

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 November 2010

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

Summary

The complainant made a request for the contract or other documentation relating to the relationship between the BBC and the production company (Mentorn) for the creation and broadcasting of Question Time with specific reference to the production and editorial responsibilities and where the responsibility lies in choosing the composition of the panel of the programme. He also asked for the material about the decision to invite Alistair Campbell on a specific episode of Question Time.

The BBC stated that the requests were for information that 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 genuinely held for the purposes of journalism and therefore it was 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.

Background

2. Alastair Campbell appeared on an episode of Question Time on 27 May 2010.

The Request

3. On 28 May 2010 the complainant requested the following information from the BBC:

'(1) the contract or the relevant section of the contract and any documentation relating to the contract that the BBC has with the production company Mentorn for the creation and broadcasting of Question Time with specific reference to the respective production and editorial responsibilities of the two organisations and where the final responsibility for decisions on the composition of the Question Time panel resides.

'(2) any material relating to the decision to invite Alastair Campbell onto this week's show and any correspondence with the Government relating to this.'

4. On 23 June 2010 the public authority issued a 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

5. On 24 June 2010 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant provided the following submissions about why he believed that the BBC had relied on the derogation inappropriately:
1. The BBC's programme "Question Time" does not represent journalistic, artistic or literary output:
 - a. It is not journalistic output because it is a debate;
 - b. None of its panellists are producing or preparing news stories. They are merely expressing their opinions. This is not journalism;

- c. News stories are not created when it is prepared for broadcast, therefore its production is not a journalistic act;
 - d. There is no added value of a kind that could be considered journalism in the production of the programme. I have no evidence that the BBC adds any value to the work of Mentorn, the production company that is contracted to produce Question Time, or that Mentorn employs any journalists. My initial question partly sought to establish the facts around this matter. I would submit that the BBC cannot rely on a defence whose foundation is questioned in my original request which remains unanswered;
 - e. I have no evidence that the BBC exercises any editorial control over the programme. Again, the question of editorial control and independence formed part of my initial request and it has not been answered. Again, I would submit that the BBC cannot rely on a defence whose foundation is questioned in my original request which remains unanswered;
 - f. The programme cannot be considered art, as it is merely a record of a debate, or, in some cases, the live broadcast of a debate; and
 - g. The programme is self-evidently not literary.
2. It is in the public interest to know the facts behind the incident in which the government was criticised by the BBC for not fielding a suitable speaker to appear opposite Alastair Campbell. The BBC has not proven its independence and has revealed neither the decision-making processes involved nor the lines of authority between itself and its production company, nor where and how the decision was taken, therefore it cannot rely on a defence of preservation of independence when it refuses to give information that would allow a member of the public to judge whether it acted independently, or indeed is contractually able to act independently in this matter.

Chronology

6. On 2 August 2010 the Commissioner wrote to the public authority and the complainant and explained that he had received an eligible complaint.
7. On 15 September 2010 the case officer wrote to the complainant to explain his preliminary view in this case. He explained the Commissioner's view of the relevant High Court and Court of Appeal decisions, addressed the complainant's arguments and asked the complainant whether he wished the investigation to continue.
8. On 16 September 2010 the complainant responded to the Commissioner and confirmed that he did want the case to continue.
9. On 17 September 2010 the Commissioner wrote to the complainant to acknowledge this response and address some of the comments within it. He confirmed that a Decision Notice would be prepared.

Analysis

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*¹ 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 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

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

17. The Commissioner interprets this to mean that if the information is held for a genuine journalistic, artistic or literary purpose it is derogated.
18. Then establishing the purpose for which the information was held Lord Neuberger of Abbotsbury MR drew a distinction between information which had an affect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes at paragraph 55. 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

¹ *Sugar v BBC* [2009] UKHL 9

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/2005/0035] at paragraphs 107 to 109 which set out that journalism comprised of 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 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 colleague, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

20. In considering whether the information is held 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.

Request 1

21. This request is for the provisions of the contract between the BBC and Mentorn that set out production and editorial responsibilities in respect of Question Time, including who has responsibility for appointing panellists.
22. The complainant argued that the format of Question Time meant that the requested information could not be said to relate to 'journalism, art or literature'. He confirmed that he was not aware where the editorial

responsibility lay and that it was important to consider that the BBC commissioned Mentorn to make the programme. He explained that the foundation of the BBC's arguments appears to be focussed on its independence and he wanted the information to see if it was independent.

23. In light of submissions made by the BBC in previous cases and as outlined in its response in this case, the Commissioner understands that the BBC believes that the information requested is genuinely held for the purposes of 'art, journalism and literature.' This is because it relates to the framework of editorial responsibility for a particular television programme – Question Time.
24. The Commissioner has considered the three factors mentioned above when deciding whether the information relevant to request 1 is derogated. He is satisfied that the requested information was created to assist in the management of the production of Question Time by Mentorn on behalf of the BBC. It is likely held by both parties and includes clarification about the responsibility for particular editorial decisions such as the composition of the panel. The information would be used by those producing the Question Time programme on behalf of the BBC when making editorial decisions about its content. It would also likely be used by BBC staff responsible for making editorial decisions in respect of Question Time, such as the selection, prioritisation and timing of matters for broadcast and the analysis and review of individual programmes. Therefore there is a clear relationship between the information and the content of the Question Time programmes broadcast by the BBC.
25. In view of the above, the Commissioner believes that the requested information is genuinely held by the BBC for the journalistic purposes outlined in paragraph 108 of the Tribunal Decision mentioned in paragraph 19 above.
26. In addition, the Commissioner considers it likely that the requested elements of the contract would be required and considered during any review of the content of the programme should an editorial complaint be made. It was created not only to inform editorial decisions by those involved in programme production as explained above but also to ensure clarity about roles and responsibilities in respect of programme production. It would be used by those responsible for enhancing the standards and quality of journalism which in part is achieved via the consideration of editorial complaints. It would also likely be used by those responsible for the management and oversight of programme production by third parties on behalf of the BBC. He believes that the information can therefore correctly be said to be held for the

journalistic purposes outlined in paragraph 109 of the Tribunal Decision referenced in paragraph 19 above (the reviews of the standards and quality of particular areas of programme making).

27. In reaching his conclusion the Commissioner has considered the complainant's argument that the programme was commissioned by the BBC from a third party production company, but he does not believe that this means that the information is not held by the BBC for the purposes of journalism as outlined above. As he has explained the information is likely to be held by both parties for the journalistic purposes mentioned. Furthermore, the Commissioner understands that many of the BBC's programmes are in fact made by separate production companies but in effect the editorial decisions that are made are still on behalf of the BBC and it is ultimately in control of what content is broadcast.
28. The Commissioner has found that the request is for information held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of the Act.

Request 2

29. The second request is for information that relates to the editorial decision to have Mr Alastair Campbell as a panellist on Question Time.
30. The Commissioner understands that the BBC believes that the request relates directly to the content of the Question Time programme and the decision to include Mr Campbell as a panellist and therefore there is a clear relationship to its creative output. It would therefore be held for to the purposes of 'art, journalism and literature'.
31. The Commissioner is satisfied that the information held would have been created to inform the editorial decision about whether this individual should appear as a panellist. As explained above, such decisions are ultimately made on behalf of the BBC. The information would likely have been used by those making the editorial decision in respect of this particular episode but also in the editorial review of Question Time programmes to inform the content of future episodes. This is on the basis that a balance of panellists on the programme would be an ongoing issue for those responsible for production to consider.
32. In light of the criticism and controversy that the Question Time programme dated 27 May 2010 generated, the Commissioner believes that it was not unreasonable to assume that Mr Campbell's inclusion as

a panellist would have been an issue under active editorial consideration on the following day.

33. In addition, the Commissioner considers that the information would have been retained by the BBC so that it was available in the event of specific editorial complaints being submitted. As also explained above, the Commissioner considers information held to inform editorial complaints to be held for purposes falling within paragraph 109 of the definition of journalism given in paragraph 19 above.
34. In view of the above, the Commissioner has found that the request is for information held for the purposes of journalism and that the BBC was not therefore obliged to comply with Parts I to V of the Act.

The Decision

35. The Commissioner's decision is that as the requests are for information 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

36. The Commissioner requires no steps to be taken.

Right of Appeal

37. 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 November 2010

Signed

**Jo Pedder
Senior Policy Manager
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”