

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 12 November 2009

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

Summary

The complainant requested copies of the music playlists for radio stations Radio 1, Radio 2, and 6music from March 2002 to March 2009 from the British Broadcasting Corporation (the "BBC"). The BBC refused to provide the requested information arguing that journalistic judgement would be compromised by audience feedback being available and that this information fell outside the scope of the Freedom of Information Act ("the Act") because it was held for the purposes of journalism, art or literature. The Commissioner is satisfied that the information in question was held for the purpose of journalism, art and literature. 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 requested the following information from the BBC on 7 April 2009, "*the weekly music playlists for BBC Radio 1, Radio 2 and Radio 6music*" and in particular details of, "*these playlists from March 2002 to March 2009 inclusive.*"
3. The BBC responded on 17 April 2009 refusing his request on the basis that this information was derogated. It was explained to the complainant that the BBC

was not, “*obliged 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.*”

4. On 20 April 2009 the complainant requested an internal review on the basis that the ‘dominant purpose’ had changed as these were historic playlists.
5. The BBC replied on 23 April 2009 to say that it did not offer an internal review when the requested information did not fall within the Act. The Commissioner notes that it had in fact incorrectly offered an internal review in the original letter to the complainant dated 17 April 2009.

The Investigation

Scope of the case

6. On 24 April 2009 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:
 - Whether the ‘dominant purpose’ had now altered as the playlists were historic rather than contemporary. The complainant claimed that contemporary playlists inform programme content but that historic playlists were a record of editorial choice.
 - That the BBC voluntarily makes weekly playlists available on its website but does not make historic playlists from the previous decade available through the archive.

Chronology

7. Having reviewed 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 regarding its handling of the request.
8. On 2 October 2009 the High Court handed down its judgments 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. The Commissioner has applied the findings of the two judgments to the facts of this case.
9. The Commissioner wrote to the complainant on 29 October 2009 inviting him to withdraw his case on the basis that the BBC was correct to apply the derogation and that this was in line with the recent High Court Judgments. However, the complainant disagreed stating that the judge had delivered his judgment about the derogated areas in the present tense and that this did not apply to past playlists whose purpose, though originally derogated, were no longer so and that now it would be used as part of the BBC’s performance evaluation process.

Analysis

Substantive Procedural Matters

Jurisdiction

10. 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.

11. 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 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.

¹ *Sugar v BBC* [2009] UKHL 9

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”.

12. 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.
13. 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

14. 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 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).

15. 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,

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

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

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.

16. 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.
17. 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)

18. 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.
19. 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.

20. The Commissioner recognises that the High Court cases did not specifically consider information related to past radio playlists. Nevertheless the Commissioner considers the comments made by Mr Justice Irwin regarding the need for a relationship between the requested information and the derogated purposes are relevant and therefore he has considered them here. The complainant argued that historic playlists are not held for the purposes listed in Schedule 1 but for evaluation purposes. However, in the Commissioner's view whilst historic playlists may be held for non-derogated purposes this does not fundamentally alter the fact that they continue to be held to a significant extent for the purposes of journalism, art and literature. Past playlists are retained as a source of research material for content creators and may be used in future BBC output. This is similar to copies of BBC programmes which are also retained so

that they can be used for repeat broadcasts, as content in other BBC programmes and as a source for research when creating output.

21. The fact that the BBC chooses to make similar playlist information available as part of its online web content on a discretionary basis does not alter the fact that in the Commissioner's view the information requested by the complainant is held to a significant extent for the purposes listed in Schedule I.
22. 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. .

The Decision

23. 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

24. The Commissioner requires no steps to be taken.

Right of Appeal

25. 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 12th day of November 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”.”