information is genuinely held for the purposes of journalism and 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 19 March 2010 the complainant explained that he was dissatisfied with a response he had received about a complaint he had made about the lack of coverage on Wales and asked for the following information under the Act:

1. *What are the current guidelines that the BBC has to follow in order to ensure it meets the 'political, administrative, cultural and linguistic differences across the UK'?*
2. *Is Question Time considered to be covered by these BBC guidelines. If not, why not?*
3. *Which person or group of persons are responsible for making this decision?*
4. *If Question Time is covered by the guidelines, are there specific management, co-ordinating and editorial measures that have been put into place by the BBC management to ensure that these guidelines are adhered to?*
5. *Who is responsible at the BBC for deciding and implementing these measures?*
6. *Is it the view of BBC management that such measures are adequate to implement these diversity guidelines?*
7. *Is it the view of BBC management that the guidelines and the measures to implement them have been appropriately and adequately communicated to them [sic] staff responsible for making the Question Time programmes?*
8. *Is it the view of the BBC management that:*
 - (a) *The diversity guidelines were complied with in the Question Time broadcast on the 25th February 2010?*
 - (b) *The measures put in place by the BBC management to implement the diversity guidelines were implemented and complied with by all relevant staff responsible for the Question Time programme broadcast on the 25 February 2010.*
9. *Which particular individuals are responsible for deciding on the composition of the panel on Question Time?*
10. *What criteria do those individuals use for deciding which panellists to invite?*
11. *How are the particular requirements of Wales, given devolution, taken into account to ensure that that [sic]*

such criteria in respect of panellists take into account the diversity guidelines?

12. *Which particular individuals are responsible for deciding which questions are asked on Question Time?*
 13. *What are the criteria used by those individuals to decide which questions are asked?*
 14. *How are the particular requirements of Wales, given devolution, taken into account to ensure that such criteria in respect of questions take into account the diversity guidelines?*
 15. *Does the BBC management consider that the diversity guidelines were in fact complied with in Question Time on the 25th February 2010?*
 16. *Does the BBC management consider that the measures (if any) introduced to implement the diversity guidelines were complied with in Question Time on 25th February 2010?*
 17. *If the guidelines and/or measures were not complied with, who is responsible for the lack of compliance?*
 18. *What steps (including disciplinary action) does the BBC management intend to take to remedy any failure to comply with the guidelines/measures in respect of the Question Time Programme?*
 19. *What steps (including any disciplinary action) does the BBC management intend to take in the future to ensure that the diversity guidelines are met?*
 20. *How many times is Question Time broadcast per year?*
 21. *What is the proportion of Question Time broadcasts that are broadcast from Wales?*
 22. *What input does BBC Wales have into such broadcasts to ensure that the diversity guidelines are met?'*
3. On 20 April 2010 the BBC issued a response. It stated that the requested information fell outside the scope of the Act because the BBC is covered by the Act only in respect of information held for purposes other than those of journalism, art or literature. It explained

it did not offer an internal review in this kind of case and the complainant could approach the Commissioner directly should he wish to appeal.

The Investigation

Scope of the case

4. On 30 April 2010 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 1. The BBC has public commitments and obligations in respect of the diversity of its broadcasts;
 2. The BBC Trustees have commissioned a report on this very issue that was published in 2008 entitled 'The BBC Trust Impartiality Report: BBC Network News and Current Affairs Of The Four UK Nations' (the 'King Report');
 3. It is reasonable to ask them how they are fulfilling these obligations;
 4. He believes it was wrong to refuse to provide this information under the Act;
 5. The BBC does not benefit from the exemption for information that relates to 'journalism, art and literature' in this case. This is because in his view it related to the implementation by the BBC of its public sector obligations;
 6. In his view the format of the programme does not relate to 'journalism, art and literature'. The production company merely provides management and production expertise, while the content is provided by the public and the panel;
 7. It cannot be right that the BBC is able to not provide information already in the public domain;
 8. The questions do not relate to the content of the programme, but rather its compliance with obligations that it has publicly stated as important; and

9. Question Time is made by an independent production company and the BBC has an active responsibility to ensure that the programme meets its Charter obligations. The BBC does not therefore have control over the content and the protection of the space for 'journalism, art and literature' would not make sense in this context.
5. On 27 June 2010 the complainant explained that he had now considered the High Court judgments and that he wanted the case to continue in respect of at least requests 1-6 and 19-22. The email was slightly ambiguous, so for the sake of completeness, the Commissioner has decided to consider all of the original requests in this Notice.
6. The Commissioner notes that where the BBC is obliged to comply with Parts I to V of the Act, section 1 only provides a right of access to recorded information held at the date of the request. It is not possible to compel BBC 'management' to create answers to enquires under the legislation. The only thing that is required by the Act is to consider whether recorded information is held which is relevant to the requests, and if so, whether it can be provided.
7. The complainant also raised other issues that are not addressed in this Notice. The Commissioner is unable to comment on whether coverage was balanced between the regions or whether the BBC meets its Charter obligations. He also cannot adjudicate on the BBC's creative output or its implementation of the recommendations of the 'King Report'¹.

Chronology

8. On 18 June 2010 the Commissioner confirmed to the complainant and the public authority that he had received an eligible complaint and that it would undergo detailed consideration.
9. On 24 June 2010 the case officer wrote to the complainant and explained that given the Commissioner's interpretation of the recent High Court decisions his preliminary view was that the BBC had relied appropriately on the derogation in this case. He asked whether the complainant wished this investigation to continue.
10. On 27 June 2010 the complainant replied to the Commissioner. He said that this case could be distinguished from the High Court decisions and

¹ This report was commissioned by the BBC's Trustees on the issue of balancing coverage between the four Home Nations. Its official title was 'The BBC Trust Impartiality Report: BBC Network News And Current Affairs Coverage Of The Four UK Nations'.

explained why. Further detail of these arguments can be found in the analysis section of this Decision Notice.

11. On 16 July 2010 the Commissioner noted the content of the email and explained that the case would be considered further and a Decision Notice would be issued.
12. On 20 July 2010 the Commissioner telephoned the BBC to ask for more detail about its position in respect of one element of the withheld information. He was asked to put what was said into writing and did so the same day.
13. On 3 August 2010 the BBC provided the Commissioner with further arguments about the disputed element. It explained that it believed that it was covered by the derogation and why. Further detail of these arguments can be found in the analysis section of this Decision Notice. However, it explained that it was prepared to disclose some of the information that was in the public domain outside of the Act. It provided the Commissioner with a copy of the letter that it sent to the complainant disclosing this information.

Findings of fact

14. The edition of Question Time that is the subject of a number of the requests was dated 25 February 2010 and was broadcast from Cardiff, Wales.

Analysis

Substantive Procedural Matters

Jurisdiction

15. 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....."*

16. 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"

17. 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".

18. 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 is 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.
19. 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.
20. The Commissioner will first determine whether the requests are 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 requests.

Derogation

21. 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.' (para 44), 'provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA (para 46)'

22. 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.
23. 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 judgment 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.

24. The Court of Appeal adopted the Tribunal's definition of journalism in *Sugar v IC and the BBC* [EA/2005/0032] at paragraphs 107 to 109 which set out that journalism comprises 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 maintenance and 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 colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

25. In considering whether the information is held for the purposes of journalism the Commissioner has considered the following factors:

- The purpose for which the information was created;
- The relationship between the information and the programmes content which covers all types of output that the BBC produces; and
- The users of the information.

26. There are 22 requests for information in this case. The complainant has provided detailed arguments about why he believed that the information was held in respect of the implementation by the BBC of its

public sector obligations and not in his view for the purposes of 'art, journalism and literature'.

27. The Commissioner has divided the 22 requests into the following four categories:

1. A request for the guidelines that influence the BBC as an organisation (request 1 that the complainant particularly wanted the Commissioner to consider);
2. Requests that relate to the implementation of these guidelines on a specific edition of Question Time (requests 2 to 6, 19 and 22 that the complainant particularly wanted the Commissioner to consider as outlined in paragraph 5 above). For completeness, the Commissioner also believes this category would embrace requests 7, 8, 11, 14 and 15 to 18;
3. Requests for factual information about the location of Question Time (requests 20 and 21 that the complainant particularly wanted the Commissioner consider); and
4. Requests that relate to the format of the Question Time programme (These are included for completeness and were requests 9, 10, 12 and 13).

28. He will consider for each category whether the requested information is held genuinely for a journalistic purpose with reference to the definition found in paragraph 24 above.

Category 1

29. The complainant explained that he believes his request concerns only the issue about whether the BBC has complied with its publicly stated obligations. He explained in some detail that he believed that the public sector obligations apply irrespective of the journalistic content and that he believed that this information should be viewed as not being held for its journalistic, artistic or literary purposes. He then explained that his request relates purely to the overall implementation of publicly declared BBC commitments and whether there would be any exceptions to those obligations.
30. He also explained that the information that he has requested in this instance would be likely to be in the public domain. He said that it could not be right that the BBC would not be required to confirm whether or not the relevant information was in the public domain and whether there were additional internal guidelines about this matter.

31. The Commissioner asked for further arguments from the BBC about this category of information.
32. The BBC stated that it was prepared to provide the publicly available information from its Editorial Guidelines that it held in respect of this request on a voluntary basis to the complainant. However, it also provided detailed arguments about why it believed it was entitled to rely on the derogation in this case.
33. The BBC stated that the information falling within this category of the complainant's request is contained in its Editorial Guidelines. It explained that even though the information is publicly available it believed that it is still held for the purposes of journalism. It argued that the Editorial Guidelines website specifically sets out the purpose for which this information is held:

*'The BBC Editorial Guidelines outline the standards the BBC expects of all BBC content on TV, radio and online. They are designed for everyone who makes content for the BBC, to help them deal with difficult editorial decisions.'*²

34. It then stated that as the particular guidelines are designed to assist journalists in their editorial decision making in its view this information was genuinely held for journalistic purposes.
35. The Commissioner has considered the arguments of both parties carefully. He is of the view that the derogation does not allow him to distinguish this class of data in the way that the complainant has argued. The Commissioner considers that the information is held for the purposes cited in the definition of journalism mentioned in paragraph 24 above. The information was created to assist those making editorial decisions about content. It is used by people involved in the production of BBC outputs to inform their creative decisions and as such it directly affects the programme content. The guidelines are also used for the maintenance and enhancement of the standards and quality of journalism and in the reviews of the standards and quality of particular areas of programme making. In view of the above, the Commissioner is satisfied that the requested information is held for purposes that fall within the second and third paragraph of the definition of journalism. The Commissioner is satisfied that the relevant information is both in nature and usage held for the purposes of journalism.

² They can be found on: <http://www.bbc.co.uk/guidelines/editorialguidelines/> (correct on 4 August 2010).

36. As this is the case, 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.
37. Finally, the Commissioner has also noted the complainant's arguments that the breadth of the derogation would defeat the purpose of Parliament designating the BBC as a public authority in the first place. The Commissioner notes that the Court of Appeal decision provided its view about this very issue and this is provided below:

*'...Relatively little information held by the BBC will be within the ambit of FOIA if the Judge's interpretation is correct. However, although "the public's right to know", in the sense of having access to information held by government and other public bodies, is a very important aspect of a modern, free and democratic society, it is a general right, which, as it seems to me, can be expected to yield to society's more specific public interest in the media being free from the sort of constraints which would arise if journalism-related thoughts, investigations, or discussions could not be freely conducted within organisations such as the BBC. Sunlight is the best disinfectant, but it can also burn, and when it comes to information held by the BBC for the purposes of journalism, it seems to me that the legislative policy is that the risk of burning outweighs the benefit of disinfectant.'*³

Category 2

38. The complainant explained that he viewed this category of information as being distinct from the earlier High Court decisions as it did not relate to how programmes were funded, but instead how the BBC, from a management point of view, fulfils its own interpretation of its public sector obligations. He said that in his view this information did not relate to the content and therefore did not fall within the category 'art, journalism and literature'. The Commissioner notes that the arguments outlined in paragraph 29 above are also relevant in this case.
39. Furthermore, he explained that the programme was commissioned by the BBC from an independent production company Mentorn. He explained that he viewed the BBC as responsible for ensuring that it met its Charter obligations, but not for the programme's journalistic content. He explained that he viewed his requests as being for information about the BBC's overall managerial framework. Furthermore he did not consider them requests for operational

³ At paragraph 48.

information which may overlap with programme content, but for information in respect of the way in which BBC policy is implemented.

40. The BBC argued that the information requested, if held, would genuinely be held for the purposes of 'art, journalism and literature.' It explained that this information would relate to the application of its Editorial Guidance to a set programme and that as the guidelines were designed to assist journalists in their editorial decision making, then it would follow that any information on their application would also be held for journalistic purposes.
41. The Court of Appeal was asked to consider a request for the Balen Report in *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. This report was on the BBC's coverage of the Middle East, and in particular of Israeli and Palestinian affairs. This information also directly related to its editorial decisions and may have influenced its management decisions in this specified area. The Court of Appeal came to the view that the report was covered by the derogation. However, it did explain that it was important that careful consideration was given in every case as to whether the information was held genuinely for the purposes of journalism.
42. In light of submissions made by the BBC in this and previous cases, the Commissioner understands that the BBC believes that the requests relate to information about the control of the content of the Question Time programme.
43. The Commissioner has again considered the three factors mentioned in paragraph 25 above in relation to the requests in this category. He is satisfied that the information was created to assist those making editorial decisions about programme content, for example determining which questions are asked. It was also created to inform the maintenance and enhancement of the standards and quality of journalism and in the reviews of the standards and quality of particular areas of programme making.
44. There is a clear relationship between information which is about whether and how guidelines should apply to a particular programme, if those guidelines have been followed in specified circumstances, details about roles and responsibilities and the content of the BBC's output. This material sets out who is responsible for editorial decisions and details the different considerations that need to be taken into account when making them. It also identifies the different factors that those responsible for the management of standards need to take into account when reviewing creative content and details conclusions about

whether, in making particular editorial decisions, the guidelines have been followed.

45. The users of the information in this category are people involved in making editorial decisions in respect of Question Time and for reviewing its content as well as those actively managing the standard and quality of the BBC's creative output, in some cases via the consideration of editorial complaints.
46. In view of all of the above, the Commissioner is satisfied that the requested information is held for purposes that fall within the second and third paragraphs of the definition of journalism. Therefore he has found that these requests are for information held for the purpose of journalism and the BBC was not obliged to comply with Parts I to V of the Act.

Category 3

47. The complainant argued that this information should be disclosed in order to allow the public to assess the public authority's compliance with its guidelines. He therefore relied on the same arguments as in paragraphs 29, 38 and 39 above. In addition, he argued that this information was likely to be in the public domain (as explained in paragraph 30 above).
48. The Commissioner is satisfied that, though numerical, the information requested in this category is created to inform editorial decisions by programme makers, including those about programme content and scheduling. There is therefore a clear relationship between the information, the BBC's output and its delivery. As such this information is both in nature and usage held for one of the editorial purposes of journalism as defined in the second paragraph of the definition referenced in paragraph 24 above.
49. The Commissioner has therefore found that these requests are for information held for the purposes of journalism and the BBC was not obliged to comply with Parts I to V of the Act.

Category 4

50. The complainant argued that in his view the format of the Question Time programme was not to do with journalism, art or literature. He explained that a production company provides the resources to enable the public to question certain individuals. He explained that in his view the production company selects the panel, provides the chairperson for the debate and who asks questions. He said that he views these roles

as being distinct from providing any journalistic input. He explained that the production company merely provides management and expertise to enable the programme to take place. It is not responsible for the content of the programme. However, he noted that while he may have very good arguments to the contrary, he understood that the very broad High Court decision meant that the Information Commissioner was likely to find against him on this point. The complainant's submissions were made before the Court of Appeal verdict was communicated.

51. The BBC argued that these requests relate directly to the control of the content of the Question Time programme. The division of labour as the complainant has suggested would therefore not matter in this case. Information about the editorial decisions relates to the second and third paragraphs of the definition of journalism. The information would therefore be held genuinely for the purposes of journalism.
52. The Commissioner is satisfied that the BBC's position is correct. The information requested in this category relates to programme content, how editorial decision-making is conducted and by whom. It was created to ensure proper management and oversight of programme production. As such there is a clear relationship between the information and the content of BBC output. Again the information is used by those involved in programme production as well as individuals responsible for the maintenance of the standards and quality of journalism. The Commissioner is satisfied that the information is held for the purposes of journalism outlined in both paragraphs 108 and 109 of the definition given in paragraph 24. The Commissioner can only decide whether the information is genuinely held for the purposes of journalism. The Commissioner is satisfied that the relevant information is both in nature and usage held for such purposes.
53. In view of the above, the Commissioner has found that the requests are 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

54. The Commissioner's decision is that as the requests are all for information held for the purposes of journalism the BBC was not obliged to comply with Part I to V of the Act at all in this case.

Steps Required

55. The Commissioner requires no steps to be taken.

Right of Appeal

56. 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 25th day of November 2010

Signed

**Jo Pedder
Senior Policy Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex - Relevant Statutory Provisions

Section 1(1) states that –

“Any person making a request for information to the 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 the information communicated to him.

Section 3(1) states that –

“in this Act “public authority” means –

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which –

- (i) is listed in Schedule 1, or
- (ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6”

Section 3(2) states that –

“For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

Section 7(1) states 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 this Act applies to any other information held by the authority.”

Schedule 1, Part VI reads:

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