

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 December 2009

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

Summary

The complainant requested information on listening figures from the BBC relating to two different programmes broadcast on Radio 3 for several time periods. The BBC refused to provide the requested information on the basis that it was outside the scope of the Act, or in the alternative it was exempt by virtue of section 43(2). The Commissioner has decided that the requested information was held to a significant extent for the purposes of journalism, art or literature. Therefore the BBC was not obliged to comply with Parts I to V of the Act in relation to these requests.

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 2 November 2007 the complainant wrote to the BBC to request:

“The RAJAR figures for Performance on 3 for:

Quarter 2 (April-June) 2006, Monday-Friday, 7.30pm – 9.30pm
Quarter 2 (April-June) 2007, Monday-Friday, 7pm – 8.45pm

The RAJAR figures for Choral Evensong for:

Quarter 2 (April-June) 2006 Wednesdays, 4pm-5pm
Quarter 2 (April-June) 2007, Sundays, 4pm-5pm"

3. On 8 November 2007 the BBC responded to the complainant refusing to provide the requested information. It explained that in its view the information was outside the scope of the Act because it was held for the purposes of art, literature or journalism. However it also pointed out that the Commissioner had considered a complaint involving a similar request and had found that the information was within the scope of the Act. The BBC advised the complainant that it did not agree with the Commissioner's finding but that in any event, even if the requested information were within the scope of the Act, it was considered to be commercially sensitive and therefore exempt under section 43(2) of the Act.

The Investigation

Scope of the case

4. On 18 November 2007 the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant specifically asked the Commissioner to consider whether the exemption cited by the BBC applied in this case. However, as explained below, in light of two recent High Court judgments regarding the BBC derogation, the Commissioner has first considered whether or not the BBC was in fact obliged to comply with Parts I to V of the Act in relation to the requests.

Chronology

5. Unfortunately due to the volume of cases he had received the Commissioner was unable to begin investigating the complaint until 31 July 2008. On 31 July 2008 the complainant was advised that he case had been allocated for investigation. On the same day the BBC was asked for submissions regarding the derogation and in particularly the dominant purpose test, which at the time was used when determining whether or not requested material fell within the scope of the Act. The Commissioner also asked for further arguments in relation to section 43(2) in the alternative.
6. On 20 March 2009 the Commissioner contacted the complainant to explain that the case had been transferred to a different team within the Information Commissioner's Office that had taken over responsibility for BBC cases. The complainant was also advised that all BBC complaints were being assessed in light of a recent judgment in the House of Lords in the case of Sugar v BBC [2009] UKHL 9 which was likely to have a significant impact on the way in which the Commissioner approached complaints about the BBC under the Act.
7. On 20 August 2009 the BBC contacted the Commissioner and indicated that whilst it remained of the view that the requested information was outside the scope of the Act, it was prepared to disclose it to the complainant on a voluntary

- basis. The Commissioner contacted the complainant on 28 August 2009 to explain that the BBC had offered to voluntarily disclose the requested information.
8. On 24 November 2009, the BBC contacted the Commissioner to explain that there were still editorial concerns regarding the proposed voluntary disclosure and therefore it was no longer prepared to release the requested information to the complainant on that basis.
 9. The Commissioner contacted the complainant on 25 November 2009 to explain the BBC's change of position regarding the voluntary disclosure. In that correspondence the Commissioner also explained that the High Court had recently handed down its judgments in two cases involving the BBC's application of the derogation. Both had found in favour of the BBC and having applied the findings of those cases to this one the Commissioner indicated that, in his view, the requested information fell outside the scope of the Act. In light of this he asked whether the complainant wanted to pursue the complaint any further.
 10. The complainant contacted the Commissioner on 28 November 2009 to confirm that she did wish to proceed to a decision notice in this case.

Analysis

Substantive Procedural Matters

Jurisdiction

11. 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”

12. 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.

13. 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”.

14. 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.
15. The Commissioner will first determine whether the request was 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.

¹ *Sugar v BBC* [2009] UKHL 9

Derogation

16. 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).

17. 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.

18. 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.

19. 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)

20. The information relevant to the request 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.

21. The two High Court decisions referred to above related to information falling within the following categories:

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

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

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

22. 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.

23. The Commissioner recognises that the High Court cases did not specifically consider information about listening figures. Nevertheless the Commissioner considers the comments made by Mr Justice Irwin regarding the need for a relationship between the requested information and the derogated purposes are relevant and therefore he has considered them here. The information requested in this case is listening figures for two programmes broadcast on Radio 3. The Commissioner recognises that this information is held by the BBC for a number of non-derogated reasons but, in his view, it is also held to a significant extent for the purposes of journalism, art or literature. This is because RAJAR listening figures are used by programme/content producers to inform editorial decisions about the commissioning, scheduling and content of BBC broadcasts. Therefore there is a relationship between the requested information and the BBC's creative output.

24. In view of the above, the Commissioner has found that the request was for information held to a significant extent for the purposes of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of the Act. Therefore the Commissioner has not gone on to consider section 43(2).

The Decision

25. 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 Part I to V of the Act in this case.

Steps Required

26. The Commissioner requires no steps to be taken.

Right of Appeal

27. 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 8th day of December 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 –

reasonably requires further information in order to identify and locate the information requested, and

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 –

in respect of which the applicant is to be informed under subsection (1)(a),
or

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”.