

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 November 2009

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

Summary

The complainant made a request for information relating to how many BBC staff were sent to America to cover the election in the last week of October 2008 and the first week of November 2008 and how much this cost. The complainant also requested the costs incurred by the 6 November 2008 broadcast of 'This Week' hosted by Andrew Neil from New York.

The BBC provided the complainant with some of the information they requested but argued that the remainder of 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

On 2 December 2008 the complainant requested the following information:

1. How many UK BBC news correspondents, journalists and presenters were sent to America to cover the presidential election campaign in the last week of October and the first week in November 2008?

2. What was the cost to the BBC in air flights, hotel rooms – which hotel/s did they stay in, car hire, meals and other incidentals for journalists and presenters who went to America in the time period already mentioned, working for the main BBC news programme at 6pm and at 10pm and local news?
 3. With reference to the BBC Thursday night politics programme 'This Week' hosted by Andrew Neil and the broadcast from New York on November 6, what was the cost of air flights for Neil, Diane Abbott and Michael Portillo? Which hotel/s did they stay in and what was the cost to the BBC for their board, food drinks and other incidentals? How long did they stay in New York?"
2. The BBC responded to the request on 15 December 2008 and provided the number of employees who had been sent to America to cover the election and the names of the hotels which had been used. The BBC then stated that:
- “With respect to the remainder of your request, the BBC will not be providing you with the information you requested as we believe it is not covered by the Freedom of Information Act 2000 (“the Act”)
3. As the BBC considered that the information which had been withheld fell outside the scope of the Act no internal review was offered.

The Investigation

Scope of the case

4. On 21 December 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 remainder of the requested information fell outside of the scope of the Act.

Chronology

5. The Commissioner wrote to the BBC on 7 January 2009 to inform them that a complaint had been received about the refusal to provide information in response to this request.
6. Whilst the case was open the Commissioner informed the complainant that he was awaiting the outcome of the following High Court cases, BBC v Sugar & Information Commissioner [2009] EWHC 2349 (Admin) and BBC v Information Commissioner [2009] EWHC 2348 (Admin). The cases were concluded and the judgments published by the High Court on 2 October 2009. Both cases involved the application of the derogation by the BBC. The Commissioner has applied the findings of the two judgments to the facts of this case.

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. 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

¹ *Sugar v BBC* [2009] UKHL 9

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 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

11. As outlined above, the Commissioner must first determine if the request is for information held for the purpose of journalism, art or literature.
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]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).

13. The Commissioner interprets the phrase “to any significant extent”, when taken in the context of the judgement 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.

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 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.

Analysis

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.

18. The remaining information not disclosed by the BBC in this case consists of programme costs and the costs of incurred in covering specific event. This is similar to the information considered in the High Court cases. 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. The fact that the BBC disclosed the information about hotels and number of employees (related to programme content) in response to the requests does not preclude it from relying on the derogation. The Commissioner acknowledges that from time to time the

BBC will make discretionary disclosures of information that technically may fall within the derogation.

19. 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 Decision

20. 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

21. The Commissioner requires no steps to be taken.

Right of Appeal

22. 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 9th day of November 2009

Signed

**Steve Wood
Assistant Commissioner**

**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”.”