

## Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

### Decision Notice

Date: 17 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 from the BBC relating to a report published by the BBC Trust entitled 'From Seesaw to Wagon Wheel: Safeguarding Impartiality in the 21<sup>st</sup> Century'. On page 40 of that document there is reference to a *'high level seminar with some of the best scientific experts'* that the complainant requested further information about. The BBC argued that the majority of the information was outside the scope of the Act as it was held to help the BBC's editorial policy around reporting climate change. The information requested about the logistics of the seminar was disclosed to the complainant. The Commissioner has decided that the BBC was correct to withhold the remaining requested information because it is held to a significant extent for the purposes of art, literature or journalism and therefore the BBC is not required 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 20 July 2007, the complainant wrote to the BBC and requested the following information:

*"I refer to the BBC Trust's publication entitled from Seesaw to Wagon Wheel: Safeguarding Impartiality in the 21<sup>st</sup> Century. Page 40 (para 6) of this document refers to a 'high level seminar with come of the best*

*scientific experts'. Please will you provide me with the following information about this seminar including copies of information that you hold in the form of paper and electronic records, including emails. The seminar that I am referring to should not be confused with the Impartiality: Fact or Fiction event that is also referred to in the report"*

1. *What was the name or title given to this seminar?*
  2. *Where and when was this seminar held?*
  3. *When did this seminar start and when did it end?*
  4. *A copy of the invitation that was sent to prospective participants?*
  5. *The agenda for the seminar together with any notes that were provided for the participants.*
  6. *The names of all those who were invited to attend the seminar as participants, observers or in any other capacity together with their job description, organisational affiliations or any other information relating to their eligibility for being invited to be present.*
  7. *The names of all those who attended the seminar as participants, observers or in any other capacity together with their job description, organisational affiliations or any other information relating to their eligibility for being invited to be present*
  8. *Any minutes, notes, electronic communications, recorded material or other records of the proceedings of the seminar.*
3. On 21 August 2007 the BBC responded to the complainant's requests refusing to supply the majority of the information sought on the basis that it fell outside of the scope of the Act. It acknowledged that the information relevant to requests 1, 2 and 3 was held for the purposes of the Act and disclosed that information. It also supplied some other general information about the aims of the seminar and some of those involved in it on a voluntary basis and outside the scope of the Act.

## The Investigation

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### Scope of the case

4. On 5 September 2007 the complainant contacted the Commissioner to complain about the way his requests for information had been handled, he stated:

*'The BBC has not interpreted the Freedom of Information Act correctly with reference to the exclusions concerning 'journalism, art or literature that apply under Schedule 1, Part VI of the Act.*

*It is in the public interest that the BBC should disclose further information about a seminar that they apparently consider to be of public interest to the extent that they have already put it in the public domain by citing it in their report on impartiality.*

*It is possible that the BBC have applied the wrong legal instrument to my request'.*

5. The complainant also asked the Commissioner to consider the extent to which his requests should have been processed under the Environmental Information Regulations 2004 ("the Regulations") rather than the Act.
6. As noted above information relevant to requests 1, 2 and 3 was disclosed to the complainant. In view of the fact that the complainant has received the information relevant to the first three requests the Commissioner has confined his investigation and decision to the outstanding information which relates to requests 4 to 8 (as listed above).

### **Chronology**

7. Initially the Commissioner wrote to the BBC on 28 July 2008 to raise queries regarding the Regulations.
8. On 26 September 2008, having considered the matter further, the Commissioner wrote to the complainant to indicate that the Regulations were not considered to be relevant in this matter and to explain the basis for his decision in this regard. He also indicated that he had requested further information from the BBC to assist his decision about whether or not the information was held for the purposes of the Act.
9. When the Commissioner began investigating this case the relevant test when deciding whether information was held for the purposes of journalism, art or literature was the 'dominant purpose test'. This involved determining whether requested information was held for purposes listed within Schedule 1 of the Act as well as other purposes. Where it was held for both derogated and non-derogated purposes the Commissioner was then required to carry out a balance to determine the predominant purpose for which the information was held. If it was found that information was held for the predominant purpose of art, journalism or literature then the BBC would not be required to comply with Parts I to V of the Act.
10. However, whilst the case was under investigation the Commissioner informed the complainant that he was due to receive the outcome of the following High Court cases, *BBC v Sugar & Information Commissioner* [2009] EWHC 2349 (Admin) and *BBC v Information Commissioner* [2009] EWHC 2348 (Admin) which had considered whether the dominant purpose test was the appropriate test to apply when reaching a decision about whether the BBC was obliged to comply with Parts I to V of the Act in respect of a request for information.
11. On 2 October 2009 the Commissioner received the judgments of the High Court mentioned above. The Commissioner considered the contents of the High Court judgments and applied the findings to the facts of this case.

## Findings of fact

12. The BBC Trust publication entitled, 'From Seesaw to Wagon Wheel: Safeguarding impartiality on the 21<sup>st</sup> Century' was published in June 2007 and is available online from the BBC Trust website:  
  
[http://www.bbc.co.uk/bbctrust/our\\_work/other/century21.shtml](http://www.bbc.co.uk/bbctrust/our_work/other/century21.shtml)
13. Paragraph 6 (on page 40) of the publication states that the BBC held a high-level seminar with some of the best scientific experts on climate change and that it (the BBC) had come to the view that the weight of evidence no longer justifies equal space being given to the opponents of the consensus that climate change is definitely happening. The BBC position in the context of the paragraph is that the best contribution the BBC can make is to increase public awareness of the issues and the possible solutions through impartial and accurate programming.

## Analysis

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### Environmental Information Regulations 2004

14. The Commissioner considered the extent to which the Regulations applied to the remaining requests for information and concluded that they were not relevant at all. This was on the basis that the BBC is not a public authority for the purposes of the Regulations. Regulation 2(2) defines which organisations and bodies constitute a "public authority" for the purposes of the Regulations. However Regulation 2(2)(b)(i) specifically excludes,  
  
"any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description".
15. As the BBC is only listed in respect of material it holds for purposes other than art, journalism or literature it is not a public authority for the purposes of the Regulations. Therefore, where the BBC receives a request for environmental information it must consider whether or not it is held for the purposes of the Act and, if it is, then consider the request under the Act rather than the Regulations. The Commissioner therefore went on to consider the extent to which any or all of the remaining requested information fell within the scope of the Act.

### Substantive Procedural Matters

#### Jurisdiction

16. 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 FOIA 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 they hold the 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.

17. 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 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*

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

*provides. But it is nevertheless, for all the purposes of the Act, a public authority”.*

18. Therefore, the Commissioner has jurisdiction to issue a decision notice on the grounds that the BBC remains a public authority. Where the requested information is derogated, the Commissioner considers that the BBC has no obligations to comply with Parts I to V in respect of that information.
19. 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

20. 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 found:

*“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).*

21. 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.
22. 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.
23. 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:

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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)

*“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)*

24. 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.
25. 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.

26. The Commissioner notes that the High Court did not specifically consider information related to seminars used to inform output. 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.
27. The remaining information requested in this case relates to the contents of the seminar “Climate Change- the Challenge to Broadcasting” and details of those who attended either as observers or participants. The Commissioner understands that this was a one day event focusing on climate change and its impact on development. The event brought together 28 BBC executives and independent producers including several from BBC news and 28 policy experts. The event looked ahead to the next 10 years to explore the challenges facing television in covering the issue of climate change. One of the aims of this and other seminars was to persuade non factual programme makers to introduce international themes and stories into their programmes.
28. The purpose of the seminar was to inform the BBC’s editorial decisions and direction in relation to its coverage of climate change in both factual and non-factual programmes. The Commissioner is satisfied that as the purpose of the seminar was to influence the BBC’s creative output, the details about its contents are held by it to a significant extent for the purpose of art, literature or journalism. Furthermore, he is satisfied that details of those who attended the seminar are held by the BBC to facilitate the delivery of the event and to ensure that the appropriate people were in attendance. Therefore that information is also held to a significant extent for the purpose of art, journalism or literature.

29. The Commissioner has found that the remaining requested information is held for the purpose of journalism, art or literature and that the BBC was therefore correct to refuse to comply with Parts I to V of the Act.

### **The Decision**

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30. The Commissioner's decision is that the BBC was correct to respond to the requests for the remaining information by refusing to comply with Part I to V of the Act as the requests are for information held for the purpose of journalism, art or literature.

### **Steps Required**

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31. The Commissioner requires no steps to be taken.



## Right of Appeal

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32. 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 17th 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”.”