

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 20 May 2010

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

### Summary

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The complainant requested information relating to the BBC's decision not to broadcast the Disasters Emergency Committee's (DEC) appeal for Gaza. The public authority refused to provide the information claiming that it was outside the scope of the Freedom of Information Act 2000 (the "Act") because it was held for the purposes of journalism, art or literature. It was stated that the information was used for creating the public authority's output or was closely associated with its creative activities. The Commissioner is satisfied that the information in question is held to a significant extent for the purpose of journalism, art or literature. Therefore the BBC was not required to comply with Parts I to V of the Act in relation to these requests.

### 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. In the event of major humanitarian crises 13 UK aid agencies form the Disasters Emergency Committee. If certain criteria are met and there is a justification for a public appeal the public broadcasters are

asked to consider broadcasting that appeal. On 24 January 2009 the Director General of the BBC set out his reasons for not broadcasting the Gaza Appeal saying that the decision was in line with the Corporation's broader approach to impartiality and appeals.

## The Request

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3. On 24 January 2009 the complainant made the following requests for information

*"I am making a freedom of information request under the FOIA 2005 with regard to the BBC's decision not to broadcast the DEC appeal for Gaza. I would like to see copies of any:*

- internal memos including those proposing to or informing others of a particular course of action*
- emails either internal to the BBC or with a third party*
- handwritten or typed notes of either (i) meetings (ii) other discussions including telephone discussions. Again this requests relates to both internal and external meetings and communication.*

*I am particularly focused on any written material that pertains to the internal BBC policy making process leading up to the decision not to broadcast the DEC appeal. This includes material in which the question of whether broadcasting the DEC appeal would infringe the BBC's reputation for impartiality is discussed. It also includes any material relevant to the BBC's claim that the situation in Gaza was too "volatile" to justify such an appeal.*

*I am also interested in any written material from a third party (or written material produced by the BBC which refers to the opinion of a third party) which was produced in advance of the BBC's decision not to broadcast the appeal and which relates to that third party's wish to influence the BBC's decision.*

*I am not particularly interested in any written material produced after 1200hrs (midday) on 24th January 2009."*

4. On 20 February 2010 the BBC responded stating that,

*"the information that you requested is not covered by the Freedom of Information Act 2000 ("the Act").*

*Your request falls outside the scope of the Act because information held by the BBC and the other public service broadcasters is only*

*covered by the Act if it is held for purposes "other than those of journalism, art or literature" (see Schedule 1, 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 1 might otherwise be exempt from disclosure because of the application of other provisions of the Act."*

5. The BBC went on to provide some general background information "outside the scope of the Act" which formed the basis for the decision not to broadcast. It expressed concerns that the aid could not be delivered for logistical reasons and did not want to ask the public for donations unless this situation improved. It was emphasised that the BBC would continue to cover the human side of the conflict across the news spectrum "in an objective and balanced manner". A link was provided to the BBC Trust's decision on the appeal.

## The Investigation

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### Scope of the case

6. On 10 March 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:
  - The general scope of the derogation. The complainant did not believe that any of the information he had requested could be defined as being held for the purposes of, "journalism, literature or art". He also did not believe that the phrase "for the purposes of" is synonymous with the phrase "related to" as no information held by the BBC News division would be covered in relation to the Act.
  - His request related primarily to the decision about whether or not to broadcast a DEC humanitarian appeal rather than to the BBC's own journalistic output.
  - That his request was substantially different from the Balen Report request which he felt was more directly related to the BBC's journalistic output. He did not accept that an assessment as to the logistical problems of humanitarian aid entering Gaza could be said to be for the purposes of journalism, art or literature. He also suggested that a news organisation was not in a position to judge such an issue.

7. The Commissioner has considered whether the BBC was correct to refuse the complainant's requests on the basis that they were for information held by the BBC to a significant extent for the purposes of art, journalism or literature. He has particularly considered whether any information falling within the scope of the requests regarding the logistical concerns with aid being delivered, is held by the BBC to a significant extent for the purposes of journalism, art or literature.

### **Chronology**

8. On 18 March 2009 the Commissioner wrote to the BBC outlining the complaint that had been made.
9. Having reviewed the requests 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 requests.
10. On 2 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.
11. The complainant was invited to withdraw his complaint on 4 November 2009. When he did not receive this correspondence the Commissioner wrote again on 13 January 2010 explaining that he believed the requests to be for information that was derogated.
12. The complainant replied to this letter on 21 January 2010. In this email he accepted that the High Court judgment was unequivocal in respect of the decision not to broadcast the Gaza Appeal, however he disputed the Commissioner's interpretation of the High Court ruling especially with regard to the BBC's judgement that there was, "*insufficient access for humanitarian aid to the Gaza strip to justify the DEC appeal*". He did not believe that such a decision was journalistic. The argument put forward was that the appeal was for humanitarian reasons and that the BBC's decision not to show the appeal could not, as a result, be construed as journalistic.
13. The Commissioner replied on 27 January 2010 reiterating the points he had previously made concerning the derogation.
14. On 22 February 2010 the complainant wrote back expressing his belief that the derogation did not apply to some information within the scope of his requests as follows:

*"In short, my argument is not that Mr Justice Irwin was wrong but rather that his judgement is not relevant (or at the very least not clear) in relation to release of information relating to the operational judgements made regarding humanitarian access."*

15. On the same day the Commissioner replied to the complainant providing him with links to several Decision Notices that were of relevance to this case and repeating his view that the requested information was derogated.
16. The complainant responded on 23 March 2010 disagreeing with the Commissioner and asking him to focus particularly on the information relating to the BBC's assessment that the access restrictions into Gaza meant that humanitarian aid could not be effectively delivered. To support his argument he quoted paragraph 87 of EWHC 2348 <sup>1</sup>:

*"This does not mean that everything the BBC does is done for the purpose of journalism, art or literature. As Davis J said, that would be far too broad a reading."*

The complainant also quoted paragraph 80 of EWHC 2349<sup>2</sup> where the judge stated that managerial restructuring at the BBC which involved the commissioning of a report as to how cost-cutting could be achieved would be harder to argue as held "for the purposes of journalism" even though this would be likely to have a significant effect on journalism.

## Analysis

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### Substantive Procedural Matters

#### Jurisdiction

17. 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:

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Found at:

<sup>1</sup> <http://www.bailii.org/ew/cases/EWHC/Admin/2009/2348.html>

Found at:

<sup>2</sup> <http://www.bailii.org/ew/cases/EWHC/Admin/2009/2349.html>

“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.

18. This issue has been considered by the House of Lords in the case of *Sugar v BBC*<sup>3</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.”*

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<sup>3</sup> *Sugar v BBC* [2009] UKHL 9

*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”.*

19. 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.
20. 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**

21. 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>4</sup> and the BBC v the Information Commissioner [EW2348].<sup>5</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).*

22. 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, artistic or literary purposes the BBC

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<sup>4</sup> BBC v Steven Sugar & The Information Commissioner [2009] EWHC 2349 (Admin)

<sup>5</sup> BBC v The Information Commissioner [2009] EWHC 2348 (Admin)

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.

23. 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.
24. 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)*

25. 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.
26. 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.

27. The information requested in this case is about the BBC's decision not to broadcast the Gaza appeal. The BBC suggested to the complainant that its reading of the logistical problems on the ground in delivering aid, leaving aside the issue of whether the BBC was qualified to make that decision, which is beyond the Commissioner's remit, was one of the reasons why the DEC appeal was not shown. The complainant's



view is that the BBC was not in a position to make this assessment and that the DEC made the broadcast for humanitarian reasons which inevitably meant that the same information in the BBC's hands could not be transmuted into journalistic information.

28. However, the Commissioner is persuaded that, information held by the BBC which informed or related to its decision not to broadcast the appeal has a definite relationship to the derogated purposes. In his view material that may be held by the DEC for other reasons, is not prevented from being held to a significant extent for the derogated purposes when it is in the BBC's possession. As explained previously, on 24 January 2009 the Director General explained the reasons behind the BBC's decision not to broadcast the appeal on its website. He explained that concern about the delivery of aid was one factor that had led to an editorial decision not to show the appeal but that the situation could change. He also emphasised the point that impartiality was another factor and that "senior leaders in BBC Journalism"<sup>6</sup> had given advice relating to the decision not to show the appeal. The Commissioner is satisfied that decisions made by the BBC about what output to broadcast are editorial. In his view, information used to inform those decisions or which records the reasons for them, is held to a significant extent for the purposes of journalism, art of literature.
29. In view of the above, the Commissioner has found that the requests are for information held to a significant extent 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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30. The Commissioner's decision is that as the requests are for information held to a significant extent for the purpose 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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31. The Commissioner requires no steps to be taken.

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Found at:

<sup>6</sup> [http://www.bbc.co.uk/blogs/theeditors/2009/01/bbc\\_and\\_the\\_gaza\\_appeal.html](http://www.bbc.co.uk/blogs/theeditors/2009/01/bbc_and_the_gaza_appeal.html)

## Right of Appeal

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32. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

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 sent.

**Dated the 20<sup>th</sup> day of May 2010**

**Signed .....**

**Jo Pedder  
Group 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”.”