

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 28 June 2010**

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

### Summary

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The complainant made requests to the BBC for any communications or information generated relating to the handling of his complaint to BBC Editorial Complaints Unit and subsequent appeal to the BBC Trust's Editorial Standards Committee. His complaints related to an edition of the programme 'Panorama'. The BBC refused to comply with some of the requests on the basis that they were vexatious and applied section 14(1) of the Act, and stated that the remaining requested information was outside the scope of the Act. In view of two High Court decisions handed down on 2 October 2009 the BBC amended its original position and argued that all of the information relevant to the requests was outside the scope of the Act. The Commissioner's decision is that the BBC correctly determined that the requested information is held to a significant extent for the purposes of art, journalism or literature 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 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. The complainant has explained that the BBC broadcast an edition of 'Panorama' ('What's Next For Craig?') on 12 November 2007. The programme concerned the use of stimulant medication to treat children with attention-deficit hyperactivity disorder (ADHD).
3. The complainant submitted complaints to the BBC about the content of the programme on the basis that it was misleading and in breach of editorial standards and the Ofcom broadcasting code. The complaint was investigated by the BBC's Editorial Complaints Unit, and the complainant subsequently appealed part of the findings to the BBC Trust's Editorial Standards Committee. He also subsequently submitted a series of requests for information about the BBC's handling of his complaint, including records and correspondence exchanged or obtained in the course of considering the complaints, and the actions and processes of the Editorial Complaints Unit and Editorial Standards Committee.

## The Request

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4. The complainant wrote to the BBC on 22, 26 and 31 July 2009 and submitted a series of requests for information. The full requests are listed as requests A, B, and C in Annex A of this Decision Notice.
5. The BBC responded to requests A, B and C on 21 August 2009 and stated that it was of the view that requests A and B were vexatious and it was therefore not obliged to provide the material sought. The BBC applied section 14(1) of the Act and explained that it considered the number of requests submitted by the complainant, some of them repeated, could fairly be characterised as obsessive and would impose a significant burden on the BBC in terms of compliance. In relation to request C, the BBC stated that the requested information fell outside the scope of the Act because it was information held for the purposes of journalism, art or literature.
6. The BBC also explained that it does not offer an internal review where a request is considered to be vexatious or is not covered by the Act.

## The Investigation

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### Scope of the case

7. On 24 August 2009 the complainant contacted the Commissioner to complain about the way his requests for information had been handled.

### Chronology

8. On 2 October 2009 the High Court considered 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) that addressed 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.
9. In view of the aforementioned High Court decisions, which are binding on the Commissioner, he reverted to the BBC and requested clarification about its position in respect of the requests. He asked whether it was seeking to maintain its position that it was not obliged to comply with the requests by virtue of section 14(1) or if the BBC was now seeking to argue that all of the relevant material fell outside the scope of the Act.
10. On 8 February 2010 the BBC confirmed that, in light of the High Court judgments it now considered that all of the information relevant to requests A, B and C fell outside the scope of the Act because it was held to a significant extent for the purposes of journalism, art or literature. The Commissioner has therefore considered whether all of the material relevant to requests A, B and C fell outside of the Act.

## Analysis

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### Substantive Procedural Matters

#### Jurisdiction

11. Section 3 of the Act states:

“3. – (1) In this Act “public authority” means –

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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)

- (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.

12. 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*

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

*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".*

13. 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.
14. 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**

15. 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*

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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)

*them, then the information is not disclosable.” (para 65 EA2349 and para 73 EW2348).*

16. 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 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.
17. 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.
18. 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)*

19. 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.
20. 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.

21. The Commissioner recognises that the High Court cases did not specifically consider information related to complaints about broadcast content or subsequent appeals against the outcomes of those complaints. 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. The information requested in this case is communications and any other documented information generated in connection with the handling of a complaint to the BBC Editorial Complaints Unit and subsequent appeal to the BBC Trust's Editorial Standards Committee. The complaint and appeal related to allegations that aspects of an edition of the 'Panorama' programme were inaccurate.
22. The Commissioner considers that complaints received about the content of programmes, in this case alleged inaccuracies, provide the BBC with a source of feedback about the content of its programming. Information relating to complaints and their outcomes is used to inform future creative decisions, including decisions about programme content, scheduling, and the BBC's overall editorial direction. The Commissioner therefore considers that information about complaints and their outcomes is held to a significant extent for the purposes of journalism, art or literature because it is information used to inform creative and editorial decisions.
23. The Commissioner notes that the information requested at requests 3 and 4 of request B in this case relates to the Editorial Standards Committee's consideration of an appeal against a decision by the BBC's Editorial Complaints Unit regarding a complaint about a BBC 'Panorama' television programme.
24. The Commissioner is further satisfied that there is a relationship between the derogated purposes and information regarding appeals about complaints and their outcomes. This includes appeals about complaints to the Editorial Standards Committee. The Editorial Standards Committee is a committee responsible for assisting the BBC Trust in securing editorial standards, including the determination of editorial complaints on appeal. As such its determinations also impact upon editorial decisions and future BBC programme content. Paragraph 8.17 of the Editorial Standards Committee's Terms of Reference states:  
  
"8.17 Consider appeals against decisions and actions of the BBC's Editorial Complaints Unit in relation to complaints about programmes

transmitted or material carried by services for which the BBC has editorial responsibility. This primarily concerns the BBC's public services on radio, television and online, but may also include commercial services operated by the BBC. It includes the BBC's international services as well domestic services."

25. In view of the above, the Commissioner has also found that the requests regarding the Editorial Standards Committee are for information held to a significant extent 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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26. The Commissioner's decision is that as the requests are for information held to a significant extent 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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27. The Commissioner requires no steps to be taken.



## Right of Appeal

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28. 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 sent.

**Dated the 28<sup>th</sup> day of June 2010**

**Signed .....**

**Jo Pedder  
Group Manager**

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

## Annex A

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On 22 July 2009 the complainant wrote to the BBC to request the following information:

### **"Request A"**

BBC reference RFI20091104

"I would also be very grateful if you could inform whether since the date of the last request under the FOIA covering this, there have been any communications, drafts, correspondence or other documents or conversations generated by my complaint or the "appeal" to the BBC Trust concerning "What's Next for Craig?" or my requests for information? Please provide these to me. This is a further request for information under the FOIA."

On 26 July 2009 the complainant wrote to the BBC to request the following information:

### **"Request B"**

BBC reference RFI20091151

(1) Please list each stage in the ECU process from when the case was first referred to the ECU up to the date of the request, stating what happened in that stage, giving the dates, and stating any explanation of why it took that length of time.

(2) When does the ECU intend to produce its decision? Please state who has that intention and on what it is based.

(3) What does the Chairman of the ESC remember about the oral or written communication(s) made to him about the case by Mr Vander? What was stated, when and by whom? Was anyone else present? What documents or information was given to the Chairman? Please answer this for all communications including communications about the independent editorial advisor and her appointment.

(4) Is it the practice of any members of the ESC to have "private" conversations or communications with Mr Vander or others at the BBC about ongoing cases or "appeals", which are not disclosed or not disclosed in full to the complainant?"

On 31 July 2009 the complainant wrote to the BBC to request the following information:

**“Request C”**

“Please furnish the following:

Excluding the Excluded Information, please update the Requestor by providing him with any documents or information held by the the deputy Director-General of the BBC concerning or relating to the appeal or its future conduct or the complaints which form the subject matter of the "appeal" to the BBC Trust, including any discussions or communications he has had with [named individual].”

## 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"."