[GB] Court Decides Procedure for Determining when the BBC is Covered by the Freedom of Information Act

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Tony Prosser
University of Bristol Law School

The House of Lords, the UK's highest court, has decided the procedure to be adopted in determining whether information held by the BBC can be obtained under the Freedom of Information Act 2000. This Act, which came into effect in January 2005, creates duties for a public authority, when requested to provide information, to confirm whether it holds the information and to communicate it to the applicant. The right is subject to a large number of exemptions; decisions may be enforced by the Information Commissioner and then appealed to the Information Tribunal, both of which have wide powers to decide whether the information is covered by an exemption and should or should not be disclosed. There is a further appeal from the Tribunal to the courts limited to points of law.

The BBC and other public service broadcasters are included in the list of public authorities to which the Act applies; however, they are only public authorities "in respect of information held for purposes other than those of journalism, art or literature". In this case, an application was made for an internal report which the BBC had commissioned on its coverage of the Middle East; this was refused, as the Corporation considered it to be held for the purposes of journalism. The applicant applied to the Information Commissioner, who upheld the BBC's view, but this decision was reversed by the Information Tribunal. However, the High Court and the Court of Appeal held that the Commissioner and the Tribunal had had no power to decide the case, as the question of whether a body was a public authority fell outside the scope of the appeal rights; it could only be challenged in the courts by judicial review. This would give the courts only limited powers to overturn the decision, for example if it was unlawful or unreasonable.

By a three-two majority, the House of Lords held that the Information Commissioner had the power to decide whether or not the information held by the BBC was covered by the Act and his decision could be appealed to the Information Tribunal. The majority (Lords Phillips, Hope and Neuberger) considered that the application had been made to the BBC as a public authority, but that information could be excluded from the rights provided by the Act if it was held for journalistic purposes. It was more appropriate that any challenge to the decision be decided by a specialist tribunal than by the courts. The minority (Lord Hoffman and Baroness Hale) considered that the BBC was not a public authority at all in relation to information held for journalistic purposes and that it was appropriate

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for the courts, rather than the Tribunal, to decide the meaning of “public authority” as a question of law.

This decision concerned only the procedure for challenging a decision as to whether the BBC was a public authority in these circumstances. The case has now been sent to the Administrative Court, as if on appeal from the Information Tribunal, for the court to determine whether the report actually constituted information held for purposes of journalism.

Sugar v British Broadcasting Corporation [2009] UKHL 9

http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090211/sugar-1.htm

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