

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 22 June 2011

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

### Summary

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The complainant requested under the Freedom of Information Act 2000 (the Act) the amount spent by the BBC on a particular piece of journalistic research and the date that the research was commissioned.

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. However, it agreed to volunteer the date to the complainant outside the Act.

For the remainder, 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 in relation to it.

### 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 BBC commissioned some research from Experian to understand which regions were going to have least resilience to cuts ahead of the Coalition's autumn spending review. The BBC has published its base data online and it can be accessed through the article at the following link (correct on 14 June 2011):  
<http://www.bbc.co.uk/news/uk-england-sussex-11158816>

3. The research dealt with 33 different streams of data for each of the 324 local authorities in England. There were therefore 10,692 different bits of data.
4. The BBC has explained that the decision to commission the research was made by its English Regions department, which is responsible for local television, radio, local websites and teletext services in England. It confirmed that the English Regions department is part of its News Division and the work was used by the national network too.
5. The BBC explained that the work informed a series of 12 regional debates it conducted across the UK. It has also featured on network TV, radio and online. It confirmed that as of 28 October 2010, 386 stories were produced across the different formats that cited the research directly.

## The Request

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6. On 10 September 2010 the complainant requested the following information to be provided in accordance with the Act:

*'This is a request under the Freedom of Information Act 2000 for information regarding the Experian research commissioned by the BBC and published in September 2010 ranking "the resilience of English council areas to economic shocks"*

[1] *When was the research commissioned?*

[2] *How much did it cost to commission the research?'*

7. On 7 October 2010 the BBC issued its response. It explained that it believed that the information requested was 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 the request for information.

## The Investigation

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### Scope of the case

8. On 18 October 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 whether he was entitled to the information that had not been provided.
9. During the course of the Commissioner's investigation the BBC volunteered the date of when the research was commissioned to the complainant outside the Act. The Commissioner ensured that the complainant received this information and agreed with the complainant that his investigation would now focus solely on whether the information held about the cost of the research fell within the scope of the Act.

### Chronology

10. On 26 November 2010 the Commissioner wrote to the complainant and the BBC to confirm that he had received an eligible complaint.
11. On 10 January 2011 the Commissioner wrote to the complainant. He explained how he considered the application of the derogation and asked whether he wanted the investigation to continue. If he did, he asked the complainant to provide his arguments about why he believed that the derogation did not apply.
12. On the same day, the Commissioner wrote to the BBC. He asked the BBC to confirm where this information was held and provide detailed arguments about why it believed that the information was held for journalistic purposes. The BBC provided a partial response the same day.
13. On 24 January 2011 the Commissioner spoke to the complainant on the telephone to chase a response to the email dated 10 January 2011. The complainant told him that he wished the investigation to continue and that he would receive his arguments promptly.
14. On 31 January 2011 the complainant provided his initial arguments. The Commissioner sought clarification on a couple of points which the complainant responded to the following day.

15. On 10 February 2011 the Commissioner wrote to the BBC again. He explained that he required a detailed response to his original email dated 10 January 2011. He explained that it was in his view important to differentiate between the piece of research on one hand and the cost/date of it.
16. On 4 March 2011 the BBC provided the Commissioner with its detailed submissions. It also provided the Commissioner with a copy of the letter addressed to the complainant disclosing the date the research was commissioned. These arguments will be considered in the analysis section of this Notice.
17. On 7 March 2011 the Commissioner telephoned the complainant to establish whether he had received the new letter from the BBC and to confirm that his investigation would now focus on the residue. He was told by the complainant that he had not received the letter, but that he understood that the Commissioner would focus on the residue. The Commissioner then emailed the complainant to provide another copy of the letter and to confirm that he would move to issue a Decision Notice in respect of the residual information.

## 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. 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)*

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.
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 amount of money paid to Experian for the piece of work called "the resilience of English council areas to economic shocks".

30. The complainant argued that the BBC would be unable to prove that the information was held for a genuine journalistic purpose. The Commissioner asked the BBC for its detailed arguments to understand why it believed that the information was held to a genuine extent for the purposes of journalism.

30. The BBC explained that it regarded this cost as a production cost which was determined by editorial decision making. It explained that the decision was taken by its English Regions department to obtain background information of relevance to a particular area of news.
31. The BBC confirmed that the cost came from the English Regions fixed discretionary budget that is designated to meet local editorial requirements. The decision to distribute the funds to this story was made by the English Region's Board who had to decide which of a portfolio of options would be funded. The BBC explained that this decision was undertaken with the following criteria in mind – reach, value, impact and quality. It explained that the decision to invest its money in this set of programmes meant that that part of the fixed budget could not be spent elsewhere and in its view there is a direct association between the decision to spend the money and the creative process. This association is direct in that the amount of money spent reflects the ambitions of those stories and the resource dedicated to a particular story will have a direct impact on the quality and nature of the final output. This association is also indirect and would mean that there is less money remaining to spend on other parts of the production such as special documentaries and landmark programmes.
32. The BBC also explained that once the Board decided that it would fund this research a Steering Group was established to ensure that the scope of the data that was required to fulfil the necessary journalistic ambitions was understood.
33. The BBC then assessed how it could obtain this information for best value. It first considered the comparative costs of other providers to obtain the required output. It then decided that in all the circumstances Experian offered the optimal data. Once this was determined, the BBC undertook real and detailed negotiations with Experian. The purpose of these negotiations was to ensure that the breadth of information required editorially was acquired for the least cost. The cost was then approved by the relevant Controller and the Head of English Regions. The details of the funding were then passed to set individuals to manage the expenditure.
34. The BBC explained that it was not possible to consider the cost of this background information as being separate from the content. It provided a statement by Pat Loughrey, the Director of Nations and Regions who confirmed:

*'When an editor oversees the production of a programme, there is a constant dialogue or reconciliation between editorial ambition and resources. You cannot split resource allocation from editorial*

*judgments as they are part of one fluid process and there is constant dialogue between the two.'*

35. When looking at the first stage of the three stage test outlined in paragraph 28 above, the BBC has evidenced that the information about the cost of the programme was created for many purposes, including:
1. As part of the consideration of the English Region's Board who were to decide which project to support when deciding the nature of the journalistic ambition;
  2. As part of the negotiations between the BBC staff and Experian when ensuring that the nature of content required was obtained for best value; and
  3. As part of the approval process that ensured that the BBC accomplished its aims within the agreed budget.
36. In relation to the second stage, the Commissioner is satisfied from the way this research was commissioned that the information about costs is connected to the ambition, scope and nature of the output that the BBC produces.
37. In relation to the third stage, the Commissioner is also satisfied that the information has been used by its editorial decision makers and those who keep track of the budgets. The Commissioner also accepts that the information will continue to be used when making similar decisions in the future. The success in reach, value, impact and quality would be measured against the cost of the research.
38. As noted above the BBC was only required to evidence that the information was being genuinely held for one part of the definition of journalism outlined in paragraph 27 above. In this case, the Commissioner is satisfied that the information is held for all three limbs of the definition for the following reasons:
1. Paragraph 107 – the information was created as part of the detailed process for gathering background material for a set of journalism. The Commissioner understands that it is likely to be instructive in the event that the BBC does similar work and that it is likely that similar work may be undertaken given the current political climate;
  2. Paragraph 108 - the information was directly relevant in the selection and prioritisation of matters for publication and provides the necessary background for those



publications. The Commissioner understands that the editorial decision about how to spend money from a fixed budget on content must be considered to be an editorial decision in this context. He is persuaded in this case in particular by the way that the research was commissioned and the arguments that he has received; and

3. Paragraph 109 - the Commissioner has also been satisfied that the information will continue to be held to undertake reviews of the standards and quality of particular areas of programme making. In this case the cost is necessary to understand whether there was value when assessing the ambition, scope and nature of the relevant output. In addition, the Commissioner also understands from previous cases that any potential Editorial Complaints about the value of research would necessarily require its cost.
39. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information genuinely held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of the Act.
40. For completeness, the Commissioner wants to address the complainant's arguments that the verdict of this case ought to be consistent with **FS50115188**. This was a decision decided in June 2008 about a request submitted in March 2006. The request asked for the annual production costs of Eastenders and the Commissioner found that this was not caught by the derogation<sup>1</sup>. The decision made in June 2008 predated the Information Tribunal, High Court and Court of Appeal decisions about the nature of the derogation. The High Court and the Court of Appeal decisions are precedents that the Commissioner is required to follow. The Commissioner is obliged to make a decision on the basis of the law as it stands at the date of this Notice.

## The Decision

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41. The Commissioner's decision is that the request was for information that was held for the purposes of journalism. Therefore, the

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<sup>1</sup> This decision can be found at the following link:  
[http://www.ico.gov.uk/~media/documents/decisionnotices/2008/FS\\_50115188.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2008/FS_50115188.ashx)

information fell inside the derogation and the BBC was not obliged to comply with Part I to V of the Act in this case.

## **Steps Required**

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42. The Commissioner requires no steps to be taken.

## Right of Appeal

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43. 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 22<sup>nd</sup> day of June 2011**

**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”*