

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 number of staff and the costs involved in sending BBC Scotland staff to London to cover the General Election between certain dates. He also requested the number of staff and the projected costs involved in sending BBC Scotland staff to the World Cup in South Africa. 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 24 May 2010 the complainant requested the following information from the BBC to be provided in accordance with the Act:
 1. *The number of BBC Scotland staff sent to London to cover the UK General election between April 25 and May 20 2010*

2. *A breakdown of the cost of sending staff to London from Scotland including travel, accommodation, expenses*
 3. *The number of BBC Scotland staff being sent to South Africa to cover the World Cup finals*
 4. *The projected cost/budget for sending said staff to cover the above event.*
3. On 22 June 2010 the public authority issued its response. The BBC stated that it believed that the information requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature'. It explained that Part VI of Schedule 1 to FOIA provides that 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'. It concluded 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. It therefore would not provide any information in response to the request for information.

The Investigation

Scope of the case

4. On 25 June 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 point: that UK-wide staffing levels for events had been disclosed just a few days earlier to the *Daily Mail*.

Chronology

5. Having reviewed the request and the correspondence supplied by the complainant, the Commissioner decided that it was not necessary to contact the BBC for further information or arguments regarding its handling of the request.

Analysis

Substantive Procedural Matters

Jurisdiction

6. 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....."*

7. 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"

8. 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".

9. 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.

10. 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.

11. 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

12. 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)

13. 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.
14. 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.
15. 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."

16. 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.
17. The information that has been requested in this case is the number and cost of BBC Scotland staff being sent to cover the General Election and the World Cup. Both the General Election and the World Cup are media events that the BBC would be expected to cover and this coverage inevitably requires journalists and support staff.
18. In light of submissions made by the BBC in previous cases the Commissioner considers the second element of journalism within the definition above, the editorial process, is relevant in this instance. The Commissioner understands that at the time of the request the General Election had already been held but the World Cup was due to commence in June 2010. The creation of programmes or a series of programmes covering such events involves the consideration of many factors - one of which is the number of staff needed to produce and present those programmes and the costs involved in deploying those staff. At the time of the request the preparation for coverage of the World Cup would have been ongoing and the Commissioner believes that the information requested would still have been actively used in those preparations. In respect of the General Election, the records of the cost of covering that event would be held by programme makers to inform decisions on the content of future events of that nature. The Commissioner is satisfied that decisions regarding staffing levels and costs involved in putting on these programmes would be editorial decisions reflecting the ambition of these productions. The Commissioner is therefore satisfied that the information requested is derogated.
19. 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

20. The Commissioner's decision is that as the request is for information is 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

21. The Commissioner requires no steps to be taken.

Right of Appeal

22. 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 - 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”