

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 09 November 2011

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

### Summary

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The complainant requested the annual budget of Radio Cornwall and the salary bands of each of its members of staff. The BBC stated that the requested information fell outside the scope of the Act because it is information held for the purposes of journalism, art or literature. The Commissioner's decision is that the requested information is genuinely held for the purposes of journalism. 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.

### The Request

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2. On 23 March 2011 the complainant requested the following information to be provided in accordance with the Act [the Commissioner has added the numbers for ease of reference]:

*'[1] Please inform me of the total cost of operating RADIO CORNWALL (latest available year figures).'*

*[2] Also please inform me of the total number of employees and*

*[3] the number of employees in Salary bands of £10,000 starting from £zero and ending at £TOP EARNER.'*

3. On 6 April 2011 the BBC issued a response. It provided the information for request [2]. For the remainder, it explained that it believed that the information requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature.' It explained that Part VI of Schedule 1 to FOIA provides that 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". It concluded that the BBC was not required 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. It therefore would not provide any information in response to parts [1] and [3] of the request. To be helpful, it explained that the Commissioner had upheld its position in a similar case **FS50302135**<sup>1</sup> and provided its details. It confirmed that it did not offer an internal review and provided the Commissioner's details.

## The Investigation

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### Scope of the case

4. On 8 April 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
  - He needed to know the information because it would enable him to be able to make an informed judgment about how the BBC spends public money;
  - This is particularly so where the TV licence holder is compelled to pay the fee; and
  - In his view, the public have the right to know this information.
5. On 12 August 2011 the complainant agreed that the scope of the Commissioner's investigation was to determine whether the BBC was

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<sup>1</sup> [http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs\\_50302135.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50302135.ashx)

correct in stating that the information requested in parts [1] and [3] of his original request fell outside the Act.

6. On 7 October 2011 the BBC volunteered the salary bands of its staff outside the Act for request [3]. It provided the breakdown in its salary bands rather than in the requested salary bands.

## **Chronology**

7. On 13 May 2011 the Commissioner wrote to the BBC and the complainant to confirm that he had received an eligible complaint.
8. On 4 August 2011 the Commissioner wrote to the BBC to ask for further information. He received a response the same day.
9. On the same day the Commissioner wrote to the complainant providing his preliminary opinion that the requested information was likely to be derogated from the Act.
10. On 12 August 2011 the complainant explained that he wanted a decision notice and that his view about why the information ought not to be derogated had not changed.
11. On 15 August 2011 the Commissioner wrote to the BBC. He received a response on 7 October 2011. The Commissioner wrote to the complainant on the same day to explain what had been released to him.

## **Analysis**

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### **Substantive Procedural Matters**

#### **Jurisdiction**

12. Section 3 of the Act states that:

*"3. – (1) In this Act "public authority" means –  
(a)... any body...which –  
(i) is listed in Schedule 1....."*

13. 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"*

14. 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".*

15. This means that the BBC is a public authority for the purposes of the Act but only has to deal with requests for information which is not held for the purposes of journalism, art or literature. The term 'derogated' is used to describe information that falls outside the Act, i.e. information that **is** held by the BBC for the purposes of journalism, art or literature.
16. The House of Lords in the case of *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has jurisdiction to issue a decision notice in respect of any request made to the BBC regardless of whether or not the information is derogated. 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.
17. 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**

18. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment was made by Lord Neuberger of Abbotsbury MR who stated that:

*" ..... once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes." (paragraph 44), and that*  
*"....provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA." (paragraph 46)*
19. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to the Act.
20. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgment the Commissioner

considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.

21. The Court of Appeal adopted the Tribunal's definition of journalism in *Sugar v IC and the BBC* [EA/2005/0032] at paragraphs 107 to 109 which set out that journalism comprises three elements.

*"107. The first is the collecting or gathering, writing and verifying of materials for publication.*

*108. The second is editorial. This involves the exercise of judgement on issues such as:*

- \* the selection, prioritisation and timing of matters for broadcast or publication,*
- \* the analysis of, and review of individual programmes,*
- \* the provision of context and background to such programmes.*

*109. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."*

22. The information that has been requested in this case can be split into two categories that the Commissioner will consider in turn:

1. The annual operating budget for BBC Radio Cornwall; and
2. The breakdown of salary bands for the staff of BBC Radio Cornwall.

### **Category one (part [1] of the complainant's request)**

23. As noted above, the Commissioner has previously investigated whether or not the annual budget of BBC Coventry and Warwickshire fell inside the derogation in case reference **FS50302135**<sup>2</sup>. The BBC provided its

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<sup>2</sup> [http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs\\_50302135.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50302135.ashx)

detailed arguments and they are summarised below for the sake of clarity:

- The budget held is the actual figure which may or may not vary from the original budget. The budget for a local radio station is flexed which means additional editorial outputs are approved or not. The budgets originally set vary over the course of a year and any original budgets are no longer available.
- The BBC explained that it allocates resources on the basis of core requirements for each station's output as determined by the agreed editorial strategy for English Regions Local Radio whilst taking into account the minimum resources required and any additional obligations.
- The budget for BBC Coventry and Warwickshire is an integral part of the decision-making process in respect of the inception, planning and delivery of the BBC's local radio content. The station and its editor have financial responsibility for the budget of the station. However, the BBC requires a certain level of production effort for compliance reasons. The core resource is staff and the budget for this element is largely the same at each station. There is, however, a great deal of flexibility to reflect local editorial needs. Each Managing Editor is given a large amount of flexibility in the delivery of its editorial objectives. As a result each station has flexibility to adjust its resources and budget to meet particular priorities for the service. The BBC stated that the production resource necessary for particular programme segments or for determining the qualities and costs of particular presenters or presenter combinations were examples of this flexibility.
- The BBC maintains that although the individual budget can be extracted (and was provided to the Commissioner in that case) the BBC manages its costs according to editorial decisions that relate to the local radio service licence as a whole, rather than by station. The allocation of funds within the local radio service licence reflects the editorial judgments of the Controller, English Regions.
- The budget for the local radio service licence is fixed each year and is monitored on a weekly and monthly basis in order to give flexibility across the English regions. The BBC argued that it is impossible to divide resource allocation from editorial judgments as they are part of the same process.
- The BBC contended that the allocation of budgets below the local radio service level would directly affect the output on any particular

station. There would be media and community pressure on the allocation of funds. It went on to say that the Managing Editor allocates the budget according to their editorial priorities and that financial decisions at this level will have a direct editorial effect.

- The BBC stressed the potential 'chilling' effect and the need to protect its editorial independence. Editors should be able to make judgments based upon editorial merit and not upon how spending might appear in the press.

24. In considering whether the information is held for the purposes of journalism the Commissioner has considered the following factors:

- The purpose for which the information was created;
- The relationship between the information and the programmes content which covers all types of output that the BBC produces; and
- The users of the information.

25. The BBC's refusal notice made it clear that it was relying on the same arguments in this case. In light of submissions made by the BBC in the case mentioned above, the Commissioner notes that the purpose for which the category one information was created is to provide finance and allocate resources for the continuing provision of the Radio Cornwall local radio service in order that it can deliver on its editorial proposition.

26. Having considered the BBC's submissions, the Commissioner agrees that it is difficult to separate the BBC's budget for Radio Cornwall local radio from its creative and editorial decision-making processes as he considers them to be closely allied. At a divisional level the Commissioner is satisfied that decisions made on the spending allocated to particular programmes from this fixed budget is likely to directly impact on the content of those programmes. At the station level the Commissioner accepts that the Managing Editor's allocation of the budget according to his/her editorial decisions and priorities has a direct editorial effect. The Commissioner is therefore satisfied that the category one information, the most recent annual budget, is actually being used by those actively making programmes to inform decisions directly affecting the quality of content and production of particular programmes and, as such, the information was being used from what can be said to be editorial decisions.

27. The Commissioner also accepts that release of the individual station budget for Radio Cornwall would impinge on its editorial freedom because it is likely that both media and local pressure would be brought to bear

once the specific allocated budget was known. He accepts that any interference such as the BBC suggests might occur has the potential to impact on the BBC's remit as a public service broadcaster.

28. For all of the reasons above, the Commissioner is therefore satisfied that the information requested under part **[1]** of the complainant's request is derogated. It falls within the second limb of the definition of journalism outlined in paragraph 108 above. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism which exempts the BBC from its obligation to comply with Parts I to V of the Act.

### **Category two (part [3] of the complainant's request)**

29. In case reference **FS50302135**, the BBC explained the following in relation to the connection between staff salaries and the budget of radio stations:

- The bulk of the station's budget is made up of staff and talent costs and almost all staff members are intimately involved in all forms of the output of that station;
- When considering how to spend its budget on achieving its editorial objectives, each category of staff is costed and identified against specific lines of budget – this is particularly so with the recent settlement where cuts are to be made;
- Each Managing Editor is given a large amount of flexibility in the delivery of its editorial objectives. As a result each station has flexibility to adjust its resources and budget to meet particular priorities for the service. The BBC stated that the production resource necessary for particular programme segments or for determining the qualities and costs of particular presenters or presenter combinations were examples of this flexibility; and
- The BBC believes that revealing staff costs would offer valuable information about the staffing of a primarily speech based radio service. There are variances based on local circumstances which are driven by the need to produce appropriate output. Although the BBC is comfortable in comparing outputs at service licence level with commercial broadcasters it is not comfortable with specific costs which would take account of the price of engaging resources but not the quality or output of those resources.

30. The Commissioner sought further arguments from the BBC to understand better its position in this case. The BBC confirmed that the setting of salaries and ideas of staffing connected directly to the Managing Editor's allocation of the budget and accorded with his/her editorial



decisions and priorities. It explained that the information that was requested was used and had direct editorial effect.

31. However, without prejudice to its position, the BBC explained that in the spirit of accountability it was prepared to disclose similar information that provided the numbers of staff against the BBC's own salary bands (rather than 10k breakdowns). This did not change its view that the information could not be divorced from the editorial decisions that were taken about the output of the BBC.
32. The Commissioner understands that the BBC regards the decision as to how much resource to dedicate to a particular piece of BBC output to be a fundamental programme making decision. The BBC has a fixed resource (the licence fee) and resource allocation goes right to the heart of creative decision making. It is the Commissioner's view that information about the costs of BBC staff on a radio station is all operational information, which has a relationship to its creative output because it is connected to the editorial process. In light of the above, the Commissioner considers that this information is covered by the definition of journalism above and therefore falls outside the Act.
33. For all of the reasons above, the Commissioner is therefore satisfied that the information requested under part **[3]** is also derogated. It falls within the second limb of the definition of journalism outlined in paragraph 108 above. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism which exempts the BBC from its obligation to comply with Parts I to V of the Act.

## The Decision

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34. The Commissioner's decision is that as the request is for information which is 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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35. The Commissioner requires no steps to be taken.

## Right of Appeal

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36. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. 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.

38. 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 9<sup>th</sup> day of November 2011**

**Signed .....**

**Pamela Clements  
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