

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 9 December 2009**

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

### Summary

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The complainant requested information from the British Broadcasting Corporation (the "BBC") regarding the British Academy of Film and Television Awards (BAFTA) and the system known as "fast tracking". The BBC disclosed some of the requested information but withheld part of it, citing section 41 (information provided in confidence), section 43(2) (commercial interests) and section 40(2) (personal information) of the Freedom of Information Act (the "Act"). The BBC subsequently altered its position and claimed that the withheld information fell outside the scope of the Act. The Commissioner is satisfied that the withheld information is held by the BBC to a significant extent for the purposes of journalism, art or literature. Therefore the BBC was not required to comply with Parts I to V of the Act in relation to the withheld information.

### 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.

### Background

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2. Each year broadcasters can put forward programmes to BAFTA that they are most proud of in each of the television award categories. There is a fee of £235 plus VAT per entry, excluding performance categories which are free. BAFTA then circulates a list of these programmes to the members who cast their votes for those programmes and performances which they think are best. Members can vote for up to 6 programmes or performances in each category. BAFTA then informs the broadcaster of the top six programmes voted for by the membership

in each category and gives each broadcaster the chance to add a restricted number of programmes per category into each list – this is categorised as “Broadcaster Entries”. The number of entries is dependent on how many channels the broadcaster has, for example, the BBC is allowed to submit 3 entries one for BBC 1, one for BBC 2 and 1 for either BBC 3 or 4 for a fee of £535 (for programmes not previously entered).

## The Request

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3. The complainant made the following requests for information to the BBC on 1 May 2009:

*“My request is about the BAFTA television awards and a system known as fast-tracking. Under this scheme the BBC and other broadcasters can pay a fee to guarantee that a programme is included on a list of nominees which is then presented to BAFTA voters. When the issue of fast tracking last appeared in the media in 2003 the price paid to fast track programmes was £500.*

*1....Could the BBC please state if it has ever “fast tracked programmes” to ensure their inclusion in particular Bafta categories and or onto particular Bafta lists. These categories/lists will include but will not be limited to the final short lists.*

*2....Could the BBC please provide a full list of programmes that it has fast tracked in each of the following years – 2006, 2007, 2008, 2009. In each case can you name the programme, specify the fee paid and state which category and or short list and or long list the programme was fast tracked into.*

*3....Could the BBC provide any correspondence with Bafta (including emails) which relates in any way to the issue of fast tracking. Please note I am only interested in correspondence which relates to the period from January 1 2008 to the present day.*

*4....Does the BBC hold any information which relates to other broadcasters fast tracking programmes. If so can it please provide this? Please note that I am only interested in information relating to the period January 1 2008 to the present day.”*

4. The BBC responded on 24 June 2009:

- Question 1 was answered in the affirmative and a description of ‘fast-tracking’ and ‘Broadcaster Entry’ (see Background) was given.
- Question 2 – spreadsheets were provided for the years requested but some of the information was withheld.
- Question 3 – the BBC exempted certain parts of the requested information after consultation with BAFTA and it was explained that the award process

needed to be conducted in strict confidence. As a result the BBC withheld the names of programmes and performers which constituted Broadcaster Entries.

A chain of emails between BAFTA and the BBC was also withheld under section 41 and section 43. The BBC explained that BAFTA provide certain interim voting information to the main broadcasters during the course of the awards process, on a confidential basis, so that they can decide to what extent they wish to participate in the Broadcaster Entry stage. That information is not available to the BAFTA membership, the general public or anyone who is not involved in the administration of the voting process.

The BBC went on to say that any withheld information not exempt under section 41 would be exempt under section 43(2) as, "disclosure would prejudice the commercial interests of BAFTA". The public interest in maintaining the exemption outweighed disclosure as it was felt that disclosure would have a negative impact on the funding model for the BAFTA awards.

The names of individuals who were fast-tracked and any programme details that would lead to their identification were withheld under section 40(2). The BBC argued that the individuals who were nominated would not expect their details to be revealed to third parties and therefore disclosing information that would reveal their identity would be unfair and would therefore breach the first data protection principle.

- Question 4 – the BBC confirmed that it did not hold any information regarding other broadcasters fast tracking programmes.

5. On 7 July 2009 the complainant asked for an internal review on several grounds:

- He objected to the withholding of the chain of emails and the failure to disclose the names of the fast-tracked programmes
- He argued that, as both BAFTA and its members were aware of the Broadcaster Entry system, he did not see how this would have an adverse effect on the awards and how people vote
- Similarly the broadcasters knew about this entry system and the complainant could not see how further disclosure would undermine the process
- The complainant had not asked for the identification of individuals but individual programmes.
- He did not accept that individuals at the BBC and BAFTA were unaware that their communications might be disclosed

6. The BBC's internal review was dated 13 August 2009. It noted that the BBC had consulted BAFTA in line with Part IV of the FOI Code of Practice, BAFTA had asked for the exemptions in section 41 and 43 to be applied. The BBC had followed this application but had released some of the correspondence. The reviewer highlighted the fact that section 41 was engaged regarding correspondence from BAFTA to the BBC but that this was not the case in relation to information generated by the BBC. The BBC's decision to withhold the remainder of the information under section 43(2) was also upheld as was the

public interest test in favour of withholding the requested information. It was pointed out that BAFTA are not a public authority. Section 40 was not considered.

## The Investigation

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### Scope of the case

7. On 22 August 2009 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - That the BBC had declined to provide the information he sought.
  - That the public in general, and BAFTA members in particular, have a right to know which programmes are only included on shortlists because of the Broadcaster Entry system.
  - That, although he was not criticising the individual concerned, he was unhappy that the review was carried out by someone who works in the Freedom of Information Unit at the BBC.
8. As explained below, the Commissioner has focussed his investigation on whether the information that the BBC withheld from the complainant is held to a significant extent for the purposes set out in Schedule 1 of the Act. He has also limited his consideration to the information which relates to requests 2 and 3 and was withheld from the complainant.

### Chronology

9. On 24 November 2009, once this case was allocated for investigation and in light of recent High Court decisions relating to Schedule 1 of the Act which were handed down on 2 October 2009, the Commissioner asked the BBC to consider whether it now believed the information requested was held to a significant extent for the purposes of journalism, art or literature and therefore it was not obliged to comply with Parts I to V of the Act.
10. The BBC replied on 27 November 2009 confirming that it felt that the withheld information was outside the scope of the Act. It explained that, in the alternative it felt that section 41 and 43(2) would apply.
11. On 2 December 2009 the BBC provided some further information to support its position that the withheld information was outside the scope of the Act.

## Analysis

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### Substantive Procedural Matters

#### Jurisdiction

12. 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 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.

13. 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.*

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

*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”.*

14. 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.
15. 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

16. 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).*

17. The Commissioner interprets the phrase “to any significant extent”, when taken in the context 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,

<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)

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.

18. 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.

19. 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 me difficult to say that information held for 'operational' purposes is not held for the 'purposes of journalism, art or literature.'" (para 87 EW2348)*

20. 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.

21. 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

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.

22. The Commissioner recognises that the High Court cases did not specifically consider information related to BAFTA fast tracking. 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.

23. The information requested in this case relates to the decision by the BBC to nominate a programme for a BAFTA award and the costs associated with such nominations. The BBC has explained that it uses the BAFTA awards as one means of bringing particular creative content to the attention of new audiences.

The decision to nominate a programme also impacts on the way that it is promoted more generally because reference can be made in the BBC's advertising campaigns to the programme's nomination. This, in turn, can attract a new and wider audience to the programme. In view of this, the Commissioner is satisfied that there is a relationship between the withheld information and the BBC's creative output and that it is held to a significant extent for the purposes listed in Schedule 1 of the Act. This is notwithstanding that the information may also be held for other non-derogated purposes.

24. In light of the above, the Commissioner has found that the withheld information is held by the BBC to a significant extent for the purposes of journalism, art or literature and that it was not obliged to comply with Parts I to V of the Act in respect of that information. For this reason the Commissioner has not considered the application of the exemptions in sections 40, 41 or 43 further in this notice.

## **The Decision**

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25. The Commissioner's decision is that the withheld information is held by the BBC to a significant extent for the purposes of journalism, art or literature. Therefore the BBC was not obliged to comply with Parts I to V of the Act in relation to that information.

## **Steps Required**

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26. The Commissioner requires no steps to be taken.



## Right of Appeal

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27. 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 9<sup>th</sup> day of December 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”.”