

## Freedom of Information Act 2000 (Section 50)

### 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 made requests to the British Broadcasting Corporation (the "BBC") about an organisation known as the Cambridge Media and Environment Programme (CMEP). Various questions were asked about CMEP regarding expenditure by the BBC in relation to this organisation, who authorised that expenditure and its legal status. The public authority refused to provide the requested information claiming 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 but that it was happy to provide information about the seminars and the role of the CMEP generally on a voluntary basis. The Commissioner is satisfied that the requested information 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. In its letter to the complainant, dated 27 January 2009, the BBC explained that, over the previous 12 years, groups of BBC managers and editors had met in Cambridge to participate in 'Real World' seminars. These seminars were designed to "stimulate creative thinking" about how experts and broadcasters cover world issues in the media. The subjects have been as diverse as food, future superpowers and ageing. The first of the series of seminars was devised

by Roger Harrabin who was at that point a Today reporter then on sabbatical and Dr Joe Smith of the Open University.

## The Request

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3. On 15 December 2008 the complainant requested the:

*“(a) Annual amounts paid to CEMP [sic] since 2001. (b) The name and position of the person(s) responsible for authorising expenditure [sic] with CEMP [sic] since 2001. Here I am thinking of the person who commits the BBC to the expenditure. (c) I would then like to see any internal documents produced by or sent to the people named in (b) where these relate to CEMP [sic]. (d) Any information relating to the legal status of CEMP [sic] would also be useful.”*

4. On 16 December 2008 another email was sent to the BBC by the complainant asking for:

*“...copies of all correspondence from Jul [sic] 2005 to date between Roger Harrabin and Dr Joe Smith of the Open University. I am particularly interested in information relating to their work on the Cambridge Media & Environment Programme (which I have also seen referred to as Cambridge Environment and Media Programme), but would like you to consider any and all correspondence.*

*Could you please on receipt of this request check for deleted email using backups and restore functionality. I am sure that this request will initially be refused, but I would like to secure the relevant information pending resolution of any such issues.”*

5. The BBC acknowledged the requests and subsequently wrote on 16 January 2009 explaining that it was not in a position to respond because Mr Harrabin was unavailable to answer the requests made.
6. On 19 January 2009 the complainant wrote back to say that he did not feel that this response was credible and that he would like to know which senior members of the BBC would now be “*resolving this unfortunate illegality by the Corporation*” (referring to the delay in responding to his request).
7. The BBC acknowledged the delay in responding to the requests made on 15 and 16 December 2008 on 21 January 2009.
8. On the same date the complainant responded and made further information requests regarding the way in which the BBC was handling his earlier requests for information which remained outstanding.

9. The BBC wrote to the complainant on 22 January 2009 in relation to the requests made on 21 January 2009 to say that the Act did not require it to respond as it was not obliged to create information.
10. The complainant subsequently requested an internal review of the handling of his December 2008 requests on 23 January 2009 (although at that stage the BBC had not in fact issued its substantive initial response to those requests).
11. On 27 January 2009 the BBC responded explaining that as the information relevant to the December 2008 requests fell outside the Act it did not offer an internal review. On the same day the BBC replied more fully to the December 2008 requests outlining its belief that the requested information was derogated because it was held for the purposes of journalism, art and literature. A general explanation was given regarding the purpose of the CMEP (see background). Some details about the way the seminars are funded were offered on a voluntary basis outside of the Act but no figures were supplied. The request for the correspondence between the Roger Harrabin and Dr Smith was also refused on the basis that information relevant to it was derogated but the BBC also stated that disclosure of private correspondence would be inappropriate.

## The Investigation

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### Scope of the case

12. On 28 January 2009 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. The complainant specifically asked the Commissioner to investigate the BBC's handling of his requests dated 15 and 16 December 2008. The Commissioner has therefore not made a decision in relation to the handling of the complainant's requests dated 21 January 2009. In relation to the December 2008 requests the complainant asked the Commissioner to consider the BBC's claim that the information relevant to those requests was derogated as he did not feel that the correspondence between Roger Harrabin and Dr Joe Smith was related to "journalistic purposes and [was] barely even related to editorial policy". He also asked the Commissioner to consider if this correspondence could be deemed private as Roger Harrabin's time was funded by the BBC as were the meetings of the CMEP.

### Chronology

13. Having reviewed the requests and the correspondence supplied by the complainant, the Commissioner decided that it was not necessary to contact the BBC for further information or arguments regarding its handling of the request.
14. On 2 October 2009 the High Court handed down its judgments in relation to two appeals it had heard involving the application of the derogation by the BBC. Both judgments found in favour of the BBC. The Commissioner has applied the findings of the two judgments to the facts of this case.

15. The Commissioner wrote to the complainant on 26 October 2009 in order to explain that he felt that the BBC's application of the derogation to the requested information was correct and inviting the complainant to withdraw. However, he declined to do so because he felt that the link to the derogated areas was too tenuous.

## Analysis

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### 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 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.

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*

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

*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 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 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 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**

20. 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,*

<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)

*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:

*“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)*

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 recognises that the High Court cases did not consider information of the nature requested by the complainant in this case. 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 CMEP seminars are used by the BBC to inform development of editorial direction as well as more specific editorial decisions about coverage of issues by the BBC. The Commissioner is satisfied that all of the information requested by the complainant is held to a significant extent for the purposes of art, literature or journalism. In his view information about payments made to CMEP, including internal documents produced by or sent to those authorising that expenditure, is material held to facilitate and manage the delivery of the seminars. As these seminars are used as a forum for developing ideas about the way that the BBC covers a range of issues in its creative output, the Commissioner is satisfied that there is a relationship between this information and the purposes listed in Schedule 1 of the Act.
28. The complainant also requested copies of all correspondence between Roger Harrabin and Dr Joe Smith. The Commissioner has not been provided with any evidence to suggest that individuals would have communicated about anything other than the CMEP seminars. As explained above, the seminars are used to inform editorial decisions about BBC coverage and creative output. The Commissioner is satisfied that any correspondence between the named parties is therefore held by the BBC to ensure that the seminars cover relevant issues, that they are held at appropriate times and that those responsible for editorial decisions are able to attend. On this basis there is a relationship between the information and the purposes listed in Schedule 1 and the Commissioner is therefore satisfied that it is also information held to a significant extent for the purposes of art, literature or journalism.
29. In view of the above, the Commissioner has found that the requests are for information held 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. As the Commissioner has concluded that the BBC is not required to comply with Parts I to V of the Act in relation to the correspondence between Roger Harrabin and Dr Joe Smith, it has not been necessary for him to consider whether that information was private as the complainant requested.

## The Decision

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30. The Commissioner's decision is that as the requests are for information 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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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”.”