

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 February 2011

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

Summary

The complainant requested the total amount paid to Melanie Phillips and Joshua Rozenberg in 2009 and 2010 by the BBC and/or independent production companies working for the BBC. 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 26 October 2010 the complainant requested the following information to be provided in accordance with the Act:

" - How much money did the BBC and or independent production companies working for the BBC pay Melanie Phillips in total in 2009

- *How much money did the BBC and or independent production companies working for the BBC pay Joshua Rozenberg in total in 2009*
 - *How much money did the BBC and or independent production companies working for the BBC pay Melanie Phillips in total in 2010*
 - *How much money did the BBC and or independent production companies working for the BBC pay Joshua Rozenberg in total in 2010."*
3. On 3 November 2010 the BBC issued its response. It explained that it believed that the information requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature'. It explained that Part VI of Schedule 1 to 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". It concluded that the BBC was 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. It therefore would not provide any information in response to the request for information.

The Investigation

Scope of the case

4. On 12 November 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant asked the Commissioner to look at the BBC's response as she wished to appeal the decision not to provide the requested information though she did not make any specific points to support her argument.

Chronology

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

Analysis

Substantive Procedural Matters

Jurisdiction

6. 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....."*

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 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 is 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 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 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." (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)

13. 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.
14. 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.
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 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."

16. 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 programme's content which covers all types of output that the BBC produces;
 - The users of the information.
17. The information that has been requested in this case concerns what the BBC pays to two of the journalists it employs either on a contractual or freelance basis. The purpose for which the information was created is part of a wider editorial decision to engage and reimburse journalists for their professional services with regard to the BBC's journalistic remit.
18. In light of submissions made by the BBC in previous cases the Commissioner understands that the BBC regards the decision as to how much resource to dedicate to a particular piece of BBC output to be a fundamental programme making decision. The BBC has a fixed resource (the licence fee) and resource allocation goes right to the heart of creative decision making. It is the Commissioner's view that information about the costs of BBC journalists or those freelance journalists the BBC employs is operational information, which has a relationship to its creative output. The Commissioner is satisfied that such decisions form part of the editorial process.
19. For all of 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

20. 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

21. The Commissioner requires no steps to be taken.

Right of Appeal

22. 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 23rd day of February 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution**

**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”