Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 November 2009

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

Summary

The complainant asked the BBC for information relating to the cost of advertising East Enders since the introduction of new characters who run the 'Queen Vic'. The BBC refused to provide the information on the basis that it was not a public authority in relation to this request because the information was held for the purpose of journalism, art or literature. Having considered the purposes for which this information is held, the Commissioner has concluded that the BBC has no obligations to comply with Parts I to V of the Act in respect of the request in question.

The Commissioner's Role

1. The Commissioner's duty is to decide whether the public authority 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 has advised that on 14 August 2007 he made the following request for information to the British Broadcasting Corporation (the BBC):

> "*The cost of advertising Eastenders since the introduction of the new characters who runs the Queen Vic. I would like a breakdown of the cost of advertising in places other than the BBC. Those include advertising hoarding and newspapers/magazine adverts. I would also like a figure of total expenditure including adverts on the BBC. And the amounts of any planned future advertising on the subject*".

3. The BBC responded on 18 September 2007 explaining that the requested information was not covered by the Act. The BBC stated that the request fell outside of the scope of the Act because the BBC is covered by the Act only in respect of information held for purposes other than those of journalism, art or literature. The BBC stated that it was therefore not obliged to supply information held for the purposes of creating its output or information that supports and is closely associated with these creative activities. The BBC concluded by adding that information which was not subject to disclosure under the Act because of Schedule 1 might otherwise be exempt from disclosure because of the application of other provisions of the Act.

4. The BBC informed the complainant that it did not offer an internal review procedure when its position was that the requested information fell outside the scope of the Act. However the BBC did inform the complainant of his right to contact the Commissioner and ask him to review the BBC's decision.

The Investigation

Scope of the case

5. On 18 September 2007, the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

6. On 5 October 2007, the Commissioner wrote to the BBC to advise that it had received this complaint.

7. On 29 July 2008, the Commissioner wrote to the BBC seeking clarification of its claim that it was not a public authority in relation to the requested information.

8. On 7 August 2009, the Commissioner sought the outstanding response from the BBC.

9. On 8 September 2009, the BBC confirmed its position that the requested information fell outside the scope of the Act and that its decision of 18 September 2007 still stood. The BBC provided detailed arguments to support its decision.

10. Whilst the case was open the Commissioner informed the complainant that he was awaiting the outcome of the following High Court cases, BBC v Sugar & Information Commissioner [2009] EWHC 2349 (Admin) and BBC v Information Commissioner [2009] EWHC 2348 (Admin). The cases were concluded and the judgments published by the High Court on 2 October 2009. Both cases involved the application of the derogation by the BBC. The Commissioner has applied the findings of the two judgments to the facts of this case.

Analysis

Substantive Procedural Matters

Jurisdiction

11. 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 FOIA 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".

12. The BBC has argued that the construction of sections 3 and 7, and Schedule 1, means that the BBC is not a public authority where it holds the 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 of the Act.

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, 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".

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 the BBC is required to comply with Parts I to V in respect of the request.

Derogation

16. As mentioned above the scope of the derogation has been considered by the High Court in the cases of the BBC vs. Steven Sugar (BBC v Sugar & Information Commissioner [2009] EWHC 2349 (Admin)) and The Information Commissioner and the BBC v the Information Commissioner (BBC v Information Commissioner [2009] EWHC 2348 (Admin)). 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 68 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)

20. The information relevant to a 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 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 / other events
- Content of programmes / coverage of issues within programmes

22. 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 art, journalism and literature.

23. The information requested in this case relates to a marketing campaign to promote EastEnders and would be classed as in-house production costs falling within the 'programme budgets' and 'programme costs' categories. This is similar to the information considered in the High Court cases. The Commissioner accepts the findings in the High Court decisions. Reading the request relevant to this case and taking into account the context surrounding it, the Commissioner can find nothing to justify different findings to those of the High Court in this case.

24. In view of the above, the Commissioner finds that the complainant's request was for information held for the purpose of journalism, art or literature and that the BBC was therefore right to refuse to comply with Parts I to V of the Act.

The Decision

25. The Commissioner's decision is that as the request is for information 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.

Steps Required

26. The Commissioner requires no steps to be taken.

Right of Appeal

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27. 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 2nd 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"."