

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 February 2011

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

Summary

The complainant made a request to the BBC for the terms of engagement and fees relating to its employment of David Coulthard and Eddie Jordan as part of the commentating team for Formula 1 coverage. The BBC responded by stating that the requested information fell outside the scope of the Freedom of Information Act 2000 (the "Act") because it is information held for the purposes of journalism, art or literature. The Commissioner's decision is that the information is genuinely held for the purposes of journalism. The Commissioner therefore finds that 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 a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 26 September 2010 the complainant submitted the following information request to the BBC:

"David Coulthard and Eddie Jordan have been part of the BBC Sports commentating team for F1 since 2008, can you let me know their terms of engagement and fees for their services."

3. The BBC responded to the request on 21 October 2010 by stating that the requested information was excluded from the Act because it is held for the purposes of "journalism, art or literature." The BBC explained that Part VI of Schedule 1 to the Act 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 further noted that the BBC is 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. The BBC therefore refused to provide any information in response to the request.

The Investigation

Scope of the case

4. On 22 October 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 public interest inherent in the disclosure of the requested information.

Chronology

5. The Commissioner has not deemed it necessary to see the withheld information in this case or receive further submissions from the BBC and the complainant in relation to the request.

Analysis

Substantive Procedural Matters

Jurisdiction

6. Section 3 of the Act states:

*"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 – 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 is not held for the purposes of journalism, art or literature. The term 'derogated' is used to describe information that falls outside the Act, ie 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 obligation to comply with Parts I to V in respect of that information.
11. The Commissioner will first determine whether a 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 that request.

Derogation

12. The scope of the derogation has been considered in 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) and that "provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA." (para 46)

13. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – ie 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 comprised of the following 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 colleagues by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making.

16. In determining whether the requested 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 programme's 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, in effect, the conditions on which David Coulthard and Eddie Jordan are employed by the BBC.
18. The Commissioner considers that the second element of journalism set out above, namely the editorial process, is relevant in this instance. The Commissioner recognises that the creation of programmes or a series of programmes covering sporting events such as the Formula 1 championship (F1) involves the consideration of many factors. One of which is the cost associated with employing qualified individuals to commentate on an event as part of its coverage.
19. The Commissioner considers that information relating to the production of the BBC's coverage of F1, which would include the conditions on which the named individuals were employed, would be retained so that the producers of programmes could make informed decisions on the coverage of future F1 championships or other sporting events of a similar nature. The costs involved in putting on these programmes would be editorial decisions reflecting the ambition of these productions.
20. As a result the Commissioner is satisfied that the requested information is held for the purposes of the BBC's editorial process and therefore of journalism. The Commissioner has therefore concluded that the information requested is derogated and that the BBC was not obliged to comply with Parts I to V of the Act.

The Decision

21. The Commissioner's decision is that as the request is for information that is held for the purpose of journalism the BBC was not obliged to comply with Part I to V of the Act in this case.

Steps Required

22. The Commissioner requires no steps to be taken.

Right of Appeal

23. 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 28th day of February 2011

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”