

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 November 2010

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

Summary

The complainant requested information relating to any written communications that His Royal Highness the Prince of Wales or anyone acting on his behalf had had with the BBC over a certain time period. The BBC stated that the requested information fell outside the scope of the Act because it is information held for the purposes of journalism, art or literature. The Commissioner's decision is that the requested information is genuinely held for the purposes of journalism. Therefore the BBC is 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. On 27 April 2010 the complainant requested the following information to be provided in accordance with the Act:

"1. During the aforementioned period has His Royal Highness the Prince of Wales written to the BBC's Director General? Can the BBC state how many letters it has received from His Royal Highness the

Prince of Wales? Can it please provide the date(s) for the letters and can you please provide a brief description of what they were about?

2. During the aforementioned period [January 1 2008 to the present day] has any one working for and or representing the Prince of Wales written to the BBC Director General on behalf of his Royal Highness? Can the BBC state how many letters it has received from anyone working for and or representing the Prince of Wales? Can the BBC please provide the date (s) for the letters and can you please provide a basic description of what they were about.

3. During the aforementioned period has His Royal Highness the Prince of Wales written to the chairman of the BBC Trust? Can the BBC please state how many letters the Chairman of the Trust has received from His Royal Highness the Prince of Wales? Can the BBC please provide the date(s) for the letters and can you please provide a basic description of what they were about.

4. During the aforementioned period has anyone working for and or representing the Prince of Wales written to the BBC's Chairman on behalf of his Royal Highness? Can the BBC please state how many letters the Chairman has received from anyone working for and or on behalf of the Prince of Wales. Can the BBC provide the date(s) for the letters and can you please provide a basic description of what they were about?

5. Has the Prince of Wales or anyone working for or representing the Prince of Wales met with the Director General and or the Chairman of the Trust during the aforementioned period. Can the BBC please state how many of these meetings took place, when they took place and where they took place. Can the BBC please state the items/issues under discussion and please provided any related minutes."

3. On 14 June 2010 the BBC issued its response. It stated that it did not hold information relating to points 1, 3 and 4 of the complainant's request. The information regarding Point 5 was provided, though the BBC asserted that the information it was providing was derogated from the Act. The BBC did not provide any information relating to point 2 other than that information was held relating to this point. It explained that Part VI of Schedule 1 to the FOIA provides that information held by the BBC and the other public service broadcasters is only covered by the Act if it is held for 'purposes other than those of journalism, art or literature'. The BBC maintained that feedback from an audience member including the Royal Household is excluded from the Act as it is held for the purposes of journalism, art or literature.

The Investigation

Scope of the case

4. On 14 June 2010 the complainant contacted the Commissioner to complain about the way their request for information had been handled. However, he confined his complaint to point 2 of the request. The complainant specifically asked the Commissioner to consider the following points:
 - That the derogation does not apply to this request.
 - That the BBC was being disingenuous when it said that correspondence from the Royal Household is just like any other audience feedback as its feedback is unlikely to be treated like that of any other member of the audience.
 - That licence fee payers have a right to know if certain institutions are being given undue influence over BBC programming.

Chronology

5. The Commissioner wrote to the BBC on 21 September 2010 asking to look at the withheld information.
6. The BBC responded on 20 October 2010 enclosing the withheld information. The BBC maintained:
 - *"Feedback from any audience member, including the Royal Household, is held by the BBC for the purposes of reviewing audience reaction to its programme content and informing decisions on how that content will be produced in the future."*
 - That the BBC had a right to protect its journalistic and editorial independence by maintaining a private place in which to produce its content. This extended to criticism or praise which form part of the creation and improvement of programmes
 - That the BBC needs to be able to resist pressure from various interest groups and individuals to influence its output
 - That if public service broadcasters were obliged to disclose information it would damage their independence by impeding their ability to weigh comments alongside other elements of feedback on a programme whilst reaching an editorial decision without public scrutiny

- That the impediments it described operated regardless of the identity of the audience or whether the feedback was a complaint, praise or just comment.

Analysis

Substantive Procedural Matters

Jurisdiction

7. Section 3 of the Act states that:

*"3. – (1) In this Act "public authority" means –
(b).... any body...which –
(i) is listed in Schedule 1....."*

8. 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"

9. 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".

10. 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.
11. The House of Lords in the case of *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.
12. 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

13. 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." (paragraph 44), and that "...provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA." (paragraph 46)

14. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to the Act.
15. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) 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. 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.
16. The Court of Appeal adopted the Tribunal's definition of journalism in *Sugar v IC and the BBC* [EA/2005/0032] at paragraphs 107 to 109 which set out that journalism comprises 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 maintenance and 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."

17. In considering whether the information is held for the purposes of journalism the Commissioner has considered the following factors:
 - The purpose for which the information was created;
 - The relationship between the information and the programmes content which covers all types of output that the BBC produces; and
 - The users of the information.
18. The information that has been requested in this case is correspondence between The Prince of Wales and/or his representatives and the BBC. The Commissioner is satisfied that the withheld information involves correspondence between the Royal Household and the BBC regarding a programme/s that was/were part of the BBC's journalistic output.
19. In light of the present submissions of the BBC the Commissioner recognises that derogation from the Act was partly intended to protect freedom of expression for public service broadcasters. The Commissioner understands that in order to maintain its editorial independence the BBC does not release details of audience feedback including feedback from the Royal Family. The Commissioner considers that the BBC is provided in this way with a source of feedback about the content of its programming which can then be utilised to inform future creative and editorial decisions.
20. For the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of the Act.

The Decision

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

22. The Commissioner requires no steps to be taken.

Right of Appeal

23. 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 November 2010

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex - Relevant Statutory Provisions

Section 1(1) states that –

“Any person making a request for information to the 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 the information communicated to him.

Section 3(1) states that –

“in this Act “public authority” means –

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which –

- (i) is listed in Schedule 1, or
- (ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6”

Section 3(2) states that –

“For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

Section 7(1) states 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 this Act applies to any other information held by the authority.”

Schedule 1, Part VI reads:

“The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature”