

[Redacted: Not relevant to request]

31st January 2008

Case Reference Number FS50153573

Dear Mr [Redacted: Not relevant to request]

I am writing in relation to your complaint about your information request to the BBC for copies of its daily audience logs.

Our role

Firstly, I should explain our powers in relation to the Freedom of Information Act ('the Act') where a public authority has relied on the Schedule 1 derogation ('the derogation').

In April 2007 the High Court heard an appeal of a decision made by the Information Tribunal in the case of *Sugar v the Information Commissioner*. (This case involved an information request Mr Sugar had submitted to the BBC.) The reasoning for Mr Justice Davis' ruling was handed down on 27 April 2007 and in his reasoning Mr Justice Davis indicated that the approach initially taken by the Information Commissioner was the correct one. Basically, the Commissioner's initial position had been that he was unable to issue a formal decision notice under section 50 of the Act when he concluded that the information requested fell within the scope of the derogation.

A practical consequence of Mr Justice Davis' decision is that the Commissioner does not have jurisdiction to make a decision under section 50 of the Act where the derogation applies.

In this case we agree with the BBC that the requested information is held for the purposes of journalism, art or literature; the rationale behind this conclusion is outlined over the remainder of this letter.

The request

On 6 February 2007 you submitted the following request to the BBC:

'Under FOIA, I now require you publish a copy of your daily audience log for the period 1/4/2005 to present'.

The BBC informed you on 7 February 2007 that:

'Your request falls outside the scope of the Act because the BBC and other public service broadcasters are covered by the Act only in respect of information held for purposes "other than those of journalism, art or literature" (see Schedule I, Part VI of the Act). We are not therefore obliged 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. Information which is not subject to disclosure under the Act because of Schedule I might also be exempt from disclosure because of the application of other provisions of the Act, for example the exemption for third-party personal information.'

The BBC's view

The BBC has noted that Part VI of Schedule I of the Act provides that it is a public authority in respect of information held for the purposes other than those of journalism, art or literature. It is the BBC's position that unless the requested information is held for a dominant purpose other than journalism, art or literature it is not subject to the Act.

The requested information in this case consists of the daily audience logs held by the BBC for the period 1 April 2005 to 6 February 2005. These logs contain feedback, both positive and negative, the BBC receives about programmes it has broadcast. The information contained in the daily logs is compiled into internal reports and forwarded to the relevant programme makers, commissioning editors and senior managers.

It is the BBC's contention that with respect to your request for information it is not subject to the Act. This is because the BBC believes that both the content and analysis of feedback about programmes is excluded because this information is not held for purposes other than journalism, art or literature.

In support of this position the BBC have advanced the following arguments:

The BBC have argued that one of the main policy drivers behind the inclusion of the derogation was the creation of an editorial space in which public sector broadcasters could make programming decisions. They have noted that this analysis is broadly consistent with that of the Information Commissioner in his provisional decision notice in the case of *Sugar v Information Commissioner* which states that:

'the ultimate purpose of the derogation is to protect journalistic, artistic and literary integrity by carving out a creative and journalistic space for programme makers to produce programmes free from interference and scrutiny of the public'.

In the BBC's view an important part of the process of creating and improving its programmes involves reviewing feedback it receives, both positive and negative. In the BBC's opinion this is one of the main reasons that viewers and listeners continue to contact the BBC, i.e. to influence the content of future programmes. Whilst the BBC acknowledges that communications from the public are obviously not the only factors which influence future programming, they are a key element.

The BBC argue that if the content of individual comments were made available for wider scrutiny on a regular basis programme makers would be under increased pressure to respond to lobbies or vocal individuals. This could result in programme makers being reluctant to make changes to programmes in case they were accused of caving in to pressure from the public. Alternatively, if the judgement of programme makers was to ignore feedback because they believed it invalid or outweighed by more significant factors, they may be accused of ignoring public opinion. In either scenario the effect would be to limit the programme makers' ability to come to their own artistic judgement without public scrutiny.

The BBC has noted that the Information Commissioner's Counsel's skeleton arguments before the Information Tribunal in the case of *Sugar v Information Commissioner* commented on the importance of editorial freedom and in particular how this is enshrined in the European Convention of Human Rights:

'It is relevant to have regard to the legal principles concerning journalistic freedom. Article 10 of the convention provides protection for the right of free expression. The law accords importance to the freedom of the press (and other media)...The exclusion of the BBC from the status of a public authority, save where it holds information for purposes other than journalism (etc) can be seen in the context of Article 10, as allowing the BBC to produce programmes free from public scrutiny...There is thus an arena of activity which it is recognised should not be subject overview by the public. The BBC's ability to exercise free speech requires this area of freedom. The BBC needs to be able to exercise its own editorial judgement'.

Our view

Before considering the specific issues in this case, I feel that it is appropriate to confirm that Part VI of Schedule I of the Act states that the BBC is a public authority 'in respect of information held for purpose other than journalism, art

and literature'. This is commonly known as the Schedule 1 derogation. Similar provisions exist in relation to Channel 4 and S4C – as a group these organisations are called public sector broadcasters.

In order to determine the purpose for which information is held, we will apply a dominant purpose test. This means that where information is held for a number of purposes we will weigh these purposes against each other to determine the dominant purpose for which that information is held.

With regard to the information you requested, I am satisfied that the derogation applies for the following reasons:

The information you requested in this case was generated as a result of programme content and intended, presumably, to influence the future creation of the BBC's programmes. I accept the BBC's argument that it uses the feedback that it receives from the public, albeit along with a variety of other factors, to determine what the content of future programmes will be.

For example, in May 2006 the BBC received a complaint from a listener of Radio Leicester about Bill Maynard's rant (a regular feature of the programme) which it was alleged had contained one sided political views. The BBC investigated this complaint and concluded that comments were strongly critical of the then Deputy Prime Minister and the Government and in the absence of any balancing element were not in keeping with the requirements of due impartiality. As a consequence of this complaint the 'rant' feature was dropped and editorial processes have been put in place to ensure that potentially contentious issues are identified and explored before transmission. (Source: http://www.bbc.co.uk/complaints/text/ecu_julsep2006.html)

Therefore, I believe that it is clear that the feedback the BBC holds about programmes it has broadcast has a direct relationship with previously broadcast content and the creation of future content.

The BBC as an organisation is obliged to consider complaints about its programme content. I have therefore considered whether feedback information received by the BBC, and in particular, the information covered by the scope of your request, could be said to be held for purposes other than that of influencing programme content.

(For reference, extensive information on the BBC's complaints processes is available online at <http://www.bbc.co.uk/complaints>.)

I accept that complaints information is held by senior BBC managers in order to shape the strategic direction of the organisation rather than to influence individual editorial decisions. At this high level complaints information could

be used to assess the BBC's success or otherwise in meeting its wider goals regarding content delivery, the needs of the license fee payers or to ensure that they are responsive as an organisation. This is reflected in several ways: regular reports are published which provide an overview of the complaints the BBC receives; complaints about editorial standards are handled by the Editorial Complaints Unit and outcomes are published online; finally, the outcomes of complaints about programme content can be escalated to the BBC Trust for consideration.

Therefore it is clear that the information contained in the daily audience logs has the capacity to serve a number of different purposes. However, fundamentally such information is about, and intended to influence, content. Despite other applications, the daily logs are intrinsically linked with the creative process of programme making and the core activity which the derogation was designed to protect.

Conclusions

On the basis of the above I have concluded that the information is not held for purposes other than journalism, art and literature. The consequence of the Commissioner agreeing with the BBC that the requested information is held for the purposes of journalism is that the Commissioner does not have jurisdiction to make a decision under Section 50 of the Act.

However, if you are unhappy with the outcome of my investigation you can ask for this decision to be reviewed by completing a Service and Quality Complaints Form, available on our website or by contacting us on 01625 545745. You also have the right to seek a judicial review of this decision; however, if you intend to do so you should seek independent legal advice.

Yours sincerely

Jonathan Slee
Senior Complaints Officer