

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 21 December 2009

**Public Authority:** The Channel Four Television Corporation  
**Address:** 124 Horseferry Road  
London  
SW1P 2TX

### Summary

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The complainant requested information from Channel 4 regarding the British Academy of Film and Television Awards (BAFTA) and the system known as “fast tracking”. Channel 4 disclosed some of the requested information but withheld part of it, citing section 41 (information provided in confidence), section 43 (commercial interests) and section 40 (personal information) of the Freedom of Information Act (the “Act”). However, Channel 4 subsequently relied on the derogation from the Act. The Commissioner is satisfied that the withheld information is held by Channel 4 to a significant extent for the purposes of journalism, art or literature. Therefore Channel 4 was not required to comply with Parts I to V of the Act in relation to the withheld information.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether Channel 4 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. Each year broadcasters can put forward programmes to BAFTA that they are most proud of in each of the television award categories. There is a fee of £235 plus VAT per entry, excluding performance categories which are free. BAFTA then circulates a list of these programmes to the members who cast their votes for those programmes and performances which they think are best. Members can vote for up to 6 programmes or performances in each category. BAFTA then informs the broadcaster of the top six programmes voted for by the membership in each category and gives each broadcaster the chance to

add a restricted number of programmes per category into each list – this is categorised as “Broadcaster Entries”. The number of entries is dependent on how many channels the broadcaster has, for example, the BBC is allowed to submit 3 entries one for BBC 1, one for BBC 2 and 1 for either BBC 3 or 4 for a fee of £535 (for programmes not previously entered).

## The Request

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3. The complainant made the following requests for information to Channel 4 which were received on 5 May 2009:

*“1....Could Channel 4 please state if it has ever “fast tracked programmes” to ensure their inclusion in particular Bafta categories and or onto particular Bafta lists. These categories/lists will include but will not be limited to the final short lists.*

*2....Could Channel 4 please provide a full list of programmes that it has fast tracked in each of the following years – 2006, 2007, 2008, 2009. In each case can you name the programme, specify the fee paid and state which category and or short list and or long list the programme was fast tracked into.*

*3.....Could Channel 4 provide any correspondence with Bafta (including emails) which relates in any way to the issue of fast tracking. Please note I am only interested in correspondence which relates to the period from January 1 2008 to the present day.*

*4.....Does Channel 4 hold any information which relates to other broadcasters fast tracking programmes. If so can it please provide this? Please note that I am only interested in information relating to the period January 1 2008 to the present day.”*

4. Channel 4 responded on 9 July 2009. The answer to item 1 was “yes” and this was expanded on to include a description of ‘fast-tracking’ and ‘Broadcaster Entry’ (see Background). Items 2 and 3 were considered exempt after consultation with BAFTA and it was explained that the award process needed to be conducted in strict confidence. Section 43 was also cited as BAFTA considered such detailed information to be a trade secret. Channel 4 looked at the public interest test for section 43 stating that it did not believe it to be in the public interest to undermine the BAFTA award system as this could be commercially prejudicial. The administrative correspondence that was located was withheld under sections 41 and 43.
5. Channel 4 explained that BAFTA did not consider it fair to reveal the names of individuals working for it who sent and received emails as they would have had no expectation that their names would be released into the public domain. The same was true for Channel 4 employees as they did not have a “public role”. This information was withheld under section 40 of the Act.

6. The following information was provided:

The requested years were listed with the total amount of programmes entered, the total entry cost and the number of programmes that won awards. No names of programmes were provided.

It was confirmed that there was no information held on broadcaster entries made by other broadcasters.

7. On 7 July 2009 the complainant asked for an internal review on several grounds:

- The failure to identify the programmes.
- The application of the exemptions.
- That, as both BAFTA and its members were aware of the broadcast entry system, the complainant did not see how this would have an adverse effect on the awards and how people vote.
- That the broadcast entry system was not a secret and neither was the final list of nominations.
- That the complainant did not accept that all individuals at Channel 4 are unaware that internal communications might be disclosed.

8. Channel 4 wrote to the complainant to apologise for the delay and the result of the internal review was sent on 28 September 2009. The original response from Channel 4 was upheld, though it apologised for the length of time it had taken for the complainant to receive that response.

## The Investigation

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### Scope of the case

9. On 30 September 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 consider the following points:

- That Channel 4 had failed to provide the bulk of the requested information.
- That there was too much time taken to deal with the original request and the internal review.
- That the public in general, and BAFTA members in particular, have a right to know which programmes are only included on shortlists because of the broadcast entry system.

## Chronology

10. On 2 October 2009 the High Court handed down its judgments in two cases which considered the British Broadcasting Corporation's listing as a public authority in Schedule 1 of the Act, known as 'the derogation'. Channel 4 is listed in Schedule 1 in the same way and therefore the findings in the two cases are relevant when the Commissioner is considering complaints in respect of Channel Four. In view of the High Court judgments, on 24 November 2009, the Commissioner asked Channel 4 to consider whether it now believed the information requested by the complainant in this case was held for the purposes of journalism, art or literature and therefore whether Channel 4 was obliged to comply with Parts I to V of the Act.
11. Channel 4 replied on 15 December 2009 and explained that it did now consider the requests to be outside the scope of the Act on the basis of the derogation, though it stood by the exemptions previously upheld in the internal review in the alternative:

*"The information which is the subject of the complaint by [the complainant] includes the identity of programmes which have been fast-tracked by Channel 4 under BAFTA's broadcaster entry system and correspondence between Channel 4 and BAFTA concerning the same. The BAFTA awards is the UK broadcasting industry's review of the quality of UK broadcasting. Critical acclaim or otherwise by the BAFTA awards panel would certainly inform Channel 4's programme strategy and decision-making going forward."*

12. Channel 4 supported its argument by quoting from EA/2005/0032 (Sugar v The Information Commissioner's Office and the BBC) regarding the link between an output review and programme content as an indication that the information is held for the purposes of journalism. It went on to state that –

*"there is no greater accolade in the industry than for a Channel 4 programme to be reviewed and nominated for/receive a BAFTA award. The awards process is essentially a review of television programming over the previous year and has the effect of shaping the content and output of future programming."*

13. Finally Channel 4 suggested that, as the interpretation of the derogation had widened, it was confident that the withheld information was outside the scope of the Act.

## Analysis

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### Substantive Procedural Matters

14. Channel 4 is listed under Schedule 1, Part VI of the Act as - "The Channel Four Television Corporation, in respect of information held for purposes other than those of journalism, art or literature". The entry is identical to that of the BBC. Channel 4 is a UK public-service television broadcaster which, though commercially self-funded, is publicly owned. The Commissioner considers it reasonable that the following High Court Judgments can be extended to Channel 4.

### Jurisdiction

15. 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 Channel 4 at Schedule 1, Part VI reads:

"The Channel Four television Corporation, in respect of information held for purposes other than those of journalism, art or literature"

16. 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".

Channel 4 has argued that the construction of sections 3, 7 and Schedule 1 means that Channel 4 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*

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

*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 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, and for the purposes of this request Channel 4, remain public authorities. Where the information is derogated, the Commissioner considers that the BBC or Channel 4 have no obligation to comply with Parts I to V in respect of that information.

19. The Commissioner will first determine whether the requests are for information held for the purposes of journalism, art or literature and if therefore Channel 4 is required to comply with Parts I to V in respect of the requests.

## 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*

<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)

*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).*

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, or Channel 4, 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, or Channel 4, 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

26. 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.



27. The Commissioner recognises that the High Court cases related to the BBC, however, for the reasons already stated, he considers that the High Court Judgments are also relevant when considering complaints about Channel 4.
28. The information requested in this case relates to the decision by Channel 4 to nominate a programme for a BAFTA award and the costs associated with such nominations. Channel 4 has explained that it uses the BAFTA awards as one means of bringing particular creative content to the attention of new audiences. The decision to nominate a programme also impacts on the way that it is promoted more generally because reference can be made in Channel 4's advertising campaigns to the programmes nomination. This in turn can attract a new and wider audience to the programme. In view of this, the Commissioner is satisfied that there is a relationship between the withheld information and Channel 4's creative output and that it is held to a significant extent for the purposes listed in Schedule 1 of the Act. This is notwithstanding that the information may also be held for other non-derogated purposes.
29. In light of the above, the Commissioner has found that the withheld information is held by Channel 4 to a significant extent for the purposes of journalism, art or literature and that it was not obliged to comply with Parts I to V of the Act in respect of that information. For this reason the Commissioner has not considered the application of section 40, section 41 or section 43 further in this notice.

## **The Decision**

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30. The Commissioner's decision is that as the requests are for information held to a significant extent for the purposes of journalism, art or literature Channel 4 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 21<sup>st</sup> day of December 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 –

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”.”