

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 made a request for the production costs and estimated viewing figures for the programme 'Wanted Down Under'. The BBC argued that the request was for information held for the purposes of art, journalism or literature and was therefore derogated. 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 14 January 2008 the complainant wrote to the BBC and made the following request:

"...the amount of licence payers money expended in making this programme [Wanted Down Under]. Is it really necessary to send so many people to New Zealand, and what are the estimated viewing figures for this type of show."

3. The BBC responded to the request on 11 February 2008 and stated that the request fell outside the scope of the Act because the BBC is covered only in

respect of information held for purposes other than those of journalism, art or literature.

4. In its response the BBC also stated that, in the event of the Commissioner finding that the information was not held for the purposes of journalism, art or literature, it considered that the requested information would be exempt under section 43(2) of the Act. This was because it believed the disclosure of the programme's production costs would be likely to prejudice the commercial interests of the BBC, and disclosure of the programme's viewing figures would be likely to prejudice the commercial interests of the Broadcasters' Audience Research Board Limited, which collates and distributes viewing figures in return for a subscription or tariff.

The Investigation

Scope of the case

5. On 18 February 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider whether the BBC was correct to claim that the requested information fell outside of the scope of the Act.

Chronology

6. On 9 October 2009 the High Court considered two appeals *BBC v Steven Sugar and the Information Commissioner*¹ (EW2349) and *BBC v the Information Commissioner*² (EW2348) which addressed 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.
7. Having reviewed the nature of the request 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.

Analysis

Substantive Procedural Matters

Jurisdiction

8. Section 3 of the Act states:

“3. – (1) In this Act “public authority” means –

¹ *BBC v Steven Sugar & The Information Commissioner* [2009] EWHC 2349 (Admin)

² *BBC v The Information Commissioner* [2009] EWHC 2348 (Admin)

- (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.

9. This issue has been considered by the House of Lords in the case of *Sugar v BBC*³. 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,

³ *Sugar v BBC* [2009] UKHL 9

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”.

10. 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.
11. 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

12. 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]⁴ and the BBC v the Information Commissioner [EW2348].⁵ 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).

13. 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.
14. 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.
15. 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

⁴ BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)

⁵ BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

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)

16. 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.
17. 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.

Request for programme production costs

18. The complainant requested information about the cost of making the programme ‘Wanted Down Under’. This is similar to the information considered in the High Court cases. The Commissioner accepts the finding in the High Court judgements. 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.

Request for audience viewing figures

19. The Commissioner recognises that the High Court cases did not specifically consider information related to audience viewing 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 television audience viewing figures for a specific programme broadcast by the BBC.
20. The Broadcasters’ Audience Research Board (BARB) is the organisation responsible for providing official estimates of the number of people watching television. This includes the channels and programmes that have been viewed and the type of people watching at any one time. See www.barb.co.uk for further

information. The BBC has stated that it uses audience viewing figures to learn more about its audience and that the figures can influence the commissioning, scheduling and production processes of programme-making.

21. The Commissioner accepts that audience viewing figures have a role to play in the creative process and may impact upon decisions taken by programme makers and staff responsible for scheduling the BBC's broadcast output. A key part of the BBC's work is obtaining feedback on its services, reflecting on that feedback, and making informed decisions about the quality of the services provided and how to improve those services. Viewing figure information is one way that the BBC measures an audience's reaction to a programme and, whether alone or combined with other feedback, this is then used to inform decisions about programme making. This may include decisions about scheduling as well as future programme content. The Commissioner therefore considers that estimated viewing figures are held by the BBC to a more than trivial or insignificant extent for the purposes of journalism, art or literature.
22. In view of the above, the Commissioner has found that the request is 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 Commissioner has therefore not gone on to consider the BBC's application of section 43(2) of the Act to the requested information.

The Decision

23. 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

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”.”