

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 June 2011

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

Summary

The complainant made a request to the BBC for tender and commissioning information relating to Democracy Live, which provides coverage of the United Kingdom's political institutions and the European Parliament. The BBC responded by stating that the requested information fell outside the scope of the Freedom of Information Act 2000 (the "Act") because it is information held for the purposes of journalism, art or literature. The Commissioner's decision is that the information is genuinely held for the purposes of journalism. Therefore the Commissioner finds that 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. On 13 August 2010 the complainant submitted the following information request to the BBC:

"According to information made available at the time of its launch, 'The [Democracy Live] site is believed to have cost just over £1m to launch and has been funded from the BBC's existing online budget...[and] has been in development for the best part of two years.'...

Also, it is 'powered by a speech-to-text system built by two companies called Blinkx and Autonomy which create transcriptions of the words spoken in the video'...

....

Under the Freedom of Information Act, please may I be sent:

- (1) The category of commissioning [as described by the BBC's Future Media Commissioning Process] for the work done by Autonomy and/or Blinkx...*
 - (2) Copies of any and all tendering documents made available to potential suppliers.*
 - (3) The number of suppliers who were invited or submitted responses to the invitation to tender (making it clear if Autonomy and Blinkx are counted as one or two).*
 - (4) The number of suppliers on the shortlist (making it clear if Autonomy and Blinkx are counted as one or two).*
 - (5) A copy of the contract that was signed with the chosen supplier(s).*
 - (6) The date that this contract is scheduled to expire or be renewed.*
 - (7) Whether this contract was classified as Qualifying External Spend, what its value was, and any other data about it that was entered into the Future Media & Technology Finance database."*
3. The BBC responded to the request on 13 September 2010 by stating that the requested information was excluded from the Act because it is held for the purposes of "journalism, art or literature." The BBC explained that Part VI of Schedule 1 to the Act 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." It further noted that the BBC is not required 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. The BBC therefore refused to provide any information in response to the request for information.

The Investigation

Scope of the case

4. On 15 September 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

5. The Commissioner has not deemed it necessary to see the withheld information in this case or receive submissions from the complainant and the BBC in order to make a determination.

Analysis

Substantive Procedural Matters

6. Section 3 of the Act states:

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

7. 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."

8. 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 – 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 is not held for the purposes of journalism, art or literature. The term 'derogated' is used to describe information that falls outside the Act, ie information that is held by the BBC for the purposes of journalism, art or literature.
10. 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.

11. The Commissioner will first determine whether a 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 that 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) and that *"...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 considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – ie journalism, art or literature – it is not subject to the Act.
14. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury (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 these 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.
15. 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 comprised of the following three elements:

"107. The first is the collecting or gathering, writing and verifying of materials for publications."

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 by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

16. In determining whether the requested 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.
- The users of the information.
- The need to ensure a level playing field, for example as between the BBC and its commercial rivals.

17. The information that has been requested in this case relates to the tender and commissioning work associated with the provision of software for the speech-to-text processing technology used in the Democracy Live coverage. According to the BBC website¹ the speech-to-text system means that:

"After a video is made available to watch again, our system adds words spoken in the video for you to search on. When it finds a word you've asked for, it gives you a link straight to the point in the video where the word is spoken."

18. The Commissioner appreciates that the creation of a broadcast or a series of broadcasts involves the consideration of many factors. One of which is the analysis of how that broadcast can and should be developed. The Commissioner considers that each part of the request can be seen as asking for information that will have been created for the purpose of developing and managing the production of Democracy

¹ http://news.bbc.co.uk/democracylive/hi/guides/newsid_8226000/8226983.stm

Live and the associated costs of the broadcast. This would relate to editorial decisions reflecting the ambitions of the broadcasts.

19. The Commissioner also considers that the information will have been created to ensure clarity about roles and responsibilities in respect of broadcast production. Furthermore, the Commissioner is satisfied that the information is likely to have been retained for use by programme makers to inform decisions on the content and production costs of future transmissions of a similar nature.
20. The Commissioner has therefore taken the view that the BBC continues to hold the requested information for the purposes of journalism. This is because the tender and commissioning information would serve to inform the editorial process and would be used by those involved in the delivering of future output. Consequently, the Commissioner has found the requested information to be derogated and that the BBC was not obliged to comply with Parts I to V of the Act.
21. In coming to this determination, the Commissioner has also been mindful of the purpose of the derogation, which was articulated by Lord Neuberger of Abbotsbury MR at paragraph 45 of his judgment in *Sugar*:

"The purpose of limiting the extent to which the BBC and other public sector broadcasters were subject to FOIA was 'both to protect freedom of expression and the rights of the media under article 10 of the European Convention on Human Rights, and to ensure that [FOIA] does not place public sector broadcasters at an unfair disadvantage to their commercial rivals.' This is apparent, to my mind, as a matter of common sense, looking at FOIA on its own, but it was also stated in terms to be the policy in a letter from the Department of Constitutional Affairs in 2003, which was admitted in evidence by the Tribunal – hence the quotation marks."

22. The Commissioner understands that the format of Democracy Live is an innovative development in one strand of the BBC's output. The Commissioner considers that if the tender and commissioning information was subject to the Act it would make the BBC more cautious about venturing into new areas because it would have to make editorial decisions in the public glare. Ultimately, the level of scrutiny may inhibit creativity; a possibility that the Commissioner recognises was designed to be protected against by the Act through the limitation of the extent to which the BBC is subject to the legislation.

23. On a separate note, the Commissioner has observed the complainant's suggestion that, because it relates to a public sector tender, a significant portion of the requested information would likely have been published in the Official Journal of the European Union. However, the Commissioner does not consider this point to be material to whether the information held by the BBC is derogated for the purposes of the Act. He has not therefore felt it necessary to pursue this issue further.

The Decision

24. The Commissioner's decision is that as the request is for information that is held for the purpose of journalism the BBC was not obliged to comply with Part I to V of the Act in this case.

Steps Required

25. The Commissioner requires no steps to be taken.

Right of Appeal

26. 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 16th day of June 2011

Signed

**Gerrard Tracey
Principal Policy Advisor
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”