

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 23 August 2011

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

### Summary

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The complainant requested all the information that the public authority held about the 2010 World Cup in South Africa, including complaints that it received. The BBC stated that the requested information fell outside the scope of the Act because it is information held for the purposes of journalism, art or literature. The Commissioner's decision is that the requested information is 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 2010 FIFA World Cup was held in South Africa. The request that is subject to this case was made after it had concluded.

### The Request

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3. On 2 December 2010 the complainant requested the following information to be provided in accordance with the Act:

*'Can you please email ALL information you have on the World Cup Programme before and after the event including emails from staff relating to the programme*

*I want to know how many complaints you have had and copies of any letters the BBC have sent after/before the programme.'*

4. On 6 December 2010 the public authority issued its response. It confirmed that it held relevant information, but that it believed that the information requested is 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 FOIA 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 concluded that the BBC 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 the request for information under the Act. However, it did explain where the complainant could find the information it does publish about its editorial complaints outside the Act.

## **The Investigation**

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### **Scope of the case**

5. On 6 December 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
6. On 12 February 2010 the complainant detailed his complaint fully. It can be summarised in the following two points:
  1. that he does not believe that the derogation can be appropriately applied to all of the recorded information that he has requested (particularly to the number of complaints and the requested letters); and
  2. that he believed that he was not provided with appropriate advice and assistance and asked the Commissioner to consider that point.

## Chronology

7. On 22 January 2011 the Commissioner wrote to the complainant and the BBC to confirm that he has received an eligible complaint.
8. On 10 February 2011 the Commissioner wrote to the complainant to explain the operation of the derogation. He asked whether in light of this information, the complainant wished this case to continue. If he did, the Commissioner asked for him to provide his submissions about why felt that the information he requested was not embraced by the derogation.
9. On 12 February 2011 the complainant replied. He said that he did want the case to continue and provided his arguments. The Commissioner acknowledged receipt on 14 February 2011 and explained that he would now issue a Decision Notice.
10. Due to the detailed arguments that the Commissioner has received in previous cases, he did not consider it necessary to write to the BBC specifically about this case.

## 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. The information that has been requested in this case is all the recorded information held at the time of the request about the World Cup programme. In the Commissioner's view this request embraces all of the following five categories of information:
  1. Information exchanged between programme makers about the content of those programmes (both before broadcasting and

- after) – including records of editorial decision making ('category one');
2. Information about the bidding process for the rights to broadcast the 2010 World Cup, including financial information ('category two');
  3. Information about complaints received about the 2010 World Cup Programmes – including those about the content of those programmes and the decision to broadcast the programmes ('category three');
  4. The number of complaints received ('category four'); and
  5. Any other correspondence, including letters, that are held and concern the World Cup Programmes ('category five').
20. The Commissioner will explain what the jurisprudence requires for the derogation to apply, before considering each category of information in turn.
21. When 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.
22. The Commissioner considers the relevant purposes that require detailed consideration in this case are journalism and art.
23. When considering journalism, the Court of Appeal adopted the Tribunal's definition 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."*

24. The Commissioner has also adopted a similar approach with regard to art, one of the other two limbs of the BBC derogation. In his view, art is comprised of the same three elements, that is:

- the preparation and creation of the artistic output;
- the editorial process; and
- the maintenance and enhancement of the standards and quality of artistic output.

25. In order to determine whether the relevant information is held for the purposes of art and/or journalism the Commissioner has ensured that he 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.

26. He will now consider each of the categories in turn:

#### *Category one*

27. The first category of information is likely to comprise of all the information that was created during and after the programmes about their content. This also includes the choice about what material to broadcast and what material to leave out of a programme. The Commissioner accepts that all of this information directly concerns the editing process.

28. In light of the submissions made by the BBC in previous cases and mentioned in the refusal notice, the Commissioner is satisfied the information is held for the purposes outlined in both paragraphs 107 (the collecting, gathering, writing and verifying of materials for publication) and 108 (editorial, the selection, prioritisation and timing of matters for broadcast) of the Information Tribunal's definition of journalism cited in paragraph 23 above. He considers that both used and unused content is retained for reference by those involved in the creation of future broadcasts and it is held directly for journalistic purposes. It is also for the same reasons held for artistic purposes in the creative production of those programmes.

*Category two*

29. The second category of information comprises of the budgeting information that was used to enable the BBC to bid for coverage of the World Cup 2010 and the information about the costs incurred in broadcasting.
30. In light of submissions made by the BBC in previous cases the Commissioner considers that the second element of journalism within the definition above, the editorial process, is relevant in this instance. He recognises that the creation of programmes or a series of programmes covering events such as the 2010 World Cup, involves the consideration of many factors. One of which is the number of staff needed to produce and present those programmes and the costs involved in deploying those staff. At the time of the request the World Cup 2010 had finished, but it is likely that the information on the production costs of covering that event were being retained so that the producers of programmes could make informed decisions on the coverage of future World Cups or other major sporting events of a similar nature. The Commissioner is therefore satisfied that the information was held for the purposes of the editorial process and therefore of journalism.

*Category three*

31. The third category concerns all the information held about answering complaints about the 2010 World Cup Programmes.
32. The Commissioner's view is that information about complaints about programmes are editorial complaints (either about the decision to broadcast the programme at all or what was broadcast in those programmes) and fall within the third element of that definition. This is because it constitutes a review of the standards and quality of particular areas of programme making to enhance standards.

33. The BBC has previously provided arguments that explain the concern it has about releasing information in respect of ongoing editorial complaints. The main points were that:
- (1) it considers editorial complaints to be one mechanism by which it supports its programme content, through continuous review of audience reaction and to ensure that future production can be informed from their results;
  - (2) it believed that the limitation of the Act was designed to protect public broadcasters' freedom of expression and that the maintenance of its editorial independence is crucial to allow it to fulfil its function of imparting information and explaining its ideas on all matters of public interest;
  - (3) the release of information of this sort would threaten its independence as it would erode the private space and this may lead to individuals attempt to influence its output. It explained that it needed to consider its past performance while considering how to create and improve its programmes; and
  - (4) the release of the information about audience feedback would damage independence because it would impede the programme maker's ability to weigh all feedback and come to journalistic judgement on future content.
34. The Commissioner notes that the request was made on 2 December 2010 and a number of complaints are likely to have been dealt with by the time the request was made. He therefore feels it is prudent to consider the situation of historic editorial complaints. This accords with paragraph 58 of the Court of Appeal judgment where the Master of the Rolls said:

*[58] 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.'*



35. The Commissioner therefore needs to determine whether the information was genuinely held for the purposes of journalism on 2 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.
36. The BBC has previously presented detailed arguments about why it believes that the Commissioner should determine that the information remains held genuinely for the purpose of journalism, despite some complaints being decided. They are:
  - (1) the effect of editorial complaints transcends the time when they are considered. The material continues to be held for editorial purposes, may influence its editorial direction and inform future content;
  - (2) the outcome (and information relating to the complaint) plays a significant role in helping inform the editorial decisions going forward, which could involve a complaint or programme about similar or identical matters in the future. The information plays a significant role in the content and connects to improving the quality of journalistic output;
  - (3) the BBC may require the same information in the event that it receives an analogous complaint and/or must make complex editorial decisions in the future;
  - (4) the BBC confirmed that information about Partially Upheld complaints is retained permanently, which evidences the importance that it places on complying with its Editorial standards. It explained that it was kept permanently to enable it to reflect on the results of previous complaints;
  - (5) the BBC does archive some material about complaints, however it should not be regarded as relinquishing its function in relation to journalism. The information that it maintains is held in order to inform journalistic content and it proved that 91% of requests for archive material came from production divisions who created content;
  - (6) it believes it is essential that programme information is retained, such as footage, journalist notes, contracts and broadcasts, to be used as a ready resource for future publications; and

- (7) in its view the physical location of the material in this case does not change the analysis that the information remains held for the purposes of journalism.
37. The Commissioner has considered the arguments of both sides when deciding whether Parts I to V of the Act apply in respect of the information. In doing so has considered the three stage test outlined in paragraph 25 above. He finds that:
- (i) the information was created for the purpose of considering the editorial complaints. He is content that it was created in order to consider the strength of the BBC's journalistic content;
  - (ii) the Commissioner is satisfied that there is a direct relationship between the information requested in respect of editorial complaints and the content of the programme that the complaint is about. In addition, the Commissioner is satisfied that the information relating to the editorial complaint is still being held so the BBC can use it to monitor and manage the quality and standards of its journalistic output; and
  - (iii) he is satisfied that the information about the editorial complaints will continue to be used by those who monitor and manage the quality, standards and impartiality of its journalistic output. It is also likely to be used by those who create future BBC output.
38. The Commissioner is satisfied that for this category of information the BBC continues to genuinely hold the information for the purposes of journalism. As explained above evidence gathered to consider editorial complaints and their results is information created as part of the management and enhancement of the standards and quality of journalism. It also used by those involved in the production of future output. These fall within the second and third paragraph of the Tribunal's definition of what 'journalism' means.

*Category four*

39. The complainant wanted the Commissioner to consider particularly carefully whether the number of complaints that it received about the World Cup 2010 programmes was derogated. The Commissioner has decided therefore to include a special category to consider these concerns.

40. As noted above, the Commissioner is satisfied that all the information maintained about editorial complaints is held for the purposes of journalism (paragraphs 38). The Commissioner is satisfied that the number of complaints is held for the same purposes as above (if it is not held in number form, then the components are all physically held by the BBC – i.e. the reference numbers of the individual complaints<sup>1</sup>). The BBC continues to genuinely hold this information for the purposes of journalism. As explained above, the number of complaints is necessary to provide an overview of the editorial complaints and they are created as part of the management and enhancement of the standards and quality of journalism. It is also used by those involved in the production of future output. The number of complaints therefore also falls within the second and third paragraph of the Tribunal's definition of what 'journalism' means.

#### *Category five*

41. The final category is residual and is designed to cover everything else about the World Cup 2010 programmes, including letters that the complainant has expressed particular concern about.
42. The Commissioner is satisfied that the information about programmes and news stories about the 2010 World Cup on its website directly relates to its journalistic functions. The Commissioner accepts that the information remains genuinely held for the purposes of journalism.
43. The Commissioner also accepts that any other letters that are about the World Cup 2010 programmes either fall within categories one to three or are otherwise held for purposes that satisfy one or more of the three elements of the Tribunal's definition of journalism in paragraph 23 above. He is satisfied that no recorded information would be held about the World Cup 2010 Programmes, unless they were held for those purposes.
44. To sum this case up, the Commissioner has found that all five categories of relevant information was held for the purposes of journalism and so the BBC was not obliged to comply with Parts I to V of the Act.

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<sup>1</sup> This follows the reasoning in Information Tribunal decision of *The Home Office v ICO* [EA/2008/0027]. It can be found at the following link:  
[http://www.informationtribunal.gov.uk/DBFiles/Decision/i203/homeOffice\\_webDecision\\_15Aug08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i203/homeOffice_webDecision_15Aug08.pdf)

45. As the BBC has no obligations to comply with Part 1 to V of the Act, the Act therefore imposes no obligations on it to provide any advice or assistance.

### **The Decision**

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46. 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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47. The Commissioner requires no steps to be taken.

## Right of Appeal

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48. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

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 23<sup>rd</sup> day of August 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”*