

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 27 July 2011**

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

### Summary

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The complainant requested information about the BBC publishing an article on its website. The BBC provided some information, but explained that the remainder fell outside the scope of the Act because it is information held for the purposes of journalism, art or literature.

After carefully considering the arguments of both sides, the Commissioner's decision is that the requested information was genuinely held for the purposes of journalism.

Therefore the BBC is 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. The BBC placed an article on the website about the outcome of a court case that involved the complainant. The complainant was unhappy with the content of that article and made a number of requests about it.

## The Request

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3. On 23 December 2010 the complainant requested the following information to be provided in accordance with the Act:
1. *Who in the BBC wrote the text of this article?*
  2. *Was the journalist/reporter who wrote the text of this article a BBC reporter?*
  3. *If the person or journalist who wrote the text of this article wasn't a BBC reporter who was the person or journalist/reporter, and by whom was the person or journalist employed by?*
  4. *If the journalist/reporter who wrote the text of this article was a BBC journalist/reporter, was he a journalist/reporter with the BBC English news or the BBC Northern Ireland news?*
  5. *Who uploaded the article on to the BBC News Northern Ireland web site and how was this done?*
  6. *What date was the article uploaded on to the BBC News Northern Ireland web site?*
  7. *Was the person or journalist/reporter who uploaded the article on to the BBC News Northern Ireland web site a journalist/reporter with the BBC?*
  8. *If the person or journalist/reporter who uploaded the article on to the BBC News Northern Ireland web site wasn't a BBC journalist/reporter, who was the person or journalist/reporter, and by whom was the person or journalist/reporter employed by?*
  9. *If the person who uploaded the article on to the BBC News Northern Ireland web site was a journalist/reporter with the BBC, was he a journalist/reporter with the Northern Ireland News or the BBC England News?*
  10. *Did the person or journalist/reporter who uploaded the article on to the BBC News Northern Ireland web site upload the article in Northern Ireland and if so where?*
  11. *If the person or journalist/reporter who uploaded the article on to the BBC News Northern Ireland web site didn't*

*upload the article in Northern Ireland was it uploaded in England and where?*

12. *Is the BBC News Northern Ireland a web site and/or server, which is in Northern Ireland or England?*
13. *If the BBC News Northern Ireland a web site and/or server is in Northern Ireland where is it situated?*
14. *If the BBC News Northern Ireland a site and/or server is in England where is it situated?*
15. *What is the server of the BBC News Northern Ireland and does the BBC have its own server?*
16. *Regarding the comments in the article [elements of the article redacted by the Commissioner], did the person or journalist/reporter who wrote the text of the article check and or read before publication the transcript of the judgment in [case redacted by the Commissioner] to determine whether those words had actually been used in that judgment?*

4. On 19 January 2011 the public authority issued its response. It provided the information for items 12 to 15. However, it explained that it believes that the remainder of 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 the Act 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'. The BBC concluded that it 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 those items that it believed were not covered by the Act.

## **The Investigation**

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### **Scope of the case**

5. On 26 January 2011 the complainant contacted the Commissioner to complain about the way their request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

1. the article was dated as being produced in January 2010 and may be archived. In his view, the Sugar judgment in the Court of Appeal supports his view that it may no longer be held for the purposes of journalism; and
  2. the article may not have been written by 'a journalist' and so the information about it may no longer be held for the purposes of journalism.
6. On 26 May 2011 the complainant agreed with the Commissioner's proposed scope of this investigation that he was to determine:
- Whether the BBC was correct that the information you requested in parts 1-11 and 16 of the request dated 23 December 2010 fell outside the Act. Information falls outside the Act if the BBC can show that it is held for the 'purposes of journalism, art and literature'.

## **Chronology**

7. On 8 March 2011 the Commissioner wrote to the complainant and the BBC to explain that he had received an eligible complaint.
8. On 19 May 2011 the Commissioner wrote to the complainant to confirm the scope of the case and to ask whether he had any further arguments that he wanted him to consider.
9. On 26 May 2011 the complainant replied to the Commissioner. He confirmed that he understood the scope of the case and that he did not have further arguments that he wanted the Commissioner to consider.
10. The Commissioner decided in light of the arguments that he has already received from the BBC that he was able to make a decision in this case without approaching the BBC for any further information. He will confirm the arguments he considered in the analysis section of this Notice.

## **Analysis**

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### **Substantive Procedural Matters**

### **Jurisdiction**

11. Section 3 of the Act states that:

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

12. 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"*

13. 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".*

14. 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.
15. 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.
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 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)*

18. 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.
19. 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.
20. 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."*

21. The information that has been requested in this case can be split into three categories and summarised as being:
  1. information about who wrote an article that appeared on its news website (requests 1 to 4) ['category one']; and

2. information about the placing of this article on its news website (requests 5 to 11) ['category two']; and
  3. information about the verification of the material contained within that article (request 16) ['category three'].
22. 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.
23. The Commissioner will consider each category in turn:

*Category one*

24. In light of submissions made by the BBC in previous cases and mentioned in the refusal notice, the Commissioner recognises that information about who wrote an article would be information held for the purpose of presenting journalistic output and monitoring its nature. The Commissioner believes that the author of a news article amounts to a key component of it. The Commissioner appreciates that the name of the author will be known and considered by those editorially responsible for the material and those monitoring the standards of journalism. Given the above, at the time of the article being produced, the Commissioner considers that the name of the author is held for all three elements of the definition of journalism as stated in paragraph 21 above.
25. The complainant has argued that if the individual is not a journalist then the information cannot be held for the purposes of journalism. In the Commissioner's view this argument is misconceived as, by publishing their content on a news website, the individual is undertaking journalism. Indeed the group within the BBC responsible for the news content on its website is the 'Journalism' group.
26. The complainant has also argued that paragraph 58 of the Court of Appeal *Sugar* judgment supports his view that, once the article cannot be found without a direct search of the website, it should be regarded

as being archive material. This means it would not be regarded as being held for journalistic purposes. Paragraph 58 reads as follows:

*'As the Tribunal rightly observed, information held at one point for purposes of journalism may, at some later point, cease (either temporarily or permanently) to be held for that purpose. In the case of journalism, above all news journalism, information "held for purposes ... of journalism" may soon stop being held for that purpose and be held, instead, for historical or archival purposes. The BBC, and the Commissioner and the Tribunal, will no doubt carefully consider whether this applies to the information, which originated as purely journalistic-related material.'*

27. The Commissioner has carefully considered this argument. He notes that at the date of the request and at the date of this Notice, the article can be located and found on the BBC News website. It is labelled clearly as being News and can be accessed by the public as such. The Commissioner believes the BBC is correct that this article continued to relate to current journalism at the date of the request.
28. The Commissioner must determine whether the information was genuinely held for the purposes of journalism on 23 December 2010. It is not material whether the information is also held for other purposes too, provided that it is genuinely held for the purposes of journalism.
29. In another case he investigated, the Commissioner asked the BBC how its archive operates and why information contained within it may still be held for the purposes of journalism. The BBC commented that paragraph 58 above was only 'obiter dicta', in that it was a comment about the law but not binding on the Commissioner. In addition, it clearly leaves the Commissioner the power to determine when the information ceases to be held for the purposes of journalism.
30. It explained that the Commissioner should determine that the information remains held for journalism because:
  - (1) the BBC may require the information in the event that it receives an editorial complaint about it and/or must make similar editorial decisions in the future;
  - (2) as noted above, part of the journalistic process is the continuous maintenance of editorial standards. The information may need to be considered in this area even if it is a number of months old;



- (3) even archived information is not dormant. This is because the information is held permanently in order to inform journalistic content and it proved that 91% of requests for archive material came from production divisions who created content; and
  - (4) it believes it is essential that information of this description is maintained to be used as a ready resource for future publications.
31. The Commissioner is content that because the article remains on the BBC news website, information about it continues to be held genuinely for the purposes of journalism. He does not find the complainant's contrary arguments convincing.
32. For all of the reasons above, the Commissioner is satisfied that the first category of information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of the Act.

*Category two*

33. The second category of information relates to the process that led the article to appear on the website. In the Commissioner's view this relates to part of the editorial process and falls squarely within the second part of the definition of journalism, quoted in paragraph 21 above. It is held genuinely for the purposes that were involved in the selection and timing of matters for publication.
34. The Commissioner has considered whether the time between original publication and the request has led to the information not being held genuinely for the purposes of journalism anymore. For the reasons noted above in paragraphs 27 to 31, he does not find that the time makes a difference to his view that the information was held at the date of the request for the purposes of journalism.
35. He is also satisfied that the second category of information is derogated and so also falls outside the scope of Parts I to V of the Act.

*Category three*

36. The third category of information relates to the editorial control and fact checking of the document. In the Commissioner's view, this directly relates to all three elements of the definition of journalism because it relates to the verification of material for publication

(element one), the editorial analysis of it (element two) and the reviews in the standard and quality of journalism (element three).

37. The Commissioner has considered whether the time between the the information being verified and the request has led to the information not being held genuinely for the purposes of journalism anymore. For the reasons noted above in paragraphs 27 to 31, he does not find that the time makes a difference to his view that the information was held at the date of the request for the purposes of journalism.
38. Therefore, he is satisfied that the third category of information is derogated and so also falls outside the scope of Parts I to V of the Act.

## **The Decision**

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39. The Commissioner's decision is that as the request is for information that would be held 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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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 27<sup>th</sup> day of July 2011**

**Signed .....**

**Andrew White  
Group Manager  
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”*