

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 16 November 2009

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

### Summary

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The complainant submitted a request to the BBC for information concerning message boards and in particular the decision to remove "The Great Debate". The BBC considered that this information fell outside the scope of the Act by virtue of Schedule 1 of the Act as it was held for the purposes of 'journalism, art or literature'. The Commissioner's decision is that the BBC correctly determined that the information is held to a significant extent for these purposes and therefore the BBC is not obliged to comply with Parts I to V of the Act.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 10 March 2007, the complainant submitted the following request to the British Broadcasting Corporation (the BBC):

*"copies of all memos, emails, transcripts other documents etc. between BBC managers, and between the government and the BBC, which show how and why the BBC has come to its present conclusions on the matter described to you in this email.*

The email referred to the closure of a message board entitled "The Great Debate" and the moderation of the "Today" message boards.

3. The BBC responded on 13 March 2007 explaining that the requested information was not covered by the Act. The BBC stated that the request fell outside the scope of the Act because the BBC is covered by the Act only in respect of information held for purposes other than those of journalism, art or literature. The BBC stated that it was therefore not obliged to supply information held for the purposes of creating its output or information that supports and is closely associated with these creative activities. In the alternative the BBC stated that the information was exempt under the Act, although it failed to specify what sections of the Act applied.

## The Investigation

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### Scope of the case

4. On 13 March 2007, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner to consider the refusal by the BBC to release the information requested.
5. The complainant's request was contained in an email to the BBC of 10 March 2007 in which the complainant expressed concern over the use of message boards within the BBC. Specifically the complainant queried the removal of "*The Great Debate*" message board and the moderation of the "*Today*" message board. The complainant explained in an email to the Commissioner of 9 November 2008 that his request, whilst referencing the two message boards aboard, was intended to be a request for all information held on the use of message boards in general. The details of this email are discussed in paragraph 9 – 13 below.

### Chronology

6. Unfortunately there was a delay of 12 months before the Commissioner was able to begin his formal investigation. On 10 March 2008, the Commissioner wrote to the BBC and sought further arguments from the BBC in respect of its reliance on the derogation and which exemptions in the Act it would rely on to withhold the information requested should the Commissioner conclude that the derogation did not apply.
7. The Commissioner contacted the BBC on a number of occasions requesting a response in relation to these matters. The only responses that the Commissioner received from the BBC were communications confirming that a response was being prepared and same would be forwarded to the Commissioner as soon as possible. The Commissioner had no alternative but to issue an Information Notice to compel the BBC to provide a response to his queries, and this was issued on 23 October 2008.

8. The BBC provided a response to the Commissioner on 5 November 2008. The BBC provided additional arguments as to why it felt that the derogation applied to the information requested.
9. The Commissioner wrote to the complainant on 6 November 2008 to seek clarification as to the nature of his information request.
10. On 9 November 2008, the complainant contacted the Commissioner and clarified his request as follows:

*QUESTION 1*

*"To what extent were the BBC influenced by the government, so that the BBC changed the way the message boards worked – essentially removing the opportunity for users to post their own original ideas and thereby curtailing the free exchange of views between users in mainstream forums (typically but not exclusively The Great Debate and the Today boards which were closed down).*

*Could the BBC supply copies of any available communications between the government and the BBC, and the BBC and the government which show how and why the opportunity for licence payers to engage in 'Freedom of Speech' was dispersed and diluted by diversion to a number of unremarkable locations.*

*QUESTION 2*

*Could the BBC supply copies of any correspondence between BBC managers and or staff which shed light on why the message board arrangements were changed to curtail and regulate genuine 'Freedom of Speech', (typically, but not necessarily exclusively, by removal of the type of board described in question one). This will also include the way in which the residue of what had been 'Freedom of Speech' was dispersed and diluted by diversion to a number of unremarkable locations."*

11. The Commissioner contacted the BBC on 10 November 2008 regarding the interpretation of the complainant's request. The Commissioner also asked for further arguments relating to the exemptions cited by the BBC.
12. The BBC responded to the Commissioner on 17 December 2008. The BBC provided comments regarding the interpretation of the complainant's request. The BBC also provided additional arguments and supporting documents in relation to the Commissioner's query regarding the application of any exemptions to the information requested.
13. The Commissioner contacted the BBC on 19 January 2009. The Commissioner indicated what he believed to be the objective meaning of the complainant's request and required the BBC's comments as to how the derogation applied to this request.

14. Following a re-organisation within the Commissioner's office, this case was transferred to the Northern Ireland Regional Office. Regrettably, it took some time for the case to be re-assigned and for the investigation to continue.
15. The Commissioner contacted the BBC on 28 August 2009 and asked it to provide a written response in relation to the Commissioner's correspondence of 19 January 2009. The Commissioner accepted that the BBC had initially been informed that the response was not required, but upon further examination of the case, the Commissioner was of the opinion that the BBC should provide a response as directed.
16. The Commissioner contacted the BBC on 8 September 2009 to remind it that a response was to be provided on or before 16 September 2009.
17. The Commissioner contacted the BBC on 17 September 2009. The Commissioner noted that no response had been forthcoming within the timeframe previously given. The Commissioner asked the BBC to provide him with a response on or before 2 October 2009.
18. In October 2009 The High Court handed down its judgments in relation to two appeals; BBC v Steven Sugar and the Information Commissioner<sup>1</sup> (EW2349) and the BBC v the Information Commissioner<sup>2</sup> (EW2348), which addressed the application of the derogation by the BBC. Both judgements found in favour of the BBC. The Commissioner has applied the findings of the two judgments to the facts of this case.

### Findings of fact

19. As part of the BBC's online content, the BBC hosts web pages where registered users can post messages on message boards – sometimes referred to as 'users'. These message boards are available for non-members to read as well as subscribed members of the message boards.
20. Only registered users can post messages and acceptance of the "Terms of Use"<sup>3</sup> of BBC Online is a requirement of registrations. There are also further rules and guidelines available for users<sup>4</sup> and the BBC's Editorial Guidelines addresses the moderation of these message boards<sup>5</sup>.
21. The BBC's message boards may be moderated in one of three ways:
  - Pre-moderation is where material cannot be accessed by visitors to the site until the moderator has seen it and decided it is suitable for placing on the Internet.

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<sup>1</sup> BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)

<sup>2</sup> BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

<sup>3</sup> [www.bbc.co.uk/terms](http://www.bbc.co.uk/terms)

<sup>4</sup> [www.bbc.co.uk/messageboards/newguideline/rules\\_guidelines.shtml](http://www.bbc.co.uk/messageboards/newguideline/rules_guidelines.shtml)

<sup>5</sup> [www.bbc.co.uk/guidelines/editorialguidelines/onguide/interacting/moderation.shtml](http://www.bbc.co.uk/guidelines/editorialguidelines/onguide/interacting/moderation.shtml)

- Post-moderation is where the moderator sees the material, and decides whether it is suitable to remain on the site, after it has been posted.
- Reactive moderation is where visitors to the site alert the moderator to an inappropriate or offensive message<sup>6</sup>.

22. At the time that the decision was taken to close *The Great Debate*, the BBC informed users that other forums offered a very similar experience such as the 5live programme ([www.bbc.co.uk/cgi-perl/h2/h2.cgi?board=fivelive](http://www.bbc.co.uk/cgi-perl/h2/h2.cgi?board=fivelive)) or through the *Today* programme ([www.bbc.co.uk/cgi-perl/h2/h2.cgi?board=today](http://www.bbc.co.uk/cgi-perl/h2/h2.cgi?board=today)).

## Substantive Procedural Matters

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### Jurisdiction

23. Section 3 of the Act states:

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

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”.

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.”

The BBC has argued that the construction of section 3 and 7 and Schedule 1 means that the BBC is not a public authority where it holds the requested information for the purposes of journalism, art or literature. Consequently, the Commissioner would not have jurisdiction to issue a decision notice given the wording of section 50.

24. This issue has been considered by the House of Lords in the case of *Sugar v BBC*<sup>7</sup>. By a majority of 3:2, the Lords found in favour of the Appellant, Mr Sugar, in concluding that the Commissioner does have jurisdiction to issue decision notices regardless of whether the information requested is derogated. The Commissioner adopts the reasoning set out by Lord Hope at paragraphs 54 and 55 where he said:

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<sup>6</sup> <http://www.bbc.co.uk/guidelines/editorialguidelines/edguide/interacting/gamesusergenera.shtml>

<sup>7</sup> *Sugar v BBC* [2009] UKHL 9

*“54. Section 7(1) says 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 the Act applies to any other information held by the authority. What it does say is that, in that case, the authority is a hybrid – a “public authority” within the meaning of the Act for some of the information that it holds and not a “public authority” for the rest. The technique which it uses is a different one. Taking the words of the subsection exactly as one finds them, what it says is that nothing in Parts I to V of the Act applies to any other “information” held by “the authority”. This approach indicates that despite the qualification that appears against its name in Schedule 1, the body is a public authority within the meaning of the Act for all of its purposes. That, in effect, is what section 3(1) of the Act provides when it says what “public authority” means “in this Act”. The exception in section 7(1) does not qualify the meaning of “public authority” in section 3(1). It is directed to the information that the authority holds on the assumption that, but for its provisions, Parts I to V would apply because the holder of the information is a public authority.*

*55. The question whether or not Parts I to V apply to the information to which the person making the request under section 1(1) seeks access depends on the way the public authority is listed. If its listing is unqualified, Parts I to V apply to all the information that it holds. If it is listed only in relation to information of a specified description, only information that falls within the specified description is subject to the right of access that Part 1 provides. But it is nevertheless, for all the purposes of the Act, a public authority”.*

25. Therefore, the Commissioner has jurisdiction to issue a decision notice on the grounds that the BBC remains a public authority. 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.
26. 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

27. The scope of the derogation has been considered by the High Court in the cases of *BBC v Steven Sugar and the Information Commissioner [EW2349]*<sup>8</sup> and the *BBC v the Information Commissioner [EW2348]*<sup>9</sup>. In both cases, Mr Justice Irwin stated:

*“My conclusion is that the words in the Schedule mean the BBC has no obligation to disclose information which they hold to any significant extent for the purposes of journalism, art or literature, whether or not the information is also held for any other purposes. The words do not mean that the information is disclosable if it is held for purposes distinct from*

<sup>8</sup> *BBC v Steven Sugar and the Information Commissioner* [2009] EWHC 2349 (Admin)

<sup>9</sup> *BBC v Information Commissioner* [2009] EWHC 2348 (Admin)



*journalism, art or literature, whilst it is also held to any significant extent for those purposes. If the information is held for mixed purposes, including to any significant extent the purposes listed in the Schedule or one of them, then the information is not disclosable.” (para 65 EW2349 and para 73 EW2348)*

28. The Commissioner interprets the phrase “to any significant extent”, when taken in the contents of the judgment as a whole, to mean that where the requested information is held to a more than trivial or insignificant extent for journalistic, artistic or literary purposes, the BBC will not be obliged to comply with Parts I to V of the Act. This is the case even if the information is also held for other purposes.

29. For completeness, the Commissioner considers that where information is held for non-journalistic/artistic/literary purposes and is only held to a trivial or insignificant extent for the purposes listed in Schedule 1, then the BBC will be obliged to comply with its obligations under Parts I to V of the Act.

30. Thus, provided there is a relationship between the information and one of the purposes listed in Schedule 1, then the information is derogated. This approach is supported by Mr Justice Irwin’s comments on the relationship between operational information, such as programme costs and budgets, and creative output:

*“It seems to be difficult to say that information held for ‘operational’ purposes is not held for the ‘purposes of journalism, art or literature.’” (para 87 EW2348)*

31. The information relevant to the request need not be journalistic, artistic or literary material itself. As explained above, all that needs to be established is whether the requested information is held to any significant extent for one or more of the derogated purposes of art, literature or journalism.

32. The two High Court decisions referred to above related to information falling within the following categories:

- Salaries of presenters/talent
- Total staff costs of programme
- Programme budgets
- Programme costs
- Payments to other production companies for programmes
- Payments to secure coverage of sporting events and other events
- Content of programme/coverage of issues within programmes

In relation to all of the above, Mr Justice Irwin found that the information was held for operational purposes relating to programme content and therefore to a significant extent for the purposes of journalism, art or literature.

33. The Commissioner recognises that the High Court cases did not specifically consider information related to BBC online content and message boards.

Nevertheless, the Commissioner considers the comments made by Mr Justice Irwin regarding the need for a relationship between the requested information and the derogated purposes are relevant and therefore he has considered them here.

34. The information requested in this case relates to message boards contained on BBC online. Where information is not of a journalistic, artistic or literary nature, it can still be considered as derogated if it is held to any significant extent for these purposes. The Commissioner has considered the withheld information at length and is of the view that there is a significant relationship between this information and journalistic purposes in terms of creativity, programme content and journalistic output. Any discussions, for example, in relation to editorial decisions to moderate, limit, extend, or restrict message boards would clearly fall within the remit of journalistic output. The BBC's online website content related to programmes (e.g. BBC news) falls within the category of creative output and the message boards are a form of user interaction that is akin to programme content. The BBC is hosting a public discussion online, in the same way that it hosts discussion and debate in television and radio programmes. The message boards the BBC hosts are not developed in isolation and are closely linked to programmes and themes from programme content. If this information were to be released, it would threaten the space programme makers need to decide on the creation and content of particular message board forums. Even though the messages themselves are user-generated content, the range and variety of message boards, how they will be monitored and removal of inappropriate content are all part of the editorial and creative process.
35. In view of the above, the Commissioner has found that the request was for information held for the purposes of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of the Act.

## **The Decision**

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36. 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 Parts I to V of the Act in this case.

## **Steps Required**

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37. The Commissioner requires no steps to be taken.



## Right of Appeal

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38. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 served.

**Dated the 16th day of November 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### General right of Access

**Section 1(1)** provides that –

“Any person making a request for information to a 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 that information communicated to him.”

**Section 1(2)** provides that –

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

**Section 1(3)** provides that –

“Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with the further information.”

**Section 1(4)** provides that –

“The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

**Section 1(5)** provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

**Section 1(6)** provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.