

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 October 2010

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

Summary

The complainant requested the sum of money that was spent on the BBC's Winter Olympics 2010 coverage. The BBC stated that the request fell outside the scope of the Act because it was 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 for the purposes of journalism 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 2 April 2010 the complainant wrote a letter to the BBC. The letter concerned its coverage of the Winter Olympic Games in 2010 and he asked for the following information:

'I want to know exactly how much of our money you squandered on this little jolly for your staff.'

3. On 27 April 2010 the BBC issued its response. It stated that the requested information fell outside the scope 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. It explained it did not offer an internal review in this kind of case and the complainant could approach the Commissioner directly should he wish to appeal.

The Investigation

Scope of the case

4. On 19 May 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 consider the following point:
 - *I do not accept their response especially as this was purely a financial request and as they are using our money to fund a jolly for their staff to attend the Winter Olympics I consider that I have a right to this information.*
5. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of the Act. In particular, the Commissioner is unable to comment on whether the expenditure of public funds on sporting events was justified.

Chronology

6. On the 11 and 22 June 2010 the complainant asked the Commissioner to acknowledge the receipt of the correspondence dated 19 March 2010.
7. The Commissioner acknowledged the receipt of the correspondence on 24 June 2010.
8. On 28 June 2010 the Commissioner wrote to the complainant to explain his preliminary view in this case. He provided information about relevant cases heard regarding the derogation in the High Court and explained that his preliminary assessment was that the information that had been asked for was not covered by the Act. He stated that a Decision Notice would be likely to find in the BBC's favour. He asked whether the complainant wanted to pursue his complaint further.

9. The complainant replied to the Commissioner on the 5 July 2010. He explained that he did not think that the information was outside the scope of the Act. He said that the information that was asked for should be provided to allow the tax payer to scrutinise whether there was value for money.
10. The Commissioner wrote to the complainant twice on 19 July 2010. He provided more detail about the operation of the law and explained that he would issue a Decision Notice in this case. He also asked the complainant to provide one piece of information which was subsequently provided on the same day.
11. 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

12. 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....."*

13. 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"

14. 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".

15. 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.

16. 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.
17. 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

18. 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.' (para 44), 'provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA (para 46)'

19. 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.
20. 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.

21. 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."

22. In considering whether the information is held for the purposes of journalism the Commissioner has considered the following factors:

- The purpose for which the information was created;
- The relationship between the information and the programmes content which covers all types of output that the BBC produces; and
- The users of the information.

23. The information that has been requested in this case is the financial cost of the 2010 Winter Olympic Games.

24. In light of submissions made by the BBC in previous cases the Commissioner considers that the second element of journalism within the definition above, the editorial process, is relevant in this instance. He recognises that the creation of programmes or a series of programmes covering events such as the 2010 Winter Olympic Games, involves the consideration of many factors. One of which is the number of staff needed to produce and present those programmes and the costs involved in deploying those staff. At the time of the request the Olympics Games had finished, but it is likely that the information on the production costs of covering that event were being retained so that

the producers of programmes could make informed decisions on the coverage of future Olympic Games or other major sporting events of a similar nature. The Commissioner is therefore satisfied that the information was held for the purposes of the editorial process and therefore of journalism..

25. As the Commissioner has found that the request is for information held for the purpose of journalism the BBC was not obliged to comply with Parts I to V of the Act.
26. The Commissioner also believes that his decision in this regard is supported by a previous High Court judgment¹ which concluded that the information covered by the following request was derogated:

'how much the BBC paid for the rights and to cover the recent Winter Olympics in Turin Italy.'

27. While the Commissioner recognises that this request related to the previous Winter Olympic Games and specifically included the cost of rights, he believes that the similarities mean that it is analogous to this case. Both cases concern the costs to the BBC of covering the Winter Olympics and Irwin J found that this information was derogated. The Court of Appeal judgment did not overturn his reasoning in this regard.

The Decision

28. The Commissioner's decision is that as the request is for information that is held for the purpose of journalism 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.

¹ BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

Right of Appeal

30. 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 25th day of October 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

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”