

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 18 November 2010

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

Summary

The complainant made requests to the BBC for minutes and correspondence involving the BBC Trust in relation to a policy of the BBC being 'pro or anti climate change'. The BBC stated that it did not hold any information relevant to the request, but that if information were held, it would fall outside the scope of the Act because it would be information held for the purposes of journalism, art or literature. The Commissioner's decision is that the requested information, if it existed, would be genuinely held for the purposes of journalism. Therefore the BBC was not obliged to comply with Parts I to V of the Act in respect of the 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 15 December 2009 the complainant requested the following information be provided in accordance with the Act:

"I would like all minutes from the board of trustees relating to the BBC policy of being pro or anti climate change.

I would like all papers submitted to the board of trustees on the same matter.

I would like all emails on the matter discussing climate change to and from the board of trustees.

Any other communications on the matter."

3. The BBC responded on 8 January 2010 and stated that the BBC Trust had not held any discussions in its meetings, received any papers or been involved in any communications relating to the BBC being 'pro or anti climate change'. The BBC added that, if it did hold information falling within the scope of the requests, it would fall outside 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.
4. On 8 January 2010 the complainant wrote to the BBC and requested an internal review of the response that it did not hold information relevant to the requests. The complainant referred to a press release published on the BBC Trust website on 6 January 2010 announcing that it would be carrying out a review to assess the accuracy and impartiality of the BBC's coverage of science, including climate change. The complainant asserted that the BBC's response of 8 January 2010 saying it did not hold information relevant to the requests was incorrect.
5. The BBC provided an internal review response on 22 February 2010 and upheld the findings of the original response. It stressed that the BBC was reviewing whether the requested information was held at the date on which the requests were submitted. The internal review response also reiterated that, if the requested information was held, it would fall outside the scope of the Act on the grounds that it was held for the purposes of journalism, art or literature.

The Investigation

Scope of the case

6. On 22 February 2010 the complainant contacted the Commissioner to complain about the BBC's response to his requests. The Commissioner first considered whether, given the subject of the requests the Environmental Information Regulations 2004 were relevant. He then

considered whether the requested information relating to the BBC's editorial approach to climate change would be held for the purposes of journalism and therefore whether Parts I to V of the Act would apply. In the event of finding that Parts I to V did apply the Commissioner would then move on to consider whether the BBC had complied with its obligations in that regard.

Chronology

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 statement that the requested information falls outside the scope of the Act.

Analysis

Environmental Information Regulations 2004

8. The Commissioner considered the extent to which the Regulations applied to the requests for information and concluded that they were not relevant at all. This was on the basis that the BBC is not a public authority for the purposes of the Regulations. Regulation 2(2) defines which organisations and bodies constitute a "public authority" for the purposes of the Regulations. However Regulation 2(2)(b)(i) specifically excludes,

"any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description".

9. As the BBC is only listed in respect of material it holds for purposes other than art, journalism or literature it is not a public authority for the purposes of the Regulations. Therefore, where the BBC receives a request for environmental information it must consider whether or not it is held for the purposes of the Act and, if it is, then consider the request under the Act rather than the Regulations. The Commissioner therefore went on to consider the extent to which Parts I to V of the Act applied to the requests in this case.

Substantive Procedural Matters

Jurisdiction

10. Section 3 of the Act states that:

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

11. 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".

13. This means that the BBC is a public authority for the purposes of the Act but only has to deal with requests for information which is not held for the purposes of journalism, art or literature. The term 'derogated' is used to describe information that falls outside the Act, i.e. information that **is** held by the BBC for the purposes of journalism, art or literature.
14. The House of Lords in the case of *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has jurisdiction to issue a decision notice in respect of any request made to the BBC regardless of whether or not the information is derogated. 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 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 requests.

Derogation

16. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment was made by Lord Neuberger of Abbotsbury MR who stated that:

" once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes." (paragraph 44), and that

"...provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA." (paragraph 46)

17. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to the Act.
18. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.
19. The Court of Appeal adopted the Tribunal's definition of journalism in *Sugar v IC and the BBC* [EA/2005/0032] at paragraphs 107 to 109 which set out that journalism comprises three elements.

"107. The first is the collecting or gathering, writing and verifying of materials for publication.

108. The second is editorial. This involves the exercise of judgement on issues such as:

** the selection, prioritisation and timing of matters for broadcast or publication,*

** the analysis of, and review of individual programmes,*

** the provision of context and background to such programmes.*

109. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

20. In considering whether the information would be held for the purposes of journalism the Commissioner has considered the following factors:

- The purpose for which the information would have been created;
 - The relationship between the information and the programmes content which covers all types of output that the BBC produces; and
 - The likely users of the information.
21. Any policy or guidance addressing how climate change should be approached within the BBC's broadcast output would have been created to inform its editorial process and would therefore be likely to have a direct impact upon the content of its programmes and other output. Furthermore such policies and guidance would be used by those involved in producing the BBC's creative output. The proposal, formulation or implementation of such policies is also an integral part of the editorial process and a means by which the BBC manages the standards and quality of journalism. The editorial process and management of standards are activities falling within journalism as defined by the Information Tribunal. It follows that information such as meeting minutes, papers for discussion, or communications created during the editorial process and management of standards are held for the purposes of journalism.
22. The fact that, if the information was held, it would have been held at the Board Trustees level does not undermine the argument that the information would have been held for journalism. In *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715 the Court of Appeal considered a request for the Balen Report, a report reviewing the impartiality of the BBC's coverage of the Middle East. The report was held at a relatively senior level within the BBC. Lord Neuberger of Abbotsbury MR found that the report was being used to ensure impartiality and simply because it was being held and used for that purpose at "a higher, perhaps more strategic and more managerial level does not alter that simple fact".
23. The Commissioner is satisfied that information on any pro or anti climate change stance to be adopted by the BBC would be held for the purposes of journalism regardless of the level within the BBC which that information would have been held. The Commissioner therefore considers that if any information associated with any policy on climate change had been held it would have been held by the BBC for the purposes of journalism.
24. For all of the reasons above, the Commissioner is satisfied that the requested information, if it existed, would have been derogated.

Therefore, he has found that the BBC was not obliged to comply with Parts I to V of the Act in respect of the requests.

The Decision

25. The Commissioner's decision is that as the requests are for information that would be held for the purposes of journalism 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 First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 18th day of November 2010

Signed

**Jo Pedder
Group Manager, Policy Delivery**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex - Relevant Statutory Provisions

Freedom of Information Act 2000

Section 1(1) states that –

“Any person making a request for information to the 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 the information communicated to him.

Section 3(1) states that –

“in this Act “public authority” means –

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which –

- (i) is listed in Schedule 1, or
- (ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6”

Section 3(2) states that –

“For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

Section 7(1) states 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 this Act applies to any other information held by the authority.”

Schedule 1, Part VI reads:

“The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature”

Environmental Information Regulations 2004

Regulation 2(2) states that –

Subject to paragraph (3), “public authority” means –

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding –
 - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
 - (ii) any person designated by Order under section 5 of the Act;