

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 30 November 2010**

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

### Summary

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The complainant requested the number of weather presenters the BBC employed, the total salary expenditure and their range of salaries. The BBC stated that the request fell outside the scope of the Act because it was for information held for the purposes of journalism, art or literature. However, it was prepared to provide the number of relevant presenters and confirmed that it did not hold the relevant information for those presenters employed by the Met Office. The complainant asked the Commissioner to consider whether the information about the presenters employed by the BBC should be provided under the Act. He has considered this case carefully and determined that the BBC correctly stated that the requested information is held for the purpose of journalism and that it was 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. On 28 April 2010 the complainant requested the following information under the Act:

*"Could you please provide me with the number of weather presenters under contract with the BBC at both national and regional level as well as the range of annual salaries and the total salary expenditure".*

3. On 24 May 2010 the public authority issued its response. It 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. It explained it did not offer an internal review in this kind of case and the complainant could approach the Commissioner directly should he wish to appeal. It also said that it was prepared to disclose the number of weather presenters it employed on a national and regional level outside of its obligations under the Act:
  - No national weather presenters. This is because all 24 national weather presenters that it uses are employed by the Met Office (and not by itself); and
  - 34 weather presenters in the Nations and English Regions. There are 37 weather presenters altogether and the other three are employed by the Met Office (and not by itself).
4. Later on the same day, the complainant wrote to the public authority to ask for an internal review. He said that in his view the information fell outside the derogation because it related to financial expenditure of the BBC. It explained that earlier decisions of the Commissioner have indicated that this sort of information was covered by the Act as it related to 'operational purposes'.
5. The public authority responded on the same day. It reiterated that it did not offer an internal review in this kind of case and advised the complainant to appeal directly to the Commissioner.

## **The Investigation**

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### **Scope of the case**

6. Also on 24 May 2010 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:

- That the Commissioner has made earlier decisions particularly **FS50115188** and **FS50067416** which he believes are analogous to this case;
  - That he believes that the BBC are using the 'journalism, art and literature defence' to protect itself from public scrutiny; and
  - The phrase 'journalism, art and literature' covers the entire BBC and therefore potentially this line would be possible to use for all requests for information and this could not be right.
7. During the course of the Commissioner's investigation, the public authority confirmed that it did not hold the relevant recorded information for the weather presenters employed by the Met Office who were then contracted to the BBC. This was because the contract that it had with the Met Office was for a number of things; one of which was the provision of the weather presenters and this expenditure was not charged for separately. On 22 November 2010, the complainant explained that he was prepared to limit his complaint and he was content for the Commissioner to consider only the information about the weather presenters that were employed directly by the BBC.
8. The BBC is only a public authority in respect to information that does not relate to 'art, journalism or literature'. In this case, the Commissioner was required to consider whether the BBC is a public authority for any of the information that has been requested, as clarified by the complainant.

## Chronology

9. The complainant wrote to the Commissioner on 2 and 17 June 2010. asking him to acknowledge receipt of his correspondence.
10. On 17 June 2010 the Commissioner replied. He apologised for the delay and explained that the complaint he had received was eligible for consideration. He also wrote to the public authority to notify it that the complaint had been received.
11. On 24 June 2010 the Commissioner wrote to the complainant again. He provided information about the recent developments in the High Court and explained that his preliminary view was that the information that had been asked for was not covered by the Act. He stated that the Decision Notice would be likely to therefore find in the public authority's favour. He asked whether the complainant wanted his investigation to continue.

12. On 25 June 2010 the complainant explained that he did want the case to continue. He explained that he understood the Commissioner's view but said that he found the High Court verdict 'a disgrace which flies in the face of democratic accountability' in this country. He said that he would also contact his MP about this matter.
13. On 16 July 2010 the Commissioner wrote to the complainant again about this case. He explained that the High Court decision had been upheld by the Court of Appeal and provided links to other recent decisions that reflect the new position. He enquired whether in light of the Court of Appeal decision and given that he understood the legal basis of the decision, whether a Decision Notice was required.
14. On 26 July 2010 the Commissioner telephoned the complainant. The Commissioner was informed that a Decision Notice was still required.
15. On 12 October 2010 the Commissioner wrote to the public authority. He explained that he required more information from it to understand how the relevant recorded information was held and why it believed that it held the information for any of the derogated purposes.
16. On 19 November 2010 the public authority responded to the Commissioner's enquiries. It explained that on reflection it was prepared to volunteer that it did not hold relevant recorded information for those weather presenters who were employed by the Met Office and contracted to the BBC. For the remainder, it explained why it believed that the information was derogated and also put the Commissioner on notice that it believed that the information would be exempt under section 43 if it was caught by the Act. The Commissioner will consider its arguments about the derogation in the analysis section of this Notice.
17. On 22 November 2010 the Commissioner phoned the complainant to ascertain that the complainant had received the information that the public authority had indicated to the Commissioner that it was now prepared to disclose. The complainant confirmed he had received this information and that he was prepared to restrict his complaint to considering the information about those weather presenters employed directly by the BBC.

## Analysis

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### Substantive Procedural Matters

#### *Jurisdiction*

18. Section 3 of the Act states that:

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

19. 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"*

20. 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".*

21. 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.

22. 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.

23. 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

24. 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 ('Sugar'). 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.' (para 44), .provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA (para 46)"*

25. 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. It is irrelevant whether the information is also held for other purposes providing the BBC can prove that it is genuinely held for a derogated purpose.
26. 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.
27. 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."*

28. 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.
29. The information that has been requested in this case is the salary bands of weather presenters employed by the BBC and the total salary expenditure on those weather presenters. As noted above, this concerns the 34 weather presenters that are employed by the BBC within the Nations and English regions.
30. The Commissioner asked the BBC a number of questions to understand how it held this information and to establish the purposes for which it was held.
31. It provided the following information which the Commissioner believes is relevant for his consideration of the operation of the derogation:
- i) The number of people represents the number of individuals whose formal responsibilities include weather presenting;
  - ii) The salary information is held because the BBC pays the individual presenters. The information about the salaries is held by each Nation and region and is not held centrally. This is because the decision as to exactly how many weather presenters to employ is taken by each Nation and region;
  - iii) The starting point for determining the number of weather presenters per region was the BBC's Delivering Creative Future investment plan. The investment plan was designed to enable the BBC to determine what resource was necessary to achieve its editorial requirements. This figure was determined through

considering broadcasting needs across all platforms and was set at three individuals per region;

- iv) However, the three individuals per region was only a starting point. The actual number of presenters employed was decided at the local level by the Head of Local and Regional Programmes who determined how much of its budget to allocate to a particular output (in this case how much coverage of weather is required and how many staff are needed to do it). It was decided with the following in mind:
- (1) The budget. Each region has a set pot of money. Money that is spent on weather presenter's salaries cannot be invested on other content;
  - (2) The required output that each region requires. Weather is one of the BBC's public purposes and is regarded as a core output that finds its place within its news provisions;
  - (3) The versatility of its staff. It may be that weather presenters have other responsibilities such as presenting other programmes. The decision about transferring people to other duties was an editorial decision;
  - (4) The need to ensure continuity over sickness and holidays; and
  - (5) The intended ambition of weather programmes.
- v) The local management (in the Regions and the Nations) decide the editorial content of its programmes. It directs what is expected and ensures that the weather presenters input coheres with other input;
- vi) 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 cited an earlier letter from the Commissioner in **FS50165937** where he had said (in respect to the number of staff that were sent to Portugal to cover the Madeleine McCann story):

*'I agree with the BBC that the decision as to...the resources to be allocated to a given story is an editorial decision.'*



- vii) The BBC considers that a decision about resources and making particular decisions around funding as being closely linked to journalism as they determine both the quality and nature of the particular output. This is particularly so within programmes – if it costs X to employ a presenter and the budget for the programme is Y, then the remaining budget for production and other expenses amounts to (Y – X). The more money is allocated to X, the less money can be spent on other aspects of the programme; and
- viii) The BBC considers the decision about how much to spend on each piece of input to fit firmly in the editorial space that is allowed by the derogation found in Schedule 1 of the Act. It explained that it worried that the erosion of this space would lead to additional unnecessary pressure on its programme makers because resource allocation decisions can be unpopular and the creative space is required to produce sound input.
32. As noted above, the complainant provided some arguments about why he felt that the derogation did not apply. The Commissioner has considered them carefully in his analysis.
33. The Commissioner is not persuaded that the precedents cited by either the complainant (**FS50115188** and **FS50067416**) or the BBC (**FS50165937**) can be relied on in this case. This is because these cases predate the Court of Appeal decision (and the recent High Court cases – one of which was appealed to the Court of Appeal) which have led the Commissioner to review his consideration of the derogation. It follows that those decisions which predate the above court cases cannot be used to guide the application of his new test, which is outlined in paragraphs 24 to 27.
34. The Commissioner has determined that the relevant recorded information is held to a genuine extent for the purposes of journalism and so falls within the derogation and outside the Act. He has come to this decision because the information is considered when deciding what creative input will be produced and in the Commissioner's view it falls within paragraphs 108(2) [the exercise of judgment on the analysis of, and review of individual programmes] and 109 [the enhancement and maintenance of editorial standards – the training and development of weather presenters along with the review of standards and quality of input] as outlined in paragraph 27 of this notice.
35. To consolidate his position, he has also applied the three stage test outlined in paragraph 28 above and he finds that:

- The information was held as part of the employment relationship. A set amount of money was paid in exchange for the provision of output. In addition, the information was held at a local level by each Head of Local and Regional Programmes in order to decide the nature and content of broadcasts;
  - The BBC has evidenced that there is a relationship between the information held and the content of its news broadcasts; and
  - The BBC has evidenced that the information is used by its editorial staff to decide the nature of the programme to commission.
36. It follows that all three stages of this test suggest that the information is derogated and therefore supports the Commissioner's conclusion.. Therefore, the Commissioner has found that the request is for information that is held for the purpose of journalism and that the BBC was not obliged to comply with Parts I to V of the Act.
37. The Commissioner has noted the complainant's comments about the likely impact of a wide operation of the derogation. The Commissioner is unable to comment on other potential cases and will consider each and every case on its own merits. However, he does note that the Court of Appeal in *Sugar* commented about its rationale for this situation in paragraph 48:
- '...Relatively little information held by the BBC will be within the ambit of FOIA if the Judge's interpretation is correct. However, although "the public's right to know", in the sense of having access to information held by government and other public bodies, is a very important aspect of a modern, free and democratic society, it is a general right, which, as it seems to me, can be expected to yield to society's more specific public interest in the media being free from the sort of constraints which would arise if journalism-related thoughts, investigations, or discussions could not be freely conducted within organisations such as the BBC. Sunlight is the best disinfectant, but it can also burn, and when it comes to information held by the BBC for the purposes of journalism, it seems to me that the legislative policy is that the risk of burning outweighs the benefit of disinfectant.'*
38. Finally, the Commissioner wishes to address the complainant's concern about the derogation being a defence to scrutiny. The derogation is not a defence (or an exemption to the Act). Instead, the information that falls under the derogation is never covered by the Act in the first place.

## **The Decision**

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39. The Commissioner's decision is that as the request is for information held for the purpose of journalism, the BBC was not obliged to comply with Part I to V of the Act in this case.

## **Steps Required**

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40. The Commissioner requires no steps to be taken.

## Right of Appeal

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41. 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 30<sup>th</sup> day of November 2010**

**Signed .....**

**Pamela Clements  
Group Manager – Complaints Resolution  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex - Relevant Statutory Provisions

### Section 1(1) states that –

“Any person making a request for information to the 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 the information communicated to him.

### Section 3(1) states that –

“in this Act “public authority” means –

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which –

- (i) is listed in Schedule 1, or
- (ii) is designated by order under section 5, or

(b) a publicly-owned company as defined by section 6”

### Section 3(2) states that –

“For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority.”

### Section 7(1) states 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 this Act applies to any other information held by the authority.”

### Schedule 1, Part VI reads:

*“The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature”*