

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 March 2010

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

Summary

The complainant requested all information held by the BBC relating to the prospective televised debates between political leaders in the run up to the General Election. The BBC stated that the requests fell outside the scope of the Act because they were for information held for the purposes of journalism, art or literature. The Commissioner's decision is that the BBC correctly determined that the requested 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. The complainant made the following request to the BBC on 23 December 2009:

"Following the announcement on Monday 21 December that the BBC, Sky and ITV are to host and broadcast three debates

featuring the leaders of the Labour, Conservative and Liberal Democrat parties I am writing to request, under the Freedom of Information Act 2000 all material from 1 January 2009 to December 22 2009 relating to the prospect of debates between political leaders in the run up to a General Election, and agreement to hold such debates.

In particular I request details, including dates, attendees, papers prepared for, notes of all meetings and follow up documents between representatives of the BBC and

- 1) Labour
- 2) Conservatives
- 3) Liberal Democrats
- 4) UK Government

Together or individually at which the prospect of debates between political leaders in the run up to the General Election was raised or discussed in any way.

In addition I request all Correspondence – hard copy or electronic – between the BBC and representatives of the three political parties named above and the UK Government, or any one of the parties above relating to the prospect of debates between political leaders in the run up to a General Election, agreement to hold such debates, and the announcement of such an agreement.

All briefing notes, memos, internal documents produced in relation to the prospect of debates between political leaders in the run up to a General Election, establishment of, agreement to and announcement of the proposed debates.

All notes of telephone conversations between representatives of the BBC and representatives of Labour, Liberal Democrat, Conservative parties and/or UK Government in relation to the prospect of debates between political leaders in the run up to a General Election, establishment of, agreement to and announcement of the proposed debates.

Any material provided to the member of the BBC Trust on the issue of televised debates between leaders of political parties and any record of discussion amongst members of the BBC Trust relating to the televised debates between leaders of political parties.

Any correspondence between BBC and BBC Scotland on the subject of televised debates between leaders of political parties.

Copies of the proposed debate format as announced on 21 December and any documents relating to the preparation of that proposal – including drafts.

Any discussion or consideration in any form of editorial or production guidelines in relation to televised debates between leaders of political parties in the run up to the General Election.”

3. The BBC responded on 25 January 2010 explaining that the information requested was excluded from the Act as it was held for the purposes of journalism art or literature. The BBC explained that it does not offer an internal review when the information is not covered by the Act and instead referred the complainant to the Commissioner.

The Investigation

Scope of the case

4. On 4 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to determine if the information requested is held for the purpose of journalism, art or literature. In doing so the complainant raised the following points:
 - The request made relates directly to matters of policy, democracy and freedom of expression.
 - The BBC will only act as ‘moderator’ and will have no interaction role, the programme therefore is a platform for the opinions of others in a format negotiated with those involved.
 - In hosting a televised debate the BBC is not performing a journalistic function but is providing the forum for a debate between voters and politicians and a means for it to be seen by a wider audience. Items of journalism may stem from the debate but it in itself is not a piece of journalism, art or literature.
 - The information requested pertains not to the programme but to the decision to host such a programme and is also a matter of policy and democracy in relation to the conduct of elections not journalism, art or literature.
 - The establishment of the programme and the form it will take have not been decided by editorial decisions of the BBC alone but have been done so in negotiation with three political parties which raises questions about the impartiality of the editorial decision.

- The decision to only involve three political parties without inclusion of other “major” parties brings into question the right to Freedom of Expression as contained in Article 10 of the Human Rights Act.

Chronology

5. On 2 October 2009, prior to the Commissioner’s investigation starting,, 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.
6. The Commissioner wrote to the BBC on 17 March 2010 asking the BBC to provide him with further arguments to support its position that the information is held for the purposes of journalism, art or literature. Whilst it appeared to the Commissioner likely that the majority of the requests were for information held for the specified purposes, this was not clear in respect of the request for material sent to or recording discussions amongst members of the BBC Trust. The Commissioner asked the BBC to provide copies of the requested information falling within the scope of that request to assist him in making a decision.
7. The BBC responded on 29 March 2010 providing the Commissioner with further arguments to support its position that all of the information within the scope of the requests is held for the purposes of journalism, art or literature. The BBC also explained that it does not hold any information falling within the scope of the complainant’s request regarding the BBC Trust.
8. In relation to the request about the BBC Trust the BBC explained that it had identified the individuals most likely to hold information falling within the scope of the request and had asked these individuals to search their electronic and hard-copy records for any information relating to televised electronic debates between January 1 2009 and December 22 2009 (the period covered by the scope of the request). The BBC confirmed no information was held falling within the time period of the request but did clarify with the Commissioner in a telephone conversation that some information, such as Editorial Guidelines, had been identified but that this information post dated the request and so was therefore not in the scope of the request.

Analysis

Substantive Procedural Matters

Jurisdiction

9. 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.

10. 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

¹ *Sugar v BBC* [2009] UKHL 9

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".

11. 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.
12. 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

13. As mentioned above, 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,

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

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

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).

14. 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.
15. 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.
16. 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)

17. 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.
18. 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.

19. The Commissioner recognises that the High Court cases did not specifically consider information of the nature requested in this case, i.e. related to decisions regarding programming. 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 information about decisions about whether or not to broadcast a particular programme, discussions between programme makers and stakeholders about any such programme, and information about the proposed format.
20. The BBC has asserted that the information is clearly linked to its output and as such is material related to editorial decisions about what to broadcast and what format any such broadcast should take. The BBC stated that this is evident when considering the information held. It explained that the relevant information consisted of the following:
 - Limited records of discussions between programme makers – most of this is discussed face to face;
 - Guidance for programme makers, e.g. draft election guidelines intended to sit alongside existing editorial guidelines;
 - Stakeholder comment, e.g. communications from Government, lobbyists; and
 - Broadcast plans for the debates, e.g. selection of audience.

The BBC also confirmed that the primary users of the information are those directly concerned with programme output and editorial policy.

21. The Commissioner has also considered the arguments put forward by the complainant as to why the information is not covered by the scope of the derogation. The complainant has argued that the information requested does not relate to the programme but to the decision to hold such a programme which is a matter of policy and democracy. The Commissioner recognises that decisions regarding the televised debates do potentially involve matters of policy and democracy. However he does not accept that information regarding the BBC's decision to broadcast is not related to the programme.

22. The Commissioner considers that decisions about potential programme content and format are themselves editorial. Information regarding such decisions is recorded as part of an audit trail and to inform decisions and future content. He therefore agrees that information about decisions taken in respect of BBC output, i.e. whether to broadcast particular content is held to a significant extent for the purposes of journalism, art or literature.
23. The Commissioner also considers that editorial guidance to programme makers on how to cover issues, comments from stakeholders, discussions between programme makers and broadcast plans is all material held to a significant extent for the specified purposes as it is used to shape the content and delivery of the BBC's output. In this case the draft guidelines are designed to deliver to audiences impartial and independent reporting of the election campaign, giving fair coverage and rigorous scrutiny of the policies and campaigns of all parties.
24. The complainant also argued that, as the BBC will only act as a moderator and will have no interaction role, the programme will simply be a platform for the opinions of others. Furthermore in hosting a debate the BBC is not performing a journalistic function but is providing the forum for a debate which is not in itself a piece of journalism. As explained above, the information does not have to constitute a piece of journalism to be held to a significant extent for the purposes of journalism, art or literature. For the reasons given above the Commissioner has concluded that there is a relationship between the requested information and the purposes listed in Schedule 1.
25. Finally the complainant argued that the establishment of the programme and the form it would take was not an editorial decision alone but one that was made in negotiation with three political parties. For the reasons already provided above, the Commissioner has concluded that the requested information is held to a significant extent for the purposes of art, literature or journalism. He does not consider that any involvement of three political parties in decisions regarding BBC content undermines the BBC's position that the material is held to a significant extent for the purposes of journalism, art or literature. Information regarding input from those political parties will have been used by the BBC when making decisions regarding programme content.
26. In view of all of the above, the Commissioner is satisfied that there is a relationship between the requested information and the BBC's creative output, the information requested relates to editorial decisions about future broadcast content and is therefore held by the BBC to a significant extent for the purposes of journalism, art or literature.

27. In view of the above, the Commissioner has found that the BBC was not obliged to comply with Parts I to V of the Act.

The Decision

28. The Commissioner's decision is that as the requests are 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

29. The Commissioner requires no steps to be taken.

Right of Appeal

30. Either party has the right to appeal against this Decision Notice to the Information Tribunal. 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 served.

Dated the 31st day of March 2010

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”.”