

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 December 2010

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

Summary

The complainant firstly requested information from the BBC relating to local radio electronic/digital copies of its returns to the Performing Rights Society. Secondly, a request was made for information concerning the BBC's local radio core playlist. 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 art. 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 9 August 2010 the complainant requested the following information to be provided in accordance with the Act:

"I would like to make a freedom of information request in relation to popular music played on English region BBC Local Radio."

As I understand things, with effect from April 2006 returns to the PRS [Performing Rights Society] in relation to music broadcast on these stations have been made electronically.

I would like to request electronic/digital copies of these returns from that date until present, for all English regional stations."

Again on 11 August 2010:

"I would like a copy of what I understand is called the Local Radio core playlist. I understand that this is a list of several hundred songs which are used across the BBC LR network during core hours.

I understand that auditorium testing is used to determine which songs will be added or removed from the core playlist on a basis of around 3 times a year. I would like to know exactly which songs have been tested over the last 5 years and of those, which have been added to the core playlist.

I would also like copies of all versions of the core playlist that have been issued to BBC LR stations over the last 5 years."

3. On 23 August 2010 the BBC issued its response. It explained that it believed that the information requested was 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 requests for information.

The Investigation

Scope of the case

4. On 24 August 2010 the complainant contacted the Commissioner to complain about the way her requests for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- That the contents of their playlist are not owned or controlled by the BBC but by the composers, authors and performers.
- As these type of playlists are created with the use of auditorium testing and the involvement of around 150 members of the public (and therefore licence fee payers) on three occasions a years the claim that this information would in some way denigrate the ability of the BBC to be creative and/or artistic is an uninformed claim.
- That at least 450 people each year assist in that creative and artistic process and it is not therefore the reserve of those employed by the BBC.
- Public performances of popular music which have happened in the past and are therefore in the public domain could not possibly be said to infringe on future creativity, as they have by definition, already happened.
- The licence fee payer should be able to examine and understand whether the BBC is making the best use of the music available to them, in the interests of producing creative and definitive programming for its listeners.
- The notion that it would infringe on its ability to be creative, is in direct opposition to the very nature of the thing it does not want to give information about.
- A very tight playlist of the kind employed by BBC Local Radio encourages a high level of repetitiveness which is uncreative and indistinct from the stations with which BBC Local Radio is in competition.
- As the BBC Trust's own Local Radio Service Licence requires that between 60-70% of Local Radio output is speech based, music plays the junior role at local level when it comes to artistic and creative output.

Chronology

5. On 6 October 2010 the Commissioner wrote to the BBC to inform it that a complaint had been received about the refusal to provide information in response to these requests.

6. Having obtained a copy of the requests from the BBC and having reviewed 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 these requests.

Analysis

Substantive Procedural Matters

Jurisdiction

7. 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....."*

8. 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"

9. 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".

10. 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.
11. 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.

12. 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 these requests.

Derogation

13. 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)

14. 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.
15. 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.
16. 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."

17. The Commissioner has adopted a similar approach with regard to art, one of the other two limbs of the BBC derogation. In his view, art is comprised of the same three elements, that is:
 - The preparation and creation of the artistic output.
 - The editorial process.
 - The maintenance and enhancement of the standards and quality of artistic output.
18. In considering whether the information is held for the purposes of art 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.
19. The information that has been requested in this case is firstly information relating to the returns made to the Performing Rights Society by English BBC Local Radio from April 2006 to the time of the request. All copies of the Local Radio core playlist were also requested along with what songs had been tested in the 5 years leading up to the request and which songs had been added to the core playlist. The purpose of the second request for information would be to test songs for possible inclusion on the requested playlist and for the compilation of that list. The Commissioner accepts that this information would feed into the creative output of the BBC's local radio output in England and would affect that output directly when songs are added or removed over a period of time.
20. It is the Commissioner's view that whilst historic playlists may be held for non-derogated purposes this does not fundamentally alter the fact

that they continue to be held to a significant extent for the purposes of art. Past playlists are retained as a source of research material for content creators and may be used in future BBC output. This is in a similar fashion to the way in which copies of BBC programmes are also retained so that they can be used for repeat broadcasts, as potential content in other BBC programmes and as a source for research when creating output. Although the returns made to the Performing Rights Society which is the subject of the first request for information would appear to be purely a historical and financial record, the disclosure of these details would effectively reveal the details of the playlist. This, as discussed in the preceding paragraph, does directly impact on the artistic or creative output of BBC local radio.

21. The fact that the BBC chooses to make similar playlist information available as part of its online web content on a discretionary basis does not alter the fact that in the Commissioner's view the information requested by the complainant is held to a significant extent for the purposes listed in Schedule I.
22. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that both requests are for information held for the purposes of art 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 requests are for information which 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

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 14th day of December 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”