

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 30 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 regarding complaints made to the British Broadcasting Corporation (the "BBC") concerning Jeremy Bowen and his reporting of Middle Eastern affairs. The BBC initially withheld the requested information, citing section 40(2) of the Freedom of Information Act (the "Act") as it was personal information that the BBC felt could lead to the identification of individuals. However, the BBC subsequently altered its position and claimed that the requested information fell outside of the scope of the Act. The Commissioner is satisfied that the information in question is held for the purposes of journalism, art or literature and therefore the BBC was not required to comply with Parts I to V of the Act in relation to this request.

### 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 17 April 2009 the complainant wrote to the BBC to request the following information:

*"I would like to know who made the complaints to the BBC Trust about Jeremy Bowen's handling of the situation in the Middle East which led to the recent criticism of him by the Trust."*

3. The BBC responded on 22 April 2009 and withheld the requested information under section 40(2) as it considered that it was personal information of third parties. The complainant was informed that revealing the names of the individuals involved would breach the Data Protection Act as it would be unfair. It was explained that it would not be within the expectation of the individuals submitting the complaints that their names would be revealed.
4. The complainant asked for an internal review of this decision on 23 April 2009. He asked the BBC about fairness to Mr Bowen and he also questioned why the individuals involved would expect to have anonymity.
5. The internal review on 1 June 2009 considered the data protection issues surrounding the application of 40(2) and whether the processing of this personal data could be carried out fairly and lawfully under Schedule 2 of the Data Protection Act. The reviewer upheld the decision to withhold the requested information as he did not feel that the legitimate rights of the complainant had been jeopardised in withholding the requested information.

## The Investigation

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### Scope of the case

6. On 1 June 2009 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 point:
  - Why the names of the complainants to the BBC concerning Jeremy Bowen's reporting on Middle East affairs should be granted anonymity to the "*detriment of Mr Bowen's reputation*"?

### Chronology

7. In light of recent High Court decisions relating to the BBC's listing in Schedule 1 of the Act that were handed down on 2 October 2009, the Commissioner contacted the BBC on 18 November 2009 and asked it to consider whether it now believed the information requested was held for the purposes of journalism, art or literature and therefore it was not obliged to comply with Parts I to V of the Act.
8. The BBC replied on 20 November 2009 to the effect that it believed in the light of the recent High Court decisions that the requested information would fall outside the scope of the Act. The BBC also stated that, even if this were not the case, the information was in any case exempt under section 40(2) because it constituted third party personal data and its disclosure would breach the first data protection principle.

## Analysis

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### Substantive Procedural Matters

#### Jurisdiction

9. 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.

10. 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”.*

11. 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.
12. 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

13. 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).*

14. 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,

<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.

15. 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.
16. 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)*

17. 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.
18. 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.

19. The Commissioner recognises that the High Court cases did not specifically consider information related to the names of individuals who have made complaints to the BBC about BBC journalists. 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.
20. The BBC has stated that complaints and other feedback regarding its broadcast content are linked with the BBC's overall creative output. Details about complaints are used by the BBC to inform its editorial decisions about future broadcast content and other creative output. It has argued that this process, which is used by staff involved in creating the BBC's programmes, must be

carried out without interference to preserve its independence and avoid damage to journalistic judgement. The information requested in this case forms part of the complaints and feedback supplied to the BBC, which as previously mentioned, is used to inform editorial decisions. In view of this the Commissioner is satisfied that there is a relationship between the requested information and the BBC's creative output and that therefore it is held by the BBC to a significant extent for the purposes of art, literature or journalism.

21. In view of the above, the Commissioner has found that the BBC was not obliged to comply with Parts I to V of the Act. Therefore it has not been necessary for the Commissioner to consider the application of section 40(2).

## **The Decision**

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22. The Commissioner's decision is the request is for information held by the BBC to a significant extent for the purposes of journalism, art or literature and therefore the BBC was not obliged to comply with Part I to V of the Act in this case.

## **Steps Required**

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23. The Commissioner requires no steps to be taken.

## Right of Appeal

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24. 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 30<sup>th</sup> 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”.”