Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 October 2011

Public Authority: The British Broadcasting Corporation ('the BBC')

Address: 2252 White City
201 Wood Lane
London
W12 7TS

Decision (including any steps ordered)

1. The complainant has requested information about the number of occasions when the BBC has quoted, interviewed or featured the National Secular Society over a two year period. The BBC explained the information was covered by the derogation and excluded by the Act. The complainant complained to the Information Commissioner (the Commissioner).

2. The Commissioner's decision is that this information was held by the BBC genuinely for the purposes of journalism and did not fall inside the Act. He therefore upholds the BBC's position and requires no remedial steps to be taken.

Requests and responses

3. On 17 December 2010 the complainant made the following request for information to the BBC:

> '*Will you please inform us of the number of occasions when the BBC has quoted, interview or featured in any way, the National Secular Society during the past two years (between 17 December 2008 and 17 December 2010).'*

4. The complainant wrote to the BBC on 31 January 2011 to chase a response. The BBC then issued its first response on 10 February 2011 and explained that it did not hold the information that was sought.

5. On 7 March 2011 the complainant replied to explain that he did not believe that the BBC could not provide the information that was sought.

6. On 9 March 2011 the BBC issued another response and explained that it was too expensive to compile the information, and in any event, it did not provide this sort of information generally because it is held for the purposes of 'journalism, art or literature'.

7. On 20 May 2011 the complainant resubmitted his request and slightly modified it:

> *'The number of occasions when the BBC has quoted, interviewed or featured in any way the National Secular Society, in its news and current affairs programmes during the 2 year period ending 31st December 2010.'*

8. On 31 May 2011 the BBC issued a response. It explained that it did not believe that the information was embraced by the Act because it was held for the purposes of 'art, journalism 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".

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case to the information that was requested on 20 May 2011.

10. He explained that the information was purely factual and in view of the mounting criticism of the BBC for unfairness and/or bias, he believed that the BBC ought to provide it. After further correspondence with the Commissioner, the complainant also provided the Commissioner with his further submissions on 5 October 2011.

11. The Commissioner's role is to consider whether the derogation was applied appropriately by the BBC. He only has jurisdiction to consider the operation of the Act and cannot consider the balance or otherwise of the coverage that the BBC offers.

Reasons for decision

12. Schedule one, Part VI of the Act provides that the BBC is a public authority for the purposes of the Act but only has to deal with requests

for information in some circumstances. The entry relating to the BBC states:

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

13. This means that the BBC has no obligation to comply with Parts I to V of the Act where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.

14. The House of Lords in *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has the jurisdiction to issue a decision notice to confirm whether or not the information is caught by the derogation. The Commissioner's analysis will now focus on the derogation.

15. 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)

16. 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. His role is to consider whether the information was genuinely held for the derogated purposes or not.

17. 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.

18. The Court of Appeal adopted the tribunal's definition of journalism which set out that journalism comprises three elements.

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

2. 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.*

3. 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."

19. The information that has been requested in this case is clear in its scope. It asks for the number of times the National Secular Society was featured on any medium by the BBC.

20. The Commissioner will now explain why he considers that the information is covered by the derogation. He has considered all of the information before him, but for conciseness he has focussed on explaining why he considers that the information requested falls within the derogation. He has considered arguments that he has received from the BBC in previous cases and all of the arguments that he has received from the complainant in this case.

21. The BBC has explained that it does not hold the information centrally and the only way it would be able to gather the information would be to research and review its creative content for the relevant timeframe. It has also explained that it may be required to undertake this exercise in the event that it receives an editorial complaint about unbalanced coverage of the National Secular Society.

22. From previous decisions, the Commissioner considers that where components (or building blocks) are held of information, then the composite numbers will also be held providing it does not require a high degree of judgment about how to manipulate that information. This follows the Information Tribunal's judgment in *Johnson v ICO and MOJ* [EA/2006/0085]. In this case, the collation of the information requested would not take a high degree of judgment and the Commissioner considers that the information is held by the BBC.

23. However, the Commissioner must consider whether the components are held for the derogated purposes or not. If they are, then the only conclusion the Commissioner can come to is that the composite number would also be held for the same purposes.

24. The Commissioner considers that the components of the number of times the National Secular Society were featured by the BBC amounts to part of the creative output when it was featured.

25. In light of submissions made by the BBC in previous cases, the Commissioner considers that the components are held for the purposes outlined in the second element of journalism within the definition above - the editorial process.

26. The BBC's content is held so that its editors can analyse and review their programmes. Information about the decisions taken to feature certain organisations would be used by the editors of it to ensure that content meets its output objectives. It will continue to be held to assess the success or otherwise of such a selection and to inform the planning process for future programming. The Commissioner therefore considers that there is a relationship between it and the derogated purposes.

27. This view follows a number of previous decisions of the Commissioner. For example in **FS50358104**, the Commissioner considered whether an old edition of Panorama could be provided under the Act. In that case, the Commissioner recognised that copies of previously broadcast programmes are retained so that they can be used for repeat broadcasts, as potential content in other BBC programmes and as a source of research when creating output. He considered that the requested information was retained and used to provide context and background to the BBC's output and was still held as a resource which may be used for future programmes. He found that the information was held for the second part of the definition of journalism. In the Commissioner's view, his previous decision is analogous to the position of the components of the information requested in this case. It follows that his view is supported by his previous conclusions.

28. Furthermore, the Commissioner also considers that the components would also be held for the third part of the definition as well. This is because the BBC would need at least the components to assess the standards and quality of particular areas of programme making, in the even that it received a complaint about the coverage given to the National Secular Society.

29. It is necessary to consider whether information was still held genuinely for the purposes of journalism on 20 May 2011 (five months after the end of the period that was embraced by the modified request). It is not

material whether the information is also held for other purposes too, providing that it is held genuinely for the purposes of journalism.

30. To support his analysis, the Commissioner considers that the status of information should be judged against the following three key criteria:

- 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.

31. The information that has been requested relates to the information broadcast by the BBC across all media forms. It was created to enable the BBC to provide content to its audience and would be kept to enable the BBC to review the success of those programmes against its editorial objectives. It follows that this criterion supports the BBC's contention that the information was held for the purposes of journalism.

32. The second criterion also favours the BBC. The organisations featured in the BBC's content constitute a key part of that content. There is a real relationship between this information and the content. This relationship continues considering that the editorial decisions about what group to invite on programmes is assessed on an ongoing basis.

33. The third criterion also favours the BBC. The users of this information are the editors responsible for coordinating the BBC's creative output. The BBC has provided the Commissioner with evidence in **FS50327965** that 91% of requests that its archives receive are from production divisions in the BBC. This adds further support that the components would continue to be held in order to produce content. The relationship between the derogated purposes and the information continues beyond the time that the programme was broadcast.

34. The complainant has argued that his interest lies in the process undertaken to select a programme contributor. The Commissioner considers that this argument actually supports the BBC's position because in his view the process itself concerns an editorial decision and any information held about that decision would be held in line with the second branch of the definition of journalism above.

35. It follows that the Commissioner supports the BBC in its view that this category of information is held for one of the derogated purposes – journalism. It is not therefore caught by the Act.

36. The Court of Appeal explained in the 2010 Sugar case that the limited coverage of the BBC under the Act was justified to ensure editorial independence. The BBC has pointed out that information about content is often controversial and the disclosure of this sort of programme information would place the BBC at an unfair disadvantage to its commercial rivals and this further supports the Commissioner's conclusions that the information is held for derogated purposes.

37. The Commissioner has also considered the complainant's comments that the information sought is merely factual and/or is required to assess its legal or charter obligations. Unfortunately, these arguments cannot be given any weight because it does not relate to the issue that the Commissioner is required to decide which is whether the information requested is held for the derogated purposes or not.

38. The complainant has invited the Commissioner to consider whether the derogation would enable the BBC to escape outside oversight and whether this was Parliament's intention. While the Commissioner appreciates that transparency and accountability are the key principles of the Act, they cannot be taken into account when considering whether or not information is held for a set purpose or not.

39. The complainant has also invited the Commissioner to consider that the failure to disclose the information requested has led to public surprise, concern and even anger. It constitutes a matter of public concern and gives rise to suspicions about the fairness, impartiality and integrity of the BBC. These issues can also not be considered because they do not relate to what the Commissioner has to decide – whether the information is held for the derogated purposes or not.

40. For all of the reasons above, the Commissioner is therefore satisfied that all of 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.

Right of appeal

41. 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,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0116 249 4253
    Email: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

42. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from its website.

43. Any notice of appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed ……

Pamela Clements
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