

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 29 October 2009

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

### Summary

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The complainant requested the percentage of complaints made to the British Broadcasting Corporation (the "BBC") that are upheld. The public authority refused to provide the requested information claiming that it was outside the scope of the Freedom of Information Act ("the Act") because it was held for the purposes of journalism, art or literature. It was stated that the information was used for reviewing audience reaction to programme content and informing decisions of how that content is produced and broadcast in the future. The Commissioner is satisfied that the information in question was held for the purpose of journalism, art and literature. Therefore the BBC was 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 the BBC has complied with its duties under the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

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2. The complainant made the following request to the BBC via the BBC website on 17 November 2008:

*“What percentage of complaints to the BBC are upheld?”*

On 18 November 2008 the BBC replied to the complainant. In its response the BBC did not address the request for the percentage of complaints to the BBC upheld as one total figure. Instead it considered the information it held in relation to each stage of its three-tier complaints handling process from which the requested information would have to be extrapolated. It explained to the complainant that material related to complaints at the first two tiers was derogated because it was held for the purposes of art, journalism and literature to inform editorial choices and future output. It specifically argued that such information was considered to be derogated because it was:

*“...held for the purposes of creating the BBC’s output or information that supports or is closely associated with these creative activities.”*

3. However, it explained that information about complaints at the third tier stage of the process was subject to the Act. At that point the BBC appeared to be applying the ‘dominant purpose’ test and it concluded that information at the third tier stage was held for the dominant purpose of enabling the BBC Trust to undertake one of its regulatory functions under the Charter, ensuring that complaints made by viewers have been properly handled.
4. The BBC disclosed information regarding the first and second tier complaints outside of the Act and advised the complainant that information about complaints upheld at the third tier stage was available on its website. It explained that the third tier information it considered to fall within the scope of the Act was in any event exempt under section 21 because it was accessible on its website.
5. On 21 November 2008 the complainant wrote to the BBC stating that she could not see how the percentage of complaints upheld related to,

*“...programme content and informing decisions on how that content will be produced and broadcast in the future”.*

6. The BBC responded on the same day to say that its position with regard to information about first and second tier complaints was that it had been provided voluntarily outside of the Act. It maintained its position that the information held was derogated. It also explained that in relation to information that the BBC considered to be derogated the right of appeal was to the Information Commissioner. In relation to the third tier information which it deemed to be covered by the Act but exempt under section 21, it offered an internal review. The complainant does not appear to have submitted a request for internal review in this case however the Commissioner has used his discretion to investigate without one.

## The Investigation

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### Scope of the case

7. On 26 November 2008 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the BBC was obliged to supply the requested information.

### Chronology

8. Having reviewed the request and the correspondence supplied by the complainant, the Commissioner decided that it was not necessary to contact the BBC for further information or arguments regarding its handling of the request.
9. On 9 October 2009 the High Court handed down its judgments in relation to two appeals it had heard involving the application of the derogation by the BBC. Both judgments found in favour of the BBC. The Commissioner has applied the findings of the two judgments to the facts of this case.

## Analysis

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### Substantive Procedural Matters

#### Jurisdiction

10. 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 sections 3, 7 and Schedule 1 means that the BBC is not a public authority where they do not hold the requested information or where they hold the 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.

11. This issue has been considered by the House of Lords in the case of *Sugar v BBC*<sup>1</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 that has been requested is derogated. The Commissioner adopts the reasoning set out by Lord Hope at paragraphs 54 and 55 where he said:

*“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 not 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 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 I provides. But it is nevertheless, for all the purposes of the Act, a public authority”.*

12. 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 1 to V in respect of that information.
13. 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.

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<sup>1</sup> *Sugar v BBC* [2009] UKHL 9

## Derogation

14. The scope of the derogation has been considered by the High Court in the cases of the BBC v Steven Sugar and the Information Commissioner (EW2349)<sup>2</sup> and the BBC v the Information Commissioner (EW2348).<sup>3</sup> In both decisions 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 other purposes. The words do not mean that the information is disclosable if it is held for purposes distinct from 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 EA2349 and para 73 EW2348).*

15. The Commissioner interprets the phrase “to any significant extent”, when taken in the context of the judgement 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.
16. 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.
17. Thus, provided there is a link 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 me difficult to say that information held for ‘operational’ purposes is not held for the ‘purposes of journalism, art or literature.’” (para 87 EW2348)*

18. 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.

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<sup>2</sup> BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)

<sup>3</sup> BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

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

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

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

21. As explained above, when responding to the request initially the BBC applied the dominant purpose test to the information it held from which the percentage of complaints upheld would have been derived. The Commissioner recognises that the High Court cases did not specifically consider information related to complaints. However, he believes it is necessary to apply the comments made by Mr Justice Irwin regarding the need for a relationship between the requested information and the derogated purposes to the facts of this case.

22. The Commissioner notes the complainant's argument that the information is held for purely administrative purposes. However in his view information about complaints, including the outcomes is held by the BBC to a significant extent for the purposes of art, journalism or literature notwithstanding that it may also be retained for other non-derogated purposes. Complaints information at all three stages of the process is used to inform the BBC's editorial choices and future output and the percentage requested by the complainant would be derived from that information. The Commissioner is further satisfied that top level statistical information like that was requested would in itself trigger and inform reviews by the BBC of its output and overall editorial direction. In his view this constitutes a significant journalistic, artistic or literary purpose.

23. In view of the above, the Commissioner has found that the request is for information held for the purpose 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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24. 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

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25. The Commissioner requires no steps to be taken.

## Right of Appeal

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26. 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 29<sup>th</sup> day of October 2009**

**Signed .....**

**Jo Pedder  
Senior Policy Manager**

**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 that 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”.”