

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 October 2009

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

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the British Broadcasting Corporation (the "BBC") for information relating to the drama series "Our Friends in the North". The BBC answered the majority of the complainant's requests however it refused request iv as it stated that the information was exempt from disclosure by virtue of section 42 of the Act. Once the Commissioner's investigation had commenced, and in light of recent High Court decisions, the BBC explained that the information relevant to request iv was in fact held for the purposes of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of the Act. Upon considering the withheld information and the BBC's submissions, the Commissioner considers that the information relevant to request iv was held for the purposes of journalism, art or literature and therefore the BBC 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.

The Request

2. The complainant made a request to the BBC on 10 July 2007 for information relating to the drama series "Our Friends in the North". His request was for:
 - i. Details of any kind of contact between the BBC and any political party regarding the tone or content of the programme. The

- paperwork could predate transmission or could have been generated during and or post transmission;
- ii. Any documentation which details the attitude of the BBC or BBC figures to the storyline and or the dialogue and or the characters etc. This information could predate transmission or could have been during and or generated post transmission;
 - iii. Contact between the BBC and any member of the Conservative Party and or Conservative Government about the programme. Again this information could predate transmission or could have been generated during or post transmission;
 - iv. Details of any BBC concerns about issues of libel and bias contained in the programme. Again this information could predate transmission or could have been generated during and or post transmission;
 - v. Details of any changes suggested and or made by the BBC and or any other outside body and or individuals not connected with the show;
 - vi. Details of the Corporation's earlier attempts to adopt this landmark drama; and
 - vii. Any correspondence between the BBC and Peter Flannery. This correspondence could predate transmission or could have been generated during or post transmission
3. The BBC provided a response to the complainant on 24 July 2007 in which it provided some information and explained that some of the information was not held. In relation to request iv it explained that information was held but withheld it under section 42 of the Act.
 4. The complainant asked for an internal review to be carried out on 28 July 2007 in respect of requests iii and iv. On 14 August 2007, the BBC wrote to the complainant with the details of the result of the internal review. It confirmed that no information relevant to request iii was held. In relation to request iv, the BBC again refused to provide the relevant information, as it stated it was exempt under section 42 which relates to information covered by legal professional privilege.

The Investigation

Scope of the case

5. On 1 November 2007 the complainant contacted the Commissioner to complain about the way his requests for information had been handled.

The complainant specifically asked the Commissioner to consider the BBC's application of the section 42 exemption to information relevant to request iv. The Commissioner has therefore focused his investigation upon request iv.

6. During the Commissioner's investigation, and in light of two recent High Court decisions, the BBC explained that the information relevant to request iv was in fact held for the purposes of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of the Act. The Commissioner therefore considered the BBC's submissions in relation to this issue.

Chronology

7. On 23 July 2008 the Commissioner wrote to the BBC in order to obtain a copy of the withheld information and to request the BBC's submissions in relation to its application of section 42.
8. The BBC did not respond the Commissioner and he wrote again on 17 July 2009 requesting a copy of the withheld information and the BBC's submissions in relation to its application of section 42.
9. As the BBC still failed to respond to the Commissioner despite a further request to do so on 21 August 2009, an Information Notice was served on 21 September 2009, ordering the BBC to provide the Commissioner with the withheld information and its submissions in relation to its application of section 42.
10. On 2 October 2009 the High Court handed down its decisions 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. Therefore on 15 October 2009 the Commissioner asked the BBC to consider whether it now believed the information relevant to request iv was held for the purposes of journalism, art or literature and if it was obliged to comply with Parts I to V of the Act.
11. On the same date the BBC confirmed that in light of the High Court decisions, it did indeed believe the requested information was held for the purposes of journalism, art or literature, and agreed to provide its submissions in respect of this along with its response to the IN.

Analysis

Substantive Procedural Matters

Jurisdiction

12. 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.

13. 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 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

¹ *Sugar v BBC* [2009] UKHL 9

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".

14. 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.
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 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, 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

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

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

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).

17. 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.
18. 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.
19. 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)
20. 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.
21. 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.

22. The information requested in this case is legal advice obtained by the BBC in relation to the programme content of the drama series "Our Friends in the North". This is similar to the information about programme content that was considered in the High Court cases. The Commissioner is satisfied that the information is held for the purposes of art, journalism or literature as it informed the editorial decisions made about the content of the series "Our Friends in the North".
23. In view of the above, the Commissioner has found that the request is for information held for the purpose of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of the Act. Therefore it is not necessary to consider the BBC's initial application of section 42 any further in this Notice.

The Decision

24. 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

25. The Commissioner requires no steps to be taken.

Right of Appeal

26. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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 29th day of October 2009

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”.”