

## 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 made twelve requests to the BBC for information it holds relating to events at the Porton Down military research base. The BBC stated that the requests are for information that falls outside the scope of the Act because it is 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 is therefore covered by the 'derogation'. 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. The complainant emailed the BBC on 2 February 2010 with the following requests for information:

First request

"(1) Does the BBC hold, or has ever held, any documentation or any correspondence relating to 115 servicemen who were injected with, as well as having inhaled Lipopolysaccharide (LPS) at Porton Down?

(2) When the BBC reported several premature deaths of servicemen having occurred after having attended Porton Down what was the basis for this report?

(3) Having supplied the BBC with information as to the second set of compensation payments being made to a number of Porton Down veterans why was this not reported?

(4) Having informed the BBC that the Maddison inquest transcripts are being withheld why was this never reported?

(5) Now there is sufficient evidence to show that LPS exposures resulted in several deaths of Porton Down servicemen why is the BBC ignoring this atrocity?

(6) The Porton Down seven year long "epidemiological study" conducted by the MRC at a cost of 1.7 millions pounds DID NOT cover LPS exposures. Is the BBC aware of this?

(7) Is the BBC aware that the MRC conducted the very same LPS experiment several months prior to the Porton Down experiment, that like Porton Down the records are missing as are the five "healthy" human test subjects who were injected with the endo toxin? That the Thames Valley Police are also remaining silent when asked to trace the missing airmen. Is the BBC aware of this fact?"

#### Second request

"(1) Does the BBC hold any information relating to 109 airmen reported as missing after being injected with, and having inhaled Lipopolysaccharide (LPS) at Porton Down? If not, are you willing to accept documents that will support this claim and then report accordingly?

(2) Has the BBC ever contacted the Wiltshire Police regarding their silence when asked to trace the missing airmen ?

(3) Are you aware of any "DA notice" having been issued relating to this matter?

- (4) Are you aware that the MRC Porton Down "epidemiological study" that took seven years to complete at a cost of 1-7 million pounds did not cover LPS exposures?
- (5) Did you know that the MRC conducted their own study of LPS that involved five human test subjects several months prior to the Porton Down experiment, that the records like those of Porton Down are reported missing as are their five human test subjects? That Thames Valley Police are remaining silent when asked to investigate the matter?"
3. The BBC responded on 2 March 2010 and stated that the requested information falls 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 Investigation**

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### **Scope of the case**

4. On 9 March 2010 the complainant contacted the Commissioner to complain about the BBC's response to his request.

### **Chronology**

5. Having reviewed the nature of 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 in support of its decision that the requested information falls outside the scope of the Act.

## **Analysis**

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### **Substantive Procedural Matters**

#### **Jurisdiction**

6. 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.

7. 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*

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

*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".*

8. 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.
9. 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**

10. 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).*

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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)

11. 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.
12. 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.
13. 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)*

14. 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.
15. 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
16. 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.

17. The information requested in this case is information the BBC holds about events associated with the Porton Down military research base. The complainant has questioned whether the BBC is aware of the various events he has referred to, and requested the information it holds about them. The Commissioner recognises that the High Court cases did not specifically consider information related to the BBC's journalistic and information-gathering processes. 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. Indeed, the Commissioner considers that the information requested in this case is more immediately related to the purposes of journalism, art or literature than a number of the categories considered in the High Court decisions.
18. The Commissioner considers that the information requested relates to the research process of collating information to inform the content of its broadcast output. Information provided to or gathered by the BBC as part of any research into events associated with Porton Down military research base is generated as part of the journalistic process associated with programme-making. The Commissioner therefore considers that the requested information is closely associated with the BBC's creative and journalistic activities and is clearly information held for the purposes of journalism, art or literature.
19. In view of the above, the Commissioner has found that the request is 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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20. 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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21. The Commissioner requires no steps to be taken.

## Right of Appeal

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22. 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 20th 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"."