

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 June 2011

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

Summary

The complainant requested a breakdown of the costs incurred to redevelop the BBC's news website.

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. The Commissioner has noted that the information requested is only partially held. However, the Commissioner's decision is that the requested information, where held, 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.

Background

2. In the summer of 2009 the BBC's Planning and Prioritisation Group took the view that the redesign of its News website was an editorial priority and more resource must be allocated to it.

3. The BBC then redesigned its News website and it was relaunched on 13 July 2010. The focus of the changes was on design and navigation, with the key changes for the web user being:
 - (1) A fresh, updated design, with more space for the key stories of the day;
 - (2) Better use of video and images;
 - (3) Clearer and more prominent labelling and signposting of key stories, whether you are on the front page or a story page;
 - (4) Better indication of which are the most recent headlines; and
 - (5) Easier ways to share stories with others, for those who wish to do so.
4. During this design, the BBC also completely rebuilt the Content Production System which is used to create content and run the site. This enables journalists to format their stories and place them on the website as quickly as possible.
5. The News website forms part of BBC's website – 'BBC Online' and is not a stand alone website.

The Request

6. On 14 July 2010 the complainant requested the following information:

'I would like to make a freedom of information request about the costs of the recent website redesign for BBC News.

If possible, I would like to see an itemised breakdown of the costs, in categories such as conducting user focus groups, external consultants used, staff salaries for in-house staff working on the redesign, etc.'
7. On 28 July 2010 the BBC issued its response. It volunteered some information about the nature of the project, but explained that it believes that the information requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature.' It explained that Part VI of Schedule 1 to FOIA provides that information

held by the BBC and the other public service broadcasters is only covered by the Act if it is held for 'purposes other than those of journalism, art or literature". It concluded that the BBC was not required to supply information held for the purposes of creating the BBC's output or information that supports and is closely associated with these creative activities. It therefore would not provide any information in response to the request for information.

The Investigation

Scope of the case

8. In a connected case, the BBC confirmed to the Commissioner that it did not hold all the information that was requested in this case because of the way that it records expenditure. However, it explained to the Commissioner that it considered the components of information that it did hold to fall inside the derogation. The Commissioner has considered the status of the information that is held in this case.
9. On 29 July 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 he doesn't believe that the request relates to journalism; and
 - that his request actually concerns the way that the license fee has been spent.

Chronology

10. On 4 September 2010 the Commissioner wrote to the complainant and the BBC to confirm that he had received an eligible complaint.
11. On 14 October 2010 the Commissioner wrote to the BBC with detailed enquiries in a connected case. These enquiries concerned its position in relation to the information that it held about the costs of the News website redevelopment.
12. The Commissioner contacted the BBC on a number of occasions throughout November 2010, December 2010 and January 2011 to chase progress on it providing him with a response.

13. On 17 January 2011 the Commissioner wrote to the BBC to give it a final opportunity to provide its detailed response. He explained that he would have to issue an Information Notice if it did not respond.
14. On 28 January 2011 the Commissioner received a detailed response to his enquiries.
15. On 31 January 2011 the Commissioner wrote to the complainant to explain the nature of his investigation so far. He explained that his preliminary view was that the derogation had been applied correctly. He asked whether the complainant wished the investigation to continue and to provide further arguments about why he believed that the preliminary verdict was wrong. The complainant responded on the same day to confirm that he wanted the case to continue, but offered no further arguments to the Commissioner. The Commissioner confirmed receipt of the email.

Analysis

Substantive Procedural Matters

Jurisdiction

16. 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....."*

17. 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"

18. 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".

19. 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.

20. 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.
21. 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

22. 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)"*

23. 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.
24. 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.
25. 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."

26. As noted above, the information that has been requested in this case is a breakdown of the costs of redesigning the BBC's website.
27. The BBC made its decision in summer of 2009 to redevelop the website and simultaneously improved its Content Production System. The decision to undertake the overhaul was taken by its Planning and Prioritisation Group. The Group included the Senior Editorial Development representative and the Journalism lead from the BBC's Future Media and Technology Division. The decision was taken that the overhaul should be an editorial priority and that resources needed to be allocated (from its fixed budget) accordingly.
28. The costs information the BBC holds in its view connects to the purposes outlined in the derogation. It explains that the information was generated as a result of the editorial decision that has been discussed above. It explained that the information continued to be held to support its content and creative functions and disclosure of one set of creative costs would erode the creative space that the derogation seeks to protect.
29. It has explained that the decision about what resource to devote to each output is a fundamental programming decision. For each decision it makes to devote some money to one project, money is not available for another project. It has confirmed that the decision was made by individuals in journalistic roles with responsibility for ensuring that the BBC meets its editorial objectives.

30. In addition, the Commissioner notes from arguments in other cases, that the BBC takes the view that the information about the costs of the website redesign continues to a genuine extent to be held for journalistic purposes, because it will be used to assess the success of allocation when making future decisions about online content (particularly in light of the recent Licence Fee Settlement, where the publicised consequences were that the BBC must now make a 25% reduction in spending on its website¹).
31. In light of the arguments he has received from the BBC, the Commissioner recognises that the information held about the costs of the news website redevelopment would fall within categories two and three of the definition outlined in paragraph 25 above. He has determined that the information that is held directly relates to the exercise of judgment in editorial matters (paragraph 108), connects to a decision taken for the maintenance and enhancement of journalistic standards (paragraph 109) and that the information would be required when taking similar decisions in the future. While the information may also be held for non-derogated purposes, this is irrelevant when it continues to be held for a significant and genuine extent for derogated purposes.
32. The Commissioner offered the complainant an opportunity to provide his further submissions and no such submissions were offered.
33. The Commissioner has decided to consolidate this analysis, by considering the following relevant 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.
34. They will be considered in turn:
 - The information was generated to monitor expenditure when creating a journalistic resource (the Content Production System) and improving how it communicates news (with the

¹ This settlement relates to the agreement made with the Government about the funding for the next five years. An article about its effect to the budget of its website can be found at the following link:
<http://www.bbc.co.uk/news/entertainment-arts-12265173>

website redesign). The information was also gathered for the purpose of judging whether it was a success;

- The Commissioner considers that the information does have a direct relationship with the BBC's creative output. Both because the money was found from its creative budget and because the information is required to assess future expenditure on journalistic online output, given the consequences of the settlement; and
- The Commissioner accepts that the information is used as part of the process of allocating funds which occurs when editorial decisions are taken by it.

35. It follows that the above factors also support the Commissioner's verdict that the information requested continues to be held genuinely for the purpose of journalism.
36. For all the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, 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.

The Decision

37. The Commissioner's decision is that as the request is for information that, where held, is 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

38. The Commissioner requires no steps to be taken.

Right of Appeal

39. 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 22nd day of June 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”