

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 3 November 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 relating to the BBC's use of systems to block particular callers from going on air during 'phone-in' broadcasts. The BBC refused to comply with the requests under section 12 of the Act on the grounds that doing so would exceed the 'appropriate limit'. However, in light of a recent decision by the High Court, the Commissioner's decision is that the request fell outside the scope of the Act because it relates to information held for the purposes of journalism, art or literature. 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. The complainant wrote to the BBC on 24 September 2007 and requested the following information regarding callers blocked from phone-ins on programmes:
  - (1) *whether the BBC has a system capable of doing what I suspect has been done to block callers.*
  - (2) *if the system exists how often has it been used in the past five years?*
  - (3) *If it exists who authorised it?"*
3. The BBC responded on 19 October 2007 and provided the complainant with the information relevant to request 1. However, it refused to comply with requests 2

and 3 on the grounds that doing so would require it to work beyond the 'appropriate limit' of 18 hours. It therefore applied section 12 of the Act.

4. On 22 October 2008 the complainant requested an internal review of the BBC's decision to refuse to comply with the requests.
5. On 8 November 2007 the BBC wrote to the complainant with its internal review response and upheld the decision in the original response to the requests.

## The Investigation

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### Scope of the case

6. On 8 January 2008 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The information relevant to request 1 was disclosed to the complainant. Therefore the Commissioner has therefore only considered and made a decision in respect of requests 2 and 3.

### Chronology

7. The Commissioner exchanged correspondence with the BBC regarding its decision not to fully comply with requests 2 and 3 on the basis that section 12 of the Act applied.
8. The BBC is listed in schedule I part VI of the Act as a public authority as follows:  
  
"The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature."  
  
This has been commonly referred to as the 'derogation'.
9. Whilst the case was open, 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.
10. Following the High Court decision, the BBC informed the Commissioner that it considered the information relevant to requests 2 and 3 to be within the scope of the derogation.

## Analysis

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### Substantive Procedural Matters

#### Jurisdiction

11. 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.

12. 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”.*

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 requests are 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 requests.

## **Derogation**

15. As mentioned previously, 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).*

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,

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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)

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 information requested in this case concerns the use of systems to block or ban callers from being featured on BBC phone-in programmes. The Commissioner recognises that the High Court cases did not specifically consider this type of information. 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.
22. The BBC has explained that it operates a variety of telephone systems across its different departments relating to its phone-in programmes. These systems have different capabilities to block calls from telephone numbers which have previously been used by abusive or nuisance callers. For example, the BBC has explained

that the telephone system used for phone-in programmes by Radio 5 has a function allowing the operator to place a 'warning' or 'banned' flag against a telephone number following an undesirable call. If a call is received from that telephone number in future, the operator will be alerted to the 'warning' or 'banned' flag and can choose not to answer the call and therefore not put the call through to the programme.

23. Request 2 asked for details of the number of times the telephone systems have been used to block calls in the past 5 years. The use of telephone systems to identify certain telephone numbers and decide whether or not to allow the callers to feature on phone-in programme is a tool used to inform decisions about the broadcast output of the BBC. A decision that a caller previously deemed abusive or a nuisance should not be allowed to go on air is an editorial decision about programme content. The Commissioner is satisfied that information about the number of times these blocking systems have been used in the last five years would also be used to inform the BBC's editorial decisions such as whether a phone-in format for a particular programme and if so what sort of telephone system is appropriate. Therefore, the Commissioner considers that the information relevant to request 2 is held to a significant extent for the purposes of journalism, art or literature.
24. The Commissioner also notes that request 3 asks for the names of those who authorised the use of the systems to block callers. The BBC has explained that the telephone systems in place will vary depending on each department's need, and the authorisation of each particular system would be approved by the appropriate senior manager based on their department's assessed need. In the Commissioner's view the identity of managers who made the decision to put in place a telephone blocking system to assist staff who must decide the content of BBC output is itself information about an editorial decision. It is information about who is responsible for that decision and therefore it is held to a significant extent for the purposes of art, literature or journalism.
25. In view of the above, the Commissioner has found that the request is for information held 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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26. 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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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 served.

**Dated the 3rd day of November 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”.”