

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 November 2009

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

Summary

The complainant requested copies of any guidance issued to BBC staff about treatment of the Conservative Party and use of the metric system rather than imperial system in the BBC's broadcast output. The BBC stated that the requests fell outside the scope of the Act because they relate to information held for the purposes of journalism, art or literature. The Commissioner's decision is that the BBC correctly determined that the information is held to a significant extent for these purposes 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 30 April 2008 the complainant wrote to the BBC via email and requested the following information:

"1. Editorial treatment of the Conservative Party

To ask if the BBC has, at any point since the election of David Cameron as Leader of the Opposition, circulated any instructions, warnings, advice or guidance, verbal, written or electronic, to its executives, producers, reporters or presenters, about the treatment of the Conservative Party on its bulletins, news

programmes, documentaries, features or other output, and its website.

To ask for the contents of all such instructions, warnings, advice or guidance, the date or dates on which they were issued, the names of the persons giving them and the names, or (in the case of such communications being circulated to whole classes of individuals, the designations), of the person or persons receiving them.

2. Editorial preference for metric measurements over customary measurements

To ask if the BBC has at any point circulated any instructions, warnings, advice or guidance, verbal, written or electronic, to its executives, producers, editors, reporters or presenters, about the use of the metric system in preference to the customary or Imperial system when referring to distances, dimensions, mass or liquid capacity, in its news programmes, features, bulletins, documentaries or other output, and on its website.

To ask for the contents of all such instructions, warnings, advice or guidance, the date or dates on which they were issued, the names of the persons giving them and the names, or (in the case of such communications being circulated to whole classes of individuals, the designations), of the person or persons receiving them.”

3. The BBC responded on 3 June 2008 and stated that the requests 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.

The Investigation

Scope of the case

4. On 4 June 2008 the complainant contacted the Commissioner to complain about the BBC's response to his requests. The Commissioner has considered whether the BBC was correct to refuse to respond to the requests on the basis that they were not subject to the Act in relation to the information sought.

Chronology

5. Having reviewed the nature of the requests and the correspondence supplied by the complainant, the Commissioner decided that it was not necessary to contact the BBC for further information or arguments in support of its decision that the requested information falls outside the scope of the Act.
6. Whilst the case was open, on 2 October 2009, the High Court promulgated its finding in relation to two appeals it had heard involving the application of the derogation by the BBC. Both judgments found in favour of the BBC. The Commissioner has applied the findings of the two judgments to the facts of this case.

Analysis

Substantive Procedural Matters

Jurisdiction

7. Section 3 of the Act states:

“3. – (1) In this Act “public authority” means –
(b)... any body...which –
(i) is listed in Schedule 1.....”

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”

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”.

The BBC has argued that the construction of sections 3, 7 and Schedule 1 means that the BBC is not a public authority where it holds the requested information for the purposes of journalism, art or literature. Consequently, the Commissioner would not have jurisdiction to issue a decision notice given the wording of section 50.

8. This issue has been considered by the House of Lords in the case of *Sugar v BBC*¹. By a majority of 3:2, the Lords found in favour of the Appellant, Mr Sugar, in concluding that the Commissioner does have jurisdiction to issue decision notices regardless of whether the information that has been requested is derogated. The Commissioner adopts the reasoning set out by Lord Hope at paragraphs 54 and 55 where he said:

“54. Section 7(1) says 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 the Act applies to any other information held by the authority. What it does not say is that, in that case, the authority is a hybrid – a “public authority” within the meaning of the Act for some of the information that it holds and not a “public authority” for the rest. The technique which it uses is a different one. Taking the words of the subsection exactly as one finds them, what it says is that nothing in Parts I to V of the Act applies to any other “information” held by “the authority”. This approach indicates that, despite the qualification that appears against its name in Schedule 1, the body is a public authority within the meaning of the Act for all its purposes.

¹ *Sugar v BBC* [2009] UKHL 9

That, in effect, is what section 3(1) of the Act provides when it says what “public authority” means “in this Act”. The exception in section 7(1) does not qualify the meaning of “public authority” in section 3(1). It is directed to the information that the authority holds on the assumption that, but for its provisions, Parts I to V would apply because the holder of the information is a public authority.”

55.The question whether or not Parts I to V apply to the information to which the person making the request under section 1(1) seeks access depends on the way the public authority is listed. If its listing is unqualified, Parts I to V apply to all the information that it holds. If it is listed only in relation to information of a specified description, only information that falls within the specified description is subject to the right of access that Part I provides. But it is nevertheless, for all the purposes of the Act, a public authority”.

9. Therefore, the Commissioner has jurisdiction to issue a decision notice on the grounds that the BBC remains a public authority. 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.
10. 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 request.

Derogation

11. The scope of the derogation has been considered by the High Court in the cases of the BBC v Steven Sugar and the Information Commissioner [EW2349]² and the BBC v the Information Commissioner [EW2348].³ In both decisions Mr Justice Irwin stated:

“My conclusion is that the words in the Schedule mean the BBC has no obligation to disclose information which they hold to any significant extent for the purposes of journalism, art or literature, whether or not the information is also held for other purposes. The words do not mean that the information is disclosable if it is held for purposes distinct from journalism, art or literature, whilst it is also held to any significant extent for those purposes. If the information is held for mixed purposes, including to any significant extent the purposes listed in the Schedule or one of them, then the information is not disclosable.” (para 65 EA2349 and para 73 EW2348).

12. The Commissioner interprets the phrase “to any significant extent”, when taken in the context of the judgment as a whole, to mean that where the requested information is held to a more than trivial or insignificant extent for journalistic,

² BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)

³ BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

artistic or literary purposes the BBC will not be obliged to comply with Parts I to V of the Act. This is the case even if the information is also held for other purposes.

13. For completeness, the Commissioner considers that where information is held for non-journalistic/artistic/literary purposes and is only held to a trivial or insignificant extent for the purposes listed in Schedule 1, then the BBC will be obliged to comply with its obligations under Parts I to V of the Act.
14. Thus, provided there is a relationship between the information and one of the purposes listed in Schedule 1, then the information is derogated. This approach is supported by Mr Justice Irwin's comments on the relationship between operational information, such as programme costs and budgets, and creative output:

"It seems to me difficult to say that information held for 'operational' purposes is not held for the 'purposes of journalism, art or literature.'" (para 87 EW2348)

15. The information relevant to the requests need not be journalistic, artistic or literary material itself. As explained above all that needs to be established is whether the requested information is held to any significant extent for one or more of the derogated purposes of art, literature or journalism.
16. The two High Court decisions referred to above related to information falling within the following categories:
 - Salaries of presenters / talent
 - Total staff costs of programmes
 - Programme budgets
 - Programme costs
 - Payments to other production companies for programmes
 - Payments to secure coverage of sporting events and other events
 - Content of programmes / coverage of issues within programmes

In relation to all of the above Mr Justice Irwin found that the information was held for operational purposes related to programme content and therefore to a significant extent for the purposes of journalism, art or literature.

17. The information requested in this case relates to the BBC's coverage of the Conservative party and use of metric measurements rather than imperial measurements in broadcast output. This is similar to the information considered in the High Court cases as it concerns programme content and the coverage of issues within programmes. The Commissioner accepts the finding in the High Court judgments. Reading the request relevant to this case and taking into account the context surrounding it, he can find nothing to justify different findings to those of the High Court in this case.
18. The Commissioner considers that any instructions, advice or guidance issued to BBC staff regarding the way in which certain topics should be addressed on its bulletins, news programmes, documentaries, features, its website, or any aspect

of its broadcast output, is clearly information held for the purpose of journalism, art or literature.

19. The BBC has Editorial Guidelines providing a principle of political impartiality in its news and other broadcast output. The guidelines provide that the BBC must not express an opinion on current affairs or matters of public policy other than broadcasting, and that it must not campaign or allow itself to be used as part of a campaign. The Commissioner notes that the BBC's treatment of the Conservative party within its broadcast output is bound by the principle of political impartiality. Furthermore, the Commissioner notes that use of the metric versus imperial systems is a campaign issue between some lobbying groups and therefore the BBC's approach to this issue is also potentially a matter of relevance to its Editorial Guidelines.
20. The Commissioner considers that the issues specified within the requests are both matters of editorial significance for the BBC. Any guidance or instructions issued to executives, producers, editors, reporters or presenters about how each of these matters should be approached within broadcast output would influence the BBC's editorial decisions and would be likely to have a direct impact upon the content of its programmes and other output. The Commissioner therefore considers that the content of any such guidance is held to a significant extent by the BBC for the purposes of journalism, art or literature.
21. The Commissioner notes that, in addition to requesting the content of any such instructions or guidance, the complainant also requested details of the dates the instructions were given, the names of the persons giving them, and the names of any recipients. The Commissioner considers that this information would be inextricably linked to the content of the instructions or guidance, and is also information held to a significant extent by the BBC for the purposes of journalism, art or literature.
22. In view of the above, the Commissioner has found that the requests are for information held for the purpose of journalism, art or literature 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 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 Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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 served.

Dated the 3rd day of November 2009

Signed

**Jo Pedder
Senior Policy Manager**

**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”.”