

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 18 May 2010**

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

### Summary

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The complainant made an information request to the British Broadcasting Corporation (the "BBC") for copies of all progress reports produced by the 'Democracy Live' team (including any that were filed by the contractors Autonomy and Blinkx) during the 18 months the complainant stated that they were building this project. The BBC refused to provide access to the requested information stating that it was outside the scope of the Freedom of Information Act ("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.

### The Request

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2. On 6 November 2009 the complainant made the following request for Information:

*"According to the first blog for the Democracy Live project:*

<http://www.bbc.co.uk/blogs/aboutthebbc/2009/11/democracy-live.shtml>

*"DL, as it's become known in the BBC, is the result of about 18 months of development work... Our search is powered by a speech-to-text system built by two companies called Blinkx and Autonomy which create transcriptions of the words spoken in the video."*

*Under the Freedom of Information Act, please may I have copies of all progress reports produced by the Democracy Live team (including any that were filed by the contractors Autonomy and Blinkx) during the 18 months they were building this project."*

3. The BBC responded on 4 December 2009 stating that the information the complainant requested is excluded from the Act because it is held for the purposes of "journalism, art or literature". Consequently the BBC was withholding the requested information:

"The BBC is 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."

## The Investigation

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### Scope of the case

4. On 9 December 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:
  - That he did not believe that the progress reports that would have been submitted by the technical team during the build phase of the project for the BBC's new 'Democracy Live' on-line system was journalism, art or literature.

### Chronology

- On 7 January 2010 the Commissioner wrote to the BBC asking it to provide a copy of the requested information. He also requested further information regarding the BBC's reliance on the derogation.

5. The BBC responded on 5 March 2010. The requested information was not provided but the following points were made:
- " 'Democracy Live' is a BBC website which offers live and on demand video coverage of the UK's national political institutions and the European Parliament (see [http://news.bbc.co.uk/democracylive/hi/guides/newsid\\_8226000/8226983.stm](http://news.bbc.co.uk/democracylive/hi/guides/newsid_8226000/8226983.stm)). The website was developed as a specific method of providing news content on a particular matter to our audiences. As such, the development of this site, the engagement of contractors as well as their progress updates on the development of the service is clearly related to our output."
  - The BBC went on to say that the requestor sought information discussed regularly by the 'Democracy Live' steering group. The steering group consists of technical and editorial staff who provide updates on technical and editorial progress. The BBC emphasised that the primary users of the requested information were the editorial leaders of the 'Democracy Live' steering group which includes the Head of Editorial Development. It went on to argue that the core purpose of these progress reports, whether technical or editorial, was to "manage and oversee the development of 'Democracy Live' as a new editorial proposition within the BBC's news output".
  - The BBC argued that editorial and technical progress reports which relate to the development of a site are held to a significant extent for the purpose of journalistic output.
  - The BBC also submitted the view that content developers, which, it believed, included those who design and implement the BBC's web services "require a private journalistic space in which to gather, analyse, weigh and editorialise information in order to determine the most effective way to provide this coverage." The view was put forward that to intrude on this journalistic space would have a "chilling effect" upon the BBC's editorial freedom.
  - As a public service broadcaster the BBC argued that its right to editorial freedom of expression was underpinned by European law and the derogation from the Act allowed it to maintain its editorial independence.

Having considered the request and the BBC's additional submissions the Commissioner determined that it was not necessary for him to view the withheld information in this case.

## Analysis

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### Substantive Procedural Matters

#### Jurisdiction

6. 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 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.

7. 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*

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

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

8. 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.
9. 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**

10. 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.*

<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)

*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).*

11. 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.
12. 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.
13. 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)*

14. 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.
15. 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.

16. The Commissioner recognises that the High Court cases did not specifically consider information related to progress reports which contain technical updates. 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. The Commissioner is satisfied that progress reports produced by the 'Democracy Live' team containing technical information, including those filed by Blinx and Autonomy, will have fed into the way in which the website was set up and the delivery of its content. As a consequence technical updates contained in the requested progress reports will inevitably influence editorial decisions. By the same token, editorial decisions that are made about the content the BBC wishes to provide will also influence the technical requirements for the website and therefore the content of the reports.
17. In view of the above, the Commissioner is satisfied that there is a relationship between the requested information and the derogated purposes. Therefore he has found that the request is for information held to a significant extent for the purposes of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of the Act.

## **The Decision**

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18. The Commissioner's decision is that as the request is 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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19. The Commissioner requires no steps to be taken.

## Right of Appeal

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20. 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 served.

**Dated the 18<sup>th</sup> day of May 2010**

**Signed .....**

**Jo Pedder  
Group 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”.”