

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 March 2011

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

Summary

The complainant requested the annual budget of Coventry and Warwickshire radio station since 2005 and the annual external advertising budgets outside of BBC broadcasts for the same period. The BBC stated that the requested information fell outside the scope of the Act because it is information held for the purposes of journalism, art or literature. During the course of the Commissioner's investigation it disclosed the external advertising budgets. In relation to the remainder of the information the Commissioner's decision is that it is genuinely held for the purposes of journalism. 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 10 March 2010 the complainant requested the following information about the BBC Coventry and Warwickshire radio station :

“a) the annual budgets of the station since it began in 2005 and
b) the annual external advertising budgets (i.e. paid advertising for BBC C & W programmes outside of BBC broadcasts) for the station over the same time period...”
3. On 17 March 2010 the BBC responded to this request stating that the information was derogated from the Act for the purposes of journalism, art or literature. Additionally the BBC contended that the information was used for the purposes of creating the BBC's output or was information that supports or is closely associated with these creative activities.

The Investigation

Scope of the case

4. On 17 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 consider the following points:
 - That the information he had requested was only tangentially linked to “journalism art or literature”.
 - That he could not understand how the budget of a BBC radio station was not subject to freedom of information.

Chronology

5. On 7 May 2010 the Commissioner wrote to the complainant providing his preliminary opinion that the requested information was likely to be derogated from the Act.
6. On the same day the complainant replied reiterating some of the points he had made earlier:
 - That the BBC is publicly funded and that tax payers had a right to know how that money was spent.
 - That he did not want to know the whys and wherefores of how the whole station budget was spent but how much was spent in external advertising as a percentage of the total budget.
 - That the information he had requested was only tangentially

linked to “journalism art or literature”.

7. On 1 November 2010 the Commissioner wrote to the BBC in order to ask further questions regarding the withheld information and the BBC’s interpretation of the derogation. He asked questions relating to points a) and b) of the complainant’s request.
8. When the BBC did not respond to these questions the Commissioner issued an Information Notice on 7 January 2011 requiring that the information be supplied within 30 days.
9. The BBC provided its response on 9 February 2011. Firstly the BBC stated that, although it believed it to be derogated, it was prepared to release the information the complainant had requested under point b) of his request: *the annual external advertising budgets (i.e. paid advertising for BBC C & W programmes outside of BBC broadcasts) for the station over the same time period.* It is the Commissioner’s understanding that this information has now been released to the complainant therefore the Commissioner has not considered point b) further.
10. The BBC gave detailed argument in this letter relating to point a) of the complainant’s request:
 - The budget held is the actual figure which may or may not vary from the original budget. The budget for BBC Coventry and Warwickshire for 2004/2005 - 2009/10 is flexed which means additional editorial outputs are approved or not. The budgets originally set vary over the course of a year and any original budgets are no longer available.
 - Public high level financial information on station by station spending is available in the Annual Report & Accounts. Since 1 April 2007 divisions are required to report costs by Service Licence. In radio each ‘service’ matches a radio station except in the case of BBC English Regions where the service licence is for the whole of English regions local radio. The total figure for each service is broken down into categories. A breakdown is given for 16 stations but the BBC stated that “granularity” below a certain level risks prejudice to the BBC’s editorial and commercial interests.
 - The BBC stressed the fact that the derogation was meant to protect freedom of expression and the rights of the media under the European Convention on Human Rights. Editorial independence is a crucial factor in fulfilling this function.
 - The budget for BBC Coventry and Warwickshire is an integral part of the decision-making process in respect of the inception,

planning and delivery of the BBC's local radio content. As previously explained the budget for BBC Coventry and Warwickshire and 39 other local radio stations is amalgamated and reported against the 'BBC Local Radio' service licence.

- The BBC maintains that although the individual budget can be extracted (and has been provided to the Commissioner) the BBC manages its costs according to editorial decisions that relate to the Local Radio service licence as a whole, rather than by station.
- The allocation of funds within the Local Radio service licence reflects the editorial judgments of the Controller, English Regions. The level of costs to deliver on its editorial proposition is broadly the same across the stations.
- The bulk of the station's budget is made up of staff and talent costs and it could be argued that almost all staff members are intimately involved in all forms of the output of that station.
- Only a small proportion of the budget relates to business management or is organisational in nature and these serve only to support the editorial resource.
- The budget for the Local Radio Service licence is fixed each year and is monitored on a weekly and monthly basis in order to give flexibility across the English regions. The BBC argued that it is impossible to divide resource allocation from editorial judgments as they are part of the same process.
- The BBC stressed the potential 'chilling' effect and the need to protect its editorial independence. Editors should be able to make judgments based upon editorial merit and not upon how spending might appear in the press.

11. The BBC then went on to answer the specific questions the Commissioner had asked on 1 November 2010. The Commissioner had asked the following questions:

Does the radio station itself bid for this budget or is the budget allocated centrally?

- The BBC explained that it allocates resources on the basis of core requirements for each station's output as determined by the agreed editorial strategy for English Regions Local Radio whilst taking into account the minimum resources required and any additional obligations. There is a comparatively small budget for the additional obligations which is held centrally and that individual stations can bid for, such as investigative journalism which may be required for specific content.

Once the budget is received does the station then allocate its resources or is there ongoing centralised control over that allocation?

- The BBC responded that the station and its editor have financial responsibility for the budget of the station. However, the BBC requires a certain level of production effort for compliance reasons. The core resource is staff and the budget for this element is largely the same at each station. There is, however, a great deal of flexibility to reflect local editorial needs. Each Managing Editor is given a large amount of flexibility in the delivery of its editorial objectives. As a result each station has flexibility to adjust its resources and budget to meet particular priorities for the service. The BBC stated that the production resource necessary for particular programme segments or for determining the qualities and costs of particular presenters or presenter combinations were examples of this flexibility.

Please outline in detail how the budget for this station is calculated and broken down?

- The BBC explained that the most significant cost is the staff resource. Each category of staff is costed and identified against specific lines of budget. There are content gathering costs and such items as travel and subsistence. Other significant costs are IT and telephony and minor costs such as maintenance.

Can the BBC explain in detail how high level budget figures such as those requested affect the station's journalism, art and literary output? Please provide any supporting evidence.

- The BBC contended that the allocation of budgets below the Local Radio Service level would directly affect the output on any particular station. There would be media and community pressure on the allocation of funds. It went on to say that the Managing Editor allocates the budget according to their editorial priorities and that financial decisions at this level will have a direct editorial effect.

Does the BBC believe that disclosing the requested information regarding annual budgets for the station affects the level playing field with regard to its commercial rivals? If so, please provide supporting evidence.

- The BBC believes that, as its budgets are almost exclusively staff costs, revealing them would offer valuable information about the staffing of a primarily speech based radio service. There are variances based on local circumstances which are driven by the need to produce appropriate output. Although the BBC is comfortable in comparing

outputs at Service Licence Level with commercial broadcasters it is not comfortable with specific costs which would take account of the price of engaging resources but not the quality or output of those resources.

Does the BBC consider any of the requested annual budget information for the station since 2005 to be 'historic'? If so, how do historic budgets for the station feed into the creation of the BBC's output or underpin these creative activities?

- The BBC did not consider the information to be 'historic' because its resource and core production budget has scarcely changed from 2005 and so would give a clear indication of current budgets.

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." (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)

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 programme's content which covers all types of output that the BBC produces;
 - The users of the information.
23. The information that has been requested in this case concerns the annual budget of a local radio station since its inception in 2005. The purpose for which it was created is to provide finance and allocate resources for the continuing provision of the Coventry and Warwickshire local radio service in order that it can deliver on its editorial proposition.
24. Having considered the BBC's responses to the Commissioner's questions the Commissioner agrees that it is difficult to separate the BBC's budget for Coventry and Warwickshire Local Radio from its creative and editorial decision-making processes as he considers them to be closely allied. At a divisional level the Commissioner is satisfied that decisions made on the spending allocated to particular programmes from this fixed budget is likely to directly impact on the content of those programmes. At the station level the Commissioner accepts that the Managing Editor's allocation of the budget according to his/her editorial decisions and priorities has a direct editorial effect.

The Commissioner is therefore satisfied that the information in this case, namely the individual station budgets from 2005, is actually being used by those actively making programmes to inform decisions directly affecting the quality of content and production of particular programmes and, as such, the information was being used from what can be said to be editorial decisions.

25. The Commissioner also accepts that release of the individual station budget for Coventry and Warwickshire Local Radio would impinge on its editorial freedom because it is likely that both media and local pressure would be brought to bear once the specific allocated budget was known. He accepts that any interference such as the BBC suggests might occur has the potential to impact on the BBC's remit as a public service broadcaster.
26. For all of the reasons above, the Commissioner is therefore satisfied that the information requested under part a) of the complainant's request is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism which exempts the BBC from its obligation to comply with Parts I to V of the Act.

The Decision

27. 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

28. The Commissioner requires no steps to be taken.

Right of Appeal

29. 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 1st day of March 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
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”