

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 3 February 2011**

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

### Summary

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The complainant made a request to the BBC for a copy of a Panorama programme from 1987 entitled 'Scientology – The Road to Total Freedom?' and, if held, a transcript of the programme. The BBC responded by stating that the requested information fell outside the scope of the Freedom of Information Act 2000 (the "Act") because it is information held for the purposes of journalism, art or literature. The Commissioner's decision is that the information, to the extent that it exists, is genuinely held for the purposes of journalism. Therefore the Commissioner finds that 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 a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 26 September 2010 the complainant asked the BBC to provide the following information in accordance with the Act:
  1. *"Please release the following programme:*

*"Scientology – The Road to Total Freedom?", Panorama, 27/4/1987".*

2. *"Please release a transcript of the programme, if one exists."*
3. The BBC responded to the request on 19 October 2010 by stating that the requested information was excluded from the Act because it is held for the purposes of "journalism, art or literature." The BBC 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." It further noted that 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 BBC therefore refused to provide any information in response to the request for information.

## **The Investigation**

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### **Scope of the case**

4. On 3 November 2010 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 requested information is part of an archive, held for historical purposes. Although the information is the output of past journalism it does not mean that it is now held for the purpose of journalism.

### **Chronology**

5. The Commissioner has not deemed it necessary to see the withheld information in this case or receive submissions from the complainant and the BBC in relation to the request.

## 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..."*

7. 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."*

8. 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 – V of this Act applies to any other information held by the authority."*

9. 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, ie information that is held by the BBC for the purposes of journalism, art or literature.

10. 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.

11. The Commissioner will first determine whether a 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 that request.

#### Derogation

12. 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"* (para 44) and that *"...provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA."* (para 46)

13. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – ie journalism, art or literature – it is not subject to the Act.
14. 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.
15. 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 comprised of the following 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 colleagues by more experienced colleagues, professional*

*supervision and guidance, and reviews of the standards and quality of particular areas of programme making."*

16. In determining whether the requested 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.
17. The requested information in this case is a copy of a television programme broadcast by the BBC in 1987 and, if held, a transcript of that programme.
18. The complainant has argued that this information is historic and therefore he does not accept that it is now held for the purposes of journalism. The Commissioner therefore needs to determine whether the information was genuinely held for the purposes of journalism on 26 September 2010. It is not material whether the information is also held for other purposes too, provided it is genuinely held for the purposes of journalism.
19. The Commissioner accepts that this information may, in part, be held for non-derogated archival purposes. However, the Commissioner also recognises that copies of previously broadcast programmes are retained so that they can be used for repeat broadcasts, as potential content in other BBC programmes and as a source of research when creating output.
20. In this case the Commissioner is aware that the BBC screened a Panorama programme entitled "The Secrets of Scientology" on 28 September 2010, which itself was a follow up to an earlier Panorama film on Scientology that was shown in May 2007. The Commissioner therefore considers that the requested information would be retained and used to provide context and background to the BBC's output and still held as a resource which may be used for future documentaries on the same subject.
21. For this reason, the Commissioner is satisfied that the BBC continues to genuinely hold this information for the purposes of journalism. As stated above, he has concluded that the information would serve to inform the editorial process referred to at paragraph 15 and would be used by those involved in the production of future output. As a result,

the Commissioner has found the requested information to be derogated and that the BBC was not obliged to comply with Parts I to V of the Act.

## **The Decision**

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22. The Commissioner's decision is that as the request is for information which is held for the purposes of journalism, the BBC was not obliged to comply with Part I to V of the Act in this case.

## **Steps Required**

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23. The Commissioner requires no steps to be taken.

## Right of Appeal

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24. 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 3<sup>rd</sup> day of February 2011**

**Signed .....**

**Pamela Clements  
Group Manager, Complaints Resolution**

**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”