

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 October 2010

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

Summary

The complainant requested the figures for complaints about bias made to the British Broadcasting Corporation Scotland (the "BBC") by supporters of certain political parties. The BBC refused to provide the information claiming that it was derogated from the Freedom of Information Act 2000 (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 purposes of journalism, art and literature. He has therefore decided that the BBC was not obliged to comply with Parts I to V of the Act in respect of the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether the BBC has complied with its duties under the Act. This Notice sets out his decision.

The Request

2. On 9 March 2010 the complainant made the following request:

"How many complaints of bias have been received by BBC Scotland in the last year i.e. 1st March 2009 to 1st March 2010 by supporters of SNP, Labour, Liberal and Conservative complainants. I would like figures for each."

3. On 10 March 2010 the BBC responded. Firstly, the BBC asserted that the information requested was excluded from the Act. In its letter the BBC stated that it had chosen not to reveal information that related to editorial complaints as it wished to retain its independence and impartiality. The BBC contended that to reveal these figures might subject it to the charge of bowing to pressure or place it under pressure to respond to lobby groups or political parties.

The Investigation

Scope of the case

4. On 12 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He did not specify the grounds at the time, though he later informed the Commissioner that he did not accept that the information he had requested was not subject to the Act.

Chronology

5. 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.
6. The Commissioner wrote to the complainant on 6 May 2010 stating that he believed that the BBC was correct to refuse to provide the information to the complainant on the basis that the requested information was derogated from the Act.
7. The complainant replied to the effect that he did not accept this viewpoint and that he wished to continue with his complaint on the basis that he had not asked for information about programme content but the effect of that content on the listening or viewing public.

Analysis

Substantive Procedural Matters

Jurisdiction

8. 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".

9. 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 are 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.
10. The House of Lords, in *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.
11. 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

12. 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)"

13. The Commissioner interprets this to mean that if the information is held for a genuine journalistic, artistic or literary purpose it is derogated.
14. When establishing the purpose for which the information was held Lord Neuberger of Abbotsbury MR 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 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 information in order to create that output, in performing one of the activities covered by journalism, art or literature.
15. 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 colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

16. The Commissioner has adopted a similar approach with regard to art and literature, the other two limbs of the BBC derogation. In his view, art and literature are comprised of the same three elements, that is:

- The preparation and creation of the artistic output or written material.
 - The editorial process.
 - The maintenance and enhancement of the standards and quality of artistic or literary output.
17. In considering whether the information is held for the purposes of journalism, art or literature the Commissioner has considered the following factors:
- * the purpose for which the information was created;
 - * the relationship between the information and the programme content which encompasses all types of output that the BBC produces; and
 - * the users of the information.
18. The Commissioner recognises that journalistic, artistic and literary output are all capable of containing political commentary and consequently, political bias. Therefore the Commissioner is satisfied that there will be elements that are common to the process of producing all three forms/types of output. In particular all three will require an element of editorial control and management to ensure the maintenance and enhancement of standards and quality.
19. The information requested in this case is complaints information which is used by those involved in the production of BBC output to inform editorial choices. The figures requested by the complainant would be derived from that information. The Commissioner is further satisfied that figures such as those requested would in themselves trigger and inform reviews by the BBC of its output and overall editorial direction.
20. Based on the explanation contained in the BBC's refusal notice, dated 10 March 2010, and having considered submissions made by the BBC in previous cases the Commissioner understands that the consideration of complaints, such as those of political bias, is an important tool, used by the BBC to monitor, maintain and enhance its journalistic, artistic and literary output and to ensure the impartiality of that output.
21. In reaching this view the Commissioner has also been guided by The Master of Rolls' comments in the Court of Appeal case regarding the need to protect freedom of expression and the rights of the media under article 10 of the European Convention on Human Rights (paragraph 45) as some of the purposes behind the derogation. If the BBC was obliged to provide information relating to its consideration of complaints of political bias this could undermine the integrity of a process used to ensure the independence and impartiality of the BBC's output.

22. In view of the above, the Commissioner has found that the request is for information held for the purposes of journalism, art and 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 and 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 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 October 2010

Signed

**Jo Pedder
Group Manager, Policy Delivery
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”.”