

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 October 2009

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

Summary

1. The complainant asked the BBC for the total production costs and expenditure on providing the music for the show 'How we made Britain'. The BBC refused to provide the information on the basis that it was not a public authority in relation to this request because the information was held for the purpose of journalism, art or literature. Having considered the purposes for which this information is held, the Commissioner has concluded that the BBC had no obligations to comply with Parts I to V in respect of the requested information.

The Commissioner's Role

2. 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

3. On 14 June 2007, the complainant submitted the following request to the BBC:

'Re How We Made Britain

Through the means of the Freedom of Information Act, I should be grateful if you would provide me with details of costs for providing the music accompanying this series currently being broadcast. I would like the information to be presented quite simply so as not to disclose any salaries and such sensitive information as that.

The information required is as follows:

Total production costs.

Expenditure on providing the music – obviously a full breakdown is not required. What is definitely required is the combined cost of composer, commissioning studies if any, costs of performers and other expenses that would be obvious to the BBC in compiling a truthful total cost.

4. The BBC responded on 12 July 2007 and explained to the complainant that “your request falls outside the scope of the Act because the BBC and the other public service broadcasters are covered by the Act only in respect of information held for purposes other than those of journalism, art or literature. We are not therefore obliged 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”.
5. The BBC subsequently informed the complainant that it did not offer an internal review procedure when its position was that the requested information fell outside the scope of the Act. However, the BBC did inform the complainant of his right to contact the Commissioner and ask him to review the BBC’s decision.

The Investigation

Scope of the case

6. On 13 July 2007, the complainant contacted the Commissioner in order to complain about the way the BBC had handled his request. The complainant specifically asked the Commissioner to consider whether the BBC was correct to refuse to respond to his request on the basis that it was not subject to the Act in relation to the information sought.

Chronology

7. On 22 July 2008, the Commissioner wrote to the BBC seeking some clarification to support its claim that it was not a public authority in relation to the requested information.
8. The BBC acknowledged receipt of the Commissioner’s request in an email dated 31 July 2008.
9. On 19 September and 08 October 2008, the Commissioner sought the outstanding response from the BBC.
10. On 9 July 2009, the BBC confirmed its position that the requested information fell outside the scope of the Act and that its decision of 12 July 2007 still stood. This response included detailed arguments to support the BBC’s position.

11. 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.

Findings of fact

12. 'How we Built Britain' was a six-part BBC One series presented by David Dimbleby and aired during June and July 2007. To date, the BBC has only commissioned one series of the programme. It has however commissioned similar presenter-led landmark arts and culture series including "The Victorians" and "Seven Ages of Britain".
13. The Commissioner notes that the complainant's request asked for 2 separate pieces of information; the first was for the total cost of production and the second was for the expenditure on providing the music, namely the combined cost of composer, commissioning studies if any, costs of performers and other expenses that would be obvious to the BBC in compiling a truthful total cost.

Analysis

Substantive Procedural Matters

Jurisdiction

14. 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 FOIA 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.

15. 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. 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”.

16. 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.
17. 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

18. As mentioned above the scope of the derogation was considered by the High Court in the cases of *BBC v Steven Sugar* [2009] EWHC 2349 Admin and *Information Commissioner and BBC v the Information Commissioner* [2009] EWHC 2348 (Admin). In both decisions Mr Justice Irwin stated:

¹ *Sugar v BBC* [2009] UKHL 9

“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 68 EA2349 and para 73 EW2348).

19. 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, 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.

20. 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.

21. Thus, provided there is a relationship between the information and one of the purposes listed in Schedule 1, 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)

22. The information relevant to a request need not be journalistic, artistic or literary material itself. As explained previously 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.

23. The two High Court decisions 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 / 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.

24. The information requested in this case relates to the total production costs and expenditure on providing the music for the show 'How we made Britain'. This is similar to the information considered in the High Court cases. The Commissioner accepts the findings in the High Court decisions. 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.

25. In view of the above, the Commissioner has found that the request is for information held for the purposes of journalism, art or literature and that the BBC was therefore not obliged to comply with Parts I to V of the Act.

The Decision

26. The Commissioner's decision is that as the request is for information held for the purposes of journalism, art or literature the BBC was not obliged to comply with Parts I to V of the Act in this case.

Steps Required

27. The Commissioner requires no steps to be taken.

Right of Appeal

28. 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 20 day of October 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”.”