

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 11 January 2010

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

### Summary

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In March 2008 the complainant requested information from the British Broadcasting Corporation (the BBC) regarding the legal advice sought in relation to his own editorial complaint and copies of all records relating to the said advice. The request was refused by the BBC under section 40 – personal information - and section 42 – legal professional privilege. Subsequently the BBC came to rely on its derogation from the Freedom of Information Act and refused to provide the requested information claiming that it was outside the scope of the (“the Act”) because it was held for the purposes of journalism, art or literature. The Commissioner is satisfied that the information in question was held for the purpose of journalism, art and literature. Therefore the BBC 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 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. On 14 November 2006 the complainant complained to the BBC about a broadcast that had taken place on 11 November 2006. The complainant was dissatisfied with the emailed reply and his complaint went eventually to the Editorial Standards Unit (“the ESU”) of the BBC. The ESU wrote to the complainant on 15 March 2007 and he was informed that his complaint was not being upheld. An appeal was then filed to the Editorial Standards Committee (the ESC) on 9 May 2007. Various pieces of correspondence passed between the complainant and the BBC. The complainant discovered that the findings of the

ESC had been delayed by the fact that legal advice had been taken. The complainant then made a Freedom of Information request for that advice

## The Request

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3. On 13 March 2008 the complainant requested the following advice:

*“What I am now requesting under the Freedom of Information Act is a copy of said advice in full together with copies of all records relating to the said advice whether in physical, electronic or other form.*

*The word “records” includes but is not limited to notes, reports, memoranda, meeting minutes, synopses, requests for further advice or clarification.*

*The words “records relating to said advice” include but are not limited to records relating to matters giving rise to the seeking of the advice as well as to records relating to the time past the receipt of the advice.”*

4. On 15 May 2008 the BBC found some 34 items of information which it considered to be within the scope of the request. Five items were released in full and the rest in part because “irrelevant information” had been removed or the information was considered to be subject to section 42 or section 40(2).
5. On 16 June 2008 the complainant requested an internal review of the decision not to provide him with the requested information.
6. The BBC sent the complainant its internal review result, dated 8 August 2009. The review upheld its decision to withhold the requested legal advice on the basis of section 40(2) and section 42 of the Act.

## The Investigation

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### Scope of the case

7. On 15 December 2008 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 BBC had failed to:
- Provide all of the information that [he] had requested
  - Properly explain reasons for refusing to supply the information and
  - Correctly supply an exemption provided for in the Act
8. The Commissioner noted that the information requested was likely to constitute the complainant’s personal data which is subject to an absolute exemption under section 40(1) of the Act. However, personal data may have been accessible to

the complainant under the Data Protection Act 1998 ('the DPA'). As the Commissioner is responsible for regulating the DPA the request was first considered under the DPA. The outcome of the Commissioner's assessment in this regard was separately communicated to the complainant on 3 November 2009. It confirmed that the information was the complainant's personal data and explained the Commissioner's assessment in terms of rights of access under the DPA. As this is separate from the right of access under the Act it is not mentioned further in this decision notice.

9. The BBC subsequently amended its position in relation to the refusal under the Act and argued that in fact it was not required to comply with Parts I to V of the Act in relation to the complainant's request. It explained that in its view the information was held to a significant extent for the purposes of art, literature or journalism. The Commissioner therefore determined that it was appropriate to investigate and make a decision about this issue first and only consider the issues above if he concluded that the BBC was in fact required to comply with Parts I to V of the Act.

## **Chronology**

10. Having been advised that the Commissioner was considering whether he had a right of access under the DPA, the complainant wrote to the ICO on 3 November 2009 disagreeing that the advice taken by the BBC was his personal data. He wrote again on 12 November 2009, having received the Commissioner's assessment under the DPA to re-iterate his disagreement in this regard.
11. On the 2 October 2009 the High Court handed down its judgments in two cases involving the BBC and the interpretation of the derogation in Schedule I of the Act. The High Court judgments are binding on the Commissioner and in light of the findings he wrote to the BBC on 26 November 2009 to ask if it was intending to amend its position with regard to this request to argue that the material sought was in fact outside the scope of the Act.
12. The BBC replied on 26 November 2009 confirming that it did wish to amend its position and to rely on the derogation from the Act as, in its view, the requested information was held to a significant extent for the purposes of journalism, art or literature.

## **Analysis**

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### **Substantive Procedural Matters**

#### **Jurisdiction**

13. 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.

14. 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*

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

*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”.*

15. 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.
16. 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

17. 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).*

18. 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.
19. 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.
20. 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 EW2348)*

21. 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.

22. 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 for operational purposes related to programme content and therefore to a significant extent held for the purposes of journalism, art or literature.

23. The Commissioner recognises that the High Court cases did not specifically consider information related to complaints or legal advice about complaints concerning journalistic or editorial decisions about BBC content. 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.

24. The withheld information was advice taken in order to respond to the complainant’s concerns about journalistic/editorial decisions that were taken about particular BBC content. 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 Commissioner is satisfied that because the requested material is used in this way there is a relationship between it and the BBC’s creative output and that 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 BBC was not obliged to comply with Parts I to V of the Act in this case. He has not gone on to consider the issues raised by the complainant because they are requirements of Part I of the Act and in some instances refer to provisions of Part II of the Act.

## The Decision

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26. The Commissioner's decision is that as the request was for information held to a significant extent 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 11<sup>th</sup> day of January 2010**

**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 –

reasonably requires further information in order to identify and locate the information requested, and

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 –

in respect of which the applicant is to be informed under subsection (1)(a),  
or

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”.”