

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 October 2009

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

Summary

The complainant made requests to the BBC for information relating to the Eurovision Song Contest. The Commissioner has investigated the complaint and has found that the requested information was held for the purpose of journalism, art or literature and that therefore the public authority was not obliged to comply with parts I to V of the Act in this case. The Commissioner requires no steps to be taken.

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. On 19 May 2007 the complainant wrote to the public authority to request the following information regarding Eurovision Song Contests held since 2002. The request read as follows:
 - i. "How much does the BBC contribute to the running of the Eurovision Song Contest. How is this paid and who is it paid to. I would like to obtain individual details for every particular contest since and including 2003.
 - ii. Could the BBC please detail how many people in Britain voted in the finals of the Eurovision Song Contest for the following years 2003, 2004, 2005, 2006, 2007.

- iii. Could the BBC provide all internal (sic) documentation including emails which specifically relate to the voting of overseas audiences and juries during the actual finals of the Eurovision Song Contest. I am only interested in the contests which took place during 2003, 2004, 2005, 2006, 2007. Please note I am not interested in any semi-finals.
 - iv. Could the BBC provide all correspondence (including emails) with the European Broadcasting Union and or Eurovision television which deals with possible changes to the organisation and or running of the contest in general. This documentation will include but will not be limited to allegations of collusion and block voting, voting procedures in general, financing and transmission arrangements. It may touch upon actual contests or it may be about arrangements for future finals. I am interested in all correspondence which has been generated since 2003. This correspondence may be about the contest in general or it may be about specific contests since and including 2003.
 - v. Can the BBC provide copies of any research conducted by it or anyone acting on its behalf into the attitudes of British viewers and listeners to the Eurovision Song Contest.”
3. The public authority responded to the request on 24 May 2007. It said that the requests were outside the scope of the Act because the public authority is covered by the Act only in respect of information held for purposes ‘other than those of journalism, art or literature’. Notwithstanding this, the public authority voluntarily provided the complainant with a statement on the public authority, its links with the European Broadcasting Union and the Eurovision Song Contest. No internal review was offered.

The Investigation

Scope of the case

4. On 24 May 2007 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. In particular the complainant argued that the public authority was wrong to refuse his requests on the grounds that the derogation in schedule 1 of the Act applies to the information.
5. During the course of the Commissioner’s investigation the public authority disclosed to the complainant the information it held falling within the scope of his first request. The Commissioner considers that this aspect of the complaint has been informally resolved and therefore will not be considered in this decision notice.

Chronology

6. On 19 May 2008 the Commissioner wrote to the public authority with details of the complaint. In particular the Commissioner asked the public authority to provide him with copies of the information requested by the complainant as well as its comments on why the derogation applied to each request. In view of the possibility that he may decide that the derogation does not apply, the Commissioner asked the public authority to provide, without prejudice, details of any exemptions which it would seek to rely on in the alternative. The public authority was asked to respond within 20 working days.
7. The public authority acknowledged receipt of the Commissioner's letter on 20 June 2008 when it indicated that it would not be able to respond within the 20 working day deadline set by the Commissioner.
8. The Commissioner subsequently emailed the public authority regarding its failure to respond and also discussed the progress of the public authority's response on the telephone on 5 separate occasions. However, it was not until 13 October 2008 that the public authority provided a substantive response to the Commissioner's initial letter.
9. The public authority provided submissions to the Commissioner in support of its assertion that the requested information was derogated. Although it maintained that this information would fall outside the scope of the Act, the public authority also said that it was now prepared, without prejudice to its position, to release the information relevant to the first request. This information was subsequently made available to the complainant.
10. As regards the remaining information the public authority now explained why it considered the requested information to fall within the derogation in schedule 1 of the Act. It also explained that if the Commissioner were minded to conclude that the requested information is not derogated, it would seek to rely on section 12(1) of the Act on the grounds that the cost of complying with the request would exceed the appropriate limit. It also said that it considered that the exemption in section 43 of the Act (Commercial interests) applied to the fifth request relating to viewing figures. The public authority provided the Commissioner with a sample of information falling within the third and fourth requests.
11. On 6 November 2008 the Commissioner wrote back to the public authority with his observations on its arguments regarding the extent to which the requested information was covered by the scope of the Act. The Commissioner said that based on its submission, it appeared that some of the information was indeed derogated as the public authority suggested but that some information would need to be considered under the Act. The Commissioner invited the public authority's comments on this point and asked that it respond within 10 working days.
12. The public authority responded to the Commissioner's letter on 6 April 2009. It now provided the Commissioner with further comments as to why it considered that the requested information fell outside the scope of the Act. It also explained

that some of the sample documentation which it had provided to the Commissioner as part of its initial submission was no longer considered to be relevant to the request. Whilst maintaining that the requested information fell outside the scope of the request, the public authority now provided the Commissioner with details of two exemptions: section 41 (Information provided in confidence) and section 43 (Commercial interests) which it said would also apply to some of the sample documentation.

13. The Commissioner wrote back to the public authority on 7 May 2009. The Commissioner requested clarification about the public authority's position on whether answering the requests would exceed the appropriate limit. He also asked for a breakdown of the costs it would reasonably expect to incur in dealing with the requests.
14. On 2 October 2009 the High Court handed down decisions in two cases involving the public authority in which it had considered the extent to which information held by the public authority will be subject to the Act. These decisions are referred to below and have been applied to the facts of this case.

Analysis

Substantive Procedural Matters

Jurisdiction

15. 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.

16. 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. 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”.

17. 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.
18. 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

19. 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

¹ *Sugar v BBC* [2009] UKHL 9

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

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).

20. 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.
21. 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.
22. 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)
23. The information relevant to the request therefore 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.

Analysis

24. 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

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

- 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.

25. In this case the remaining information held by the public authority, which has not been disclosed to the complainant, concerns the voting of audiences in the Eurovision Song Contest, possible changes to the running of the contest and the attitudes of British audiences to the contest. The Commissioner recognises that the High Court cases did not specifically consider this information. 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 the Commissioner has considered them here. The Commissioner is of the view that the information on voting and the attitudes of audiences is, in this context, held for the purposes of gauging audience satisfaction with the current format with a view to the continued development and improvement of the contest. Similarly, the Commissioner is satisfied that information relating to possible changes to the running of the contest would be held for a creative purpose of reviewing and developing the contest and the public authority's coverage of it. Therefore the Commissioner has concluded that this information would be held for operational purposes related to programme content.
26. 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

27. 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

28. The Commissioner requires no steps to be taken.

Right of Appeal

29. 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 27th 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”.”