

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 17 November 2010**

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

### Summary

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The complainant requested a considerable amount of information about the BBC's Panorama programme. The Commissioner has previously issued a number of Decision Notices in relation to complaints he has received. A number of further complaints were originally closed informally. However the complainant has subsequently indicated that he requires a decision in relation to those complaints. Therefore, this Decision Notice will address the complaints regarding information requests in respect of which no previous Decision Notice has been issued. This excludes those complaints that have been expressly withdrawn by the complainant.

The Commissioner has carefully considered this case. His decision is that the BBC correctly determined that, if it existed, all recorded information relevant to the requests that are the subject of this Decision Notice would be held genuinely for the purposes of journalism. Therefore the BBC was not obliged to comply with Parts I to V of the Act in relation to those requests.

### 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 complainant has explained that the BBC broadcast an edition of 'Panorama' ('What's Next For Craig?') on 12 November 2007. The programme concerned the use of stimulant medication to treat children with attention-deficit hyperactivity disorder (ADHD).
3. The complainant submitted complaints to the BBC about the content of the programme on the basis that it was misleading and in breach of editorial standards and the Ofcom broadcasting code. The complaint was investigated by the BBC's Editorial Complaints Unit, and the complainant subsequently appealed part of the findings to the BBC Trust's Editorial Standards Committee. He also subsequently submitted a series of requests for information about the BBC's handling of his complaint, including records and correspondence exchanged or obtained in the course of considering the complaints, and the actions and processes of the Editorial Complaints Unit and Editorial Standards Committee.
4. The result of the BBC Trust's Editorial Standards Committee was that it partially upheld the complaint and its findings were issued in February 2010 and can be found at the following link:  
[http://www.bbc.co.uk/bbctrust/assets/files/pdf/appeals/esc\\_bulletins/2010/panorama.pdf](http://www.bbc.co.uk/bbctrust/assets/files/pdf/appeals/esc_bulletins/2010/panorama.pdf)
5. The BBC was also required to broadcast a correction and apology on BBC1 at the beginning or end of a Panorama Programme. This was undertaken on 8 March 2010.
6. The complainant has also made a large number of requests for information to the public authority. He is at the date of this Notice appealing five of the Commissioner's Decision Notices in the First Tier Tribunal (Information Rights) in case reference EA/2010/0042 (which has been consolidated with EA/2010/0121, EA/2010/0123, EA/2010/0124 and EA/2010/0125). A further appeal has also been submitted to the Tribunal that relates to the Commissioner's reconsideration of those cases in **FS50327965**.
7. It has become apparent for reasons outlined below that it is necessary for the Commissioner to ensure that he has considered and issued a Decision Notice in respect of all the complaints that have been referred to him from this complainant that have not been subsequently withdrawn by him. This Decision Notice is designed to achieve this purpose.

## The Requests

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8. The material parts of requests for information that are subject to this Decision Notice can be found in Appendices A – E of this Notice (redacted where appropriate). The Commissioner has maintained the separation through the case numbers that have been allocated, but renumbered the elements of the requests to ensure ease of reference for the remainder of the Notice. There are 25 requests which are referred to as Requests 1 to 25 in this Notice.
9. From the Commissioner's detailed investigations in the previous cases he understands that the BBC believes that if it existed the requested recorded information for all the remaining requests would be held genuinely for the purposes of journalism and excluded from the Act. This is because 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". The BBC therefore concluded that it was not required to supply information held for the purposes of creating its output or information that supports and is closely associated with these creative activities. It therefore would not provide any information in response to the requests. The Commissioner has also detailed the specific responses and dates of them in his Appendices below.

## The Investigation

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### Scope of the case

10. The complainant has approached the Commissioner a number of times. In relation to eight of the cases the Commissioner issued Decision Notices. Other cases were closed because the Commissioner believed at the time that the information requested was entirely personal data of the complainant and that the correct access regime was under section 7 of the Data Protection Act (the DPA). The Commissioner also closed a number of cases because the issues were seen as duplicates.
11. On 5 July 2010 the Commissioner issued his separate assessment under section 42 of the DPA. This considered the BBC's compliance with the DPA and it concluded that in fact only some of the information embraced by the requests amounted to personal data of the complainant.

12. Later the same day, the complainant wrote to the Information Tribunal to express concern that some of his complaints were erroneously considered to relate only to his own personal data (to be considered under the DPA) and that the Commissioner should be required to carefully consider the residue of those cases under the Act.
13. The Commissioner, having considered the situation, has come to the conclusion that it is necessary to issue a final Decision Notice in respect of all the complaints that he has been referred by the complainant that did not previously end in a Decision Notice or were not explicitly agreed to be withdrawn by the complainant. This Decision Notice is drafted to cover all such requests. For the sake of completeness and in the circumstances of this case, the Commissioner has first considered whether the BBC was obliged to comply with Parts I to V of the Act in relation to any of the information requests outlined in the appendices irrespective of whether they also cover the complainant's personal data. Requests 3 – 7 were not considered in Decision Notice **FS50265735** in error. As the Commissioner cannot issue two Decision Notices with the same reference number a new case reference (**FS50356476**) has been allocated in relation to these particular requests.
14. It should be noted that the Commissioner has also considered all the requests under section 42 of the DPA, so that the complainant's data protection access rights have been respected. However, it must be noted that the assessment under the DPA is a separate legal process from the Commissioner's duty under section 50 of the Act.

## Chronology

15. For clarity, the Commissioner has decided to include chronologies in the Appendices that include information about how each individual request has been handled.
16. On 21 October 2010 the Commissioner notified the public authority that he was required to draft a further Decision Notice.
17. It was decided that in light of the Commissioner acquiring detailed arguments in the previous cases and contemporary arguments in **FS50327965**<sup>1</sup> it was not necessary to make any further enquiries of the BBC about this particular case.

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<sup>1</sup> This case reference number relates to the Commissioner's reconsideration of the requests where he had already issued five Decision Notices (FS50237250, FS50265735, FS50265739, FS50266075 and FS50316361). The Commissioner was required in particular to see if his position had changed in light of the Court of Appeal decision and the passage of time.

## Analysis

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### Substantive Procedural Matters

18. Section 3 of the Act<sup>2</sup> states that:

*"3. – (1) In this Act "public authority" means –  
(b)... any body...which –  
(i) is listed in Schedule 1....."*

19. 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"*

20. 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".*

21. 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, if it existed, would be held genuinely for the purposes of journalism, art or literature.

22. 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.

23. The Commissioner will first determine whether the requests are 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 requests.

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<sup>2</sup> All provisions that have been cited in this Notice can be found in full in the Legal Annex that is attached to the end of it.

## Derogation

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

25. 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.
26. With regard to establishing the purpose for which the information would be 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 and/or in performing one of the activities covered by journalism, art or literature.
27. 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 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."*

28. In considering whether the information is, or would be, held for the purposes of journalism the Commissioner has considered the following factors:
- The purpose for which the information was, or would have been, created;
  - The relationship between the information and the programmes content which covers all types of output that the BBC produces; and
  - The users, or would be users, of the information.
29. It is also important to note that this Decision Notice considers the situation at the date of the requests. If it would be held genuinely for the purposes of journalism then the BBC would not be obliged to comply with Parts I to V of the Act.
30. There are 25 requests for information in this case. The complainant has argued why in his view the information requested cannot be said to be held for the purposes of 'art, journalism and literature' and has asked that the Commissioner pay particular attention to how some of his requests relate to the complaint process and the passage of time.
31. To ensure clarity, the Commissioner has decided that it is appropriate to subdivide the 25 requests into the following four categories:
1. Information generated in the process of considering the complainant's editorial complaints ([3], [4], [5], [7], [8], [9], [10], [11], [12], [15], [24] and [25]);
  2. Information generated in the process of considering another person's editorial complaint in 2001 ([16], [17], [18], [19], [20], [22] and [23]);
  3. Information about the complainant's information requests in relation to the programme content and his complaint about it ([1] and [2]); and

4. Information about complaints handling procedures and about an individual's qualifications and their record in handling editorial complaints ([6], [13], [14] and [21]).
32. He will consider for each category whether the requested information is, or would be, genuinely held for the purposes of journalism below.

**Category one: Information about the complainant's editorial complaint**

33. The Commissioner has adopted the definition of journalism that was advocated in Tribunal decision EA/2005/0035 and which is mentioned in paragraph 27 above. The Commissioner's view is that information about editorial complaints falls 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. This follows his previous Decision Notices.
34. The BBC has provided further 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.



35. In respect of the requests being considered in category one, it is important to consider the situation at the date of the requests. They were before the final decision regarding the complaint was communicated in February 2010. Therefore the Commissioner accepts that these requests for information concerned active editorial complaints.
36. When deciding whether Parts I to V of the Act apply in relation to the information requested for this category, the Commissioner has considered the three stage test outlined in paragraph 28 above. He finds that:
- a. The information was, or would have been, created for the purpose of considering the editorial complaint. He is content that it was, or would have been, created in order to consider the strength of the BBC's journalistic content;
  - b. 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, or would still have been, held so the BBC can use it to monitor and manage the quality and standards of its journalistic output; and
  - c. He is satisfied that the information about the editorial complaints will, or would, continue to be used by those who monitor and manage the quality, standards and impartiality of its journalistic output. It would also likely be used by those who create future BBC output.
37. It follows that the Commissioner is satisfied that, if it existed, the requested recorded information would be held genuinely 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 is, or would also be 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.
38. He therefore finds that the relevant information would be held for the purpose of journalism and so the BBC was not obliged to comply with Parts I to V of the Act.

## Category two: Information about another individual's editorial complaint

39. The second category of information relates to an editorial complaint that was partially upheld in 2001. The complainant has argued in another case that, now that the result of the complaint has been decided, he believes that it cannot be said that the BBC still holds the information for the purposes of journalism. This is because the information is now historic and he placed reliance on paragraph 58 of the Court of Appeal judgment where the Master of the Rolls had 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.'*

40. The Commissioner therefore needs to determine whether the information was genuinely held for the purposes of journalism when the requests were made. It is not material whether the information is, or would also have been held for other purposes too, provided that it is or would have been genuinely held for the purposes of journalism.
41. The BBC has presented detailed arguments in another case about why it continues to rely on the derogation in respect of historic editorial complaints. The Commissioner considers that the situation is analogous and therefore he will consider them. The BBC explained that it believes that the Commissioner should determine that the information remains held genuinely for the purpose of journalism, despite the result of the complaint being decided and the complaints process therefore being exhausted. Its arguments were as follows:
- (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 evidenced 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 ensure that the BBC is in a position to not make the same mistakes again. Indeed, the main reason it would continue to hold the information for eight years would be to inform its decisions in respect of Editorial standards;
  - (6) It explained that just because the information may have been archived, it should not be regarded as dormant. This is because the information is held permanently in order to inform journalistic content and it proved that 91% of requests for archive material came from production divisions who created content; broadcasts, to be used as a ready resource for future publications; and
  - (7) In its view the physical location of the material does not change the analysis that the information remains held for the purposes of journalism.
42. After considering the arguments above, the Commissioner has not been convinced by the complainant's arguments that information about historic editorial complaints is not still held for the purposes of journalism. Instead, he is satisfied for the reasons outlined in paragraphs 36 and 37 above that the information is or would have been genuinely held for the purposes of journalism,
43. The Commissioner considers that even after the complaint handling has been concluded, the information requested, if held, would be genuinely held for the purposes of journalism as the main reason for retention is to allow those involved in the management of standards to refer to it. It also used by those involved in the production of future output. The information therefore falls within the second and third paragraph of the Tribunal's definition of what 'journalism' means.

44. He therefore finds that the relevant information would be held for the purpose of journalism and so the BBC was not obliged to comply with Parts I to V of the Act.

**Category three: Information about complainant's information requests in relation to the programme content and his complaint about them**

45. As noted above, since the broadcast of a particular 'Panorama' programme the complainant has submitted complaints to the BBC about inaccuracies in the broadcast and has made related requests for information to the BBC. The Commissioner considers that subsequent requests for information about the handling of a complaint about broadcast content are also requests for information which, if held, would be held genuinely for the purposes of journalism.
46. As he has stated previously, the Commissioner's view is that the consideration of complaints about programme content is one of the mechanisms that the BBC uses to manage the quality of its journalistic output. It therefore follows that information that is generated when dealing with particular complaints is in effect information generated as part of that management process. The Commissioner considers that even after the complaint handling has been concluded, the information requested, if held, would be genuinely held for the purposes of journalism as the main reason for retention is to allow those involved in the management of standards to refer to it.
47. He therefore finds that the relevant information would be held for the purpose of journalism and so the BBC was not obliged to comply with Parts I to V of the Act.

**Category four: Information about complaints handling procedures and about an individual's qualifications and their record in handling editorial complaints**

48. The Commissioner appreciates that the information about the staff that investigate complaints and their qualifications are a step removed from the actual consideration of complaints as part of the management of standards.
49. It is noted that a number of these requests relate to the independent editorial adviser and their connections with the BBC or a specific 'Panorama' programme.

50. The BBC has explained that independent editorial advisers are appointed to inform the BBC Trust's Editorial Standards Committee about the range of editorial issues relating to individual complaints. Paragraph 2.4 of the Editorial Standards Committee's Terms of Reference states:

*"The [Editorial Standards] Committee is advised by one or more independent Editorial Advisors who assist on individual issues or complaints. Such advisers inform the Committee about the range of editorial issues relating to individual complaints. Advisors are appointed by the Committee for up to a three year term, renewable for a further two years by mutual agreement of the Chair of the Committee and the Advisor. Advisors usually attend meetings where relevant. The Committee may also appoint ad hoc advisors to assist on individual issues or complaints."*

51. The Commissioner notes that the role of an independent editorial adviser is to assist and inform the Editorial Standards Committee in its handling of appeals against the outcome of decisions made by the BBC's Editorial Complaints Unit. The decisions relate to editorial complaints about the BBC's broadcast content. As outlined at paragraph 36 to 38, the Commissioner considers that information about editorial complaints is held for the derogated purposes. The Commissioner considers that the role of the independent editorial adviser is closely associated with the BBC's editorial complaints handling process, and therefore information relating to the identities of those appointed as independent editorial advisers is also held to a genuine extent for the purposes of journalism.
52. To provide further detail, the Commissioner is of the view that the decision about the scope of these roles (and who is suitable) is central to the management of standards and therefore it is still held for the purpose of ultimately improving those standards. It follows that the Commissioner has been satisfied that that the information, if held, that falls within this category would be caught by paragraph 109 of the Information Tribunal judgment cited in paragraph 27 above. This conclusion corresponds with his Decision Notice in **FS50265739** where he considered a very similar request for information.
53. He therefore finds that the relevant information would be held for the purpose of journalism and so the BBC was not obliged to comply with Parts I to V of the Act.

*Section 16(1)*

54. The complainant specifically raised this issue in a number of the cases. Where requests are for derogated information Parts I to V of the Act do not apply. It follows that there is no obligation on the BBC to provide advice and assistance in respect of those requests for information that fall within the derogation.

**The Decision**

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55. The Commissioner's decision is that, if it existed, all the requested recorded information would be held for the purposes of for the purposes of journalism. Therefore, the BBC was not obliged to comply with Part I to V of the Act in this case in relation to any of the requests.

**Steps Required**

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56. The Commissioner requires no steps to be taken.

## Right of Appeal

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57. 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 17<sup>th</sup> day of November 2010**

**Signed .....**

**Jo Pedder  
Group Manager, Policy Delivery**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Annex A – requests without a current reference number that are to be considered in this case

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1. It should be noted that the Commissioner has both renumbered all the elements in this case and redacted the personal data from the requests. He has redacted the names because this Decision Notice will appear on his website. He has decided to include an appraisal of the key correspondence for each request to avoid confusion.

*The remainder of the request that was partially considered in **FS50265735***

2. On 29 May 2009 the complainant wrote to the BBC and made a set of requests that included (BBC reference RFI20090661):

*[1] Have there been any communications within the BBC concerning the requests for disclosure made by [the complainant] in the period from Friday 25<sup>th</sup> April to 2<sup>nd</sup> May 2008, to the ECU (commencing with his email dated 25<sup>th</sup> April 2008 to [Individual A redacted]), [Individual B redacted] (his email dated 29<sup>th</sup> April 2008 to her) and the Chairman of the BBC Trust relating to the Broadcast (see email dated 25<sup>th</sup> April 2008 and response from [Individual C redacted] dated 29<sup>th</sup> April 2008)? What communications have there been with whom and when? Produce all emails or other documents relating to such communications.*

*[2] Has the BBC Trust Chairman or anyone else in the Trust or the BBC had any communications concerning the Freedom of Information Act request ("the FOI Request") dated 15<sup>th</sup> February 2009 made by [the complainant] concerning or relating to the Broadcast? What communications have there been with whom and when? Have there been any communications about how the FOI Request should be handled by the BBC? Produce all emails or other documents relating to such communications.*

*[3] Has the BBC Trust Chairman or anyone else in the Trust or the Director General or anyone else in the BBC had any communications with anyone concerning any of the requests for disclosure made by [the complainant] dated 4<sup>th</sup> February 2009 (letter to the Chairman and the Director General), and emails dated 18<sup>th</sup> and 19<sup>th</sup> March to both of them? What communications have there been with whom and when? Produce all emails or other documents relating to such communications.*



*[4] Has the Chairman of the BBC Trust or the Director General of the BBC communicated with anyone in the Trust or the BBC concerning the complaints made by [the complainant] to them on 18<sup>th</sup> and 19<sup>th</sup> March 2009 that the BBC is not acting in accordance with its Royal Charter or the Agreement with the Secretary of State dated July 2006? What communications have there been with whom and when? Produce all emails or other documents relating to such communications.*

*[5] Has the Chairman of the BBC Trust or anyone on his behalf communicated with anyone concerning the email to him dated 20<sup>th</sup> March 2009 from [the complainant]? What communications have there been with whom and when? Produce all emails or other documents relating to such communications.'*

3. On 4 June 2009 the public authority responded and stated that generally complaints related information was considered to fall outside of the Act and that a considerable amount of the requested material fell into this category. However it had concluded, applying the dominant purpose test, that there was one exception. It stated that material held by the BBC Trust regarding the complaint fell within the Act because it was held primarily for the purpose of enabling the Trust to undertake a regulatory function under the Charter. It explained that where such information was held by the Trust it was refusing to comply with the request because locating and retrieving that material would exceed the appropriate limit in section 12(1).
4. It then considered each of the remaining requests in turn:
  - Element [1] – it believed that the work required to locate and retrieve the material would exceed the appropriate limit;
  - Element [2] – it explained that the Chairman did not hold any relevant recorded information and the searches it has conducted by the Information Policy and Compliance Team did not reveal any involvement with either the Chairman or the Trust; and
  - Elements [3], [4] and [5] – it provided further information about the receipt of emails, but explained that any further searches to find information referred to would exceed the appropriate limit.
5. The complainant requested an internal review on the same day. He also referred the case to the Commissioner explaining that he was dissatisfied with all the answers that he had received.

6. On 27 July 2009 the result of the internal review was communicated. It focussed solely on the remaining elements. It explained that it upheld its belief that it could rely on section 12(1) in respect to all of the information requested. It said that it had treated the request as a whole. It provided a detailed explanation and moved to consider each aspect individually too:
- Element [1] – it explained that the request asked for potentially all contact with individuals about his requests. It explained that it had checked the most obvious place, but couldn't be sure it could obtain all the information without undertaking a series of checks that exceed the costs limit. It said it was prepared to communicate the results of the most obvious search to go towards fulfilling its obligations under section 16(1);
  - Element [2] – it explained that it undertook limited searches in an effort to fulfil its obligations under section 16(1). However, it stated that it was unable to establish whether there was further information within the scope of the request without doing work that exceeded the costs limits;
  - Element [3] – it explained that it had managed to trace when the Director General received the information, but that the Director General delegates responsibility to his correspondence unit in most cases;
  - Elements [4] and [5] – it undertook limited further searches in light of its duties under section 16(1).
7. On 10 November 2009 the Commissioner wrote to the complainant in order to explain that his view was that these requests were for first party personal data and that he would not consider these elements further under the Act and conduct an assessment under the DPA instead.

*Other request that was viewed as being a duplicate and was not considered separately (this request was seen to be very similar to the request considered in **FS50265739**):*

8. On 26 July 2009 the complainant requested the following information in accordance with the Act (BBC reference RF120091150):

*'[6] The "independent editorial adviser":  
(i) who this is and her curriculum vitae;  
(ii) her e mail and telephone number;*

*(iii) on the basis of what information relating to the appointee she was selected and appointed as the independent editorial adviser;*  
*(iv) all emails, notes and other documents, including all internal emails, relating to considering and making her selection and appointment;*  
*(v) all information relating to any connections which she has or may have had with Panorama;*  
*(vi) all information relating to any connections which she has or may have had with the BBC or anyone else involved in or connected with the Panorama Broadcast ("What's Next for Craig?" on 12th November 2007), or this appeal.*

*[7] I would be grateful for any instructions given to or communications with the "independent editorial adviser" in relation to this investigation.*

*[8] I would also be grateful for all information obtained by the "independent editorial adviser" in relation to the investigation, my complaints and/or the appeal.*

*[9] I would like to see all communications or correspondence from Panorama which are held by the adviser in connection with my complaints, the investigation or the appeal.'*

9. On 21 August 2009 the public authority issued its response to this request. It explained that it was not obliged to respond to a request that was vexatious [section 14(1)] or repeated [section 14(2)]. It explained that it viewed this request as vexatious and that it does not offer an internal review when it believed that this is so.
10. On 22 August 2009 the complainant explained that he was dissatisfied with how the public authority handled this request for information.
11. On 28 June 2010 the Commissioner issued a Decision Notice in respect to **FS50265739**. This covered a request with the same words as this one, which was dated 3 June 2009. In that case the Commissioner found that the derogation applied and this has subsequently been appealed. The Commissioner feels that it is prudent to consider the reiteration of the request that was made a bit more than a month later in this Decision Notice to consider whether anything had changed between the two dates.

## Annex B – request considered in FS50265745

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1. On 29 June 2009 the complainant requested the following information (BBC reference RFI20090947):

*[10] all emails notes and other documents including all internal emails relating to communications with or from the IEA concerning my complaints concerning "What's Next for Craig?" Panorama BBC 1 on 12<sup>th</sup> November 2007 and/or my "appeal";*

*[11] all information obtained by the IEA concerning "What's Next for Craig?" Panorama BBC 1 on 12<sup>th</sup> November 2007 and/or my "appeal";*

*[12] all communications to or from Panorama which are held by the IEA concerning "What's Next for Craig?" Panorama BBC 1 on 12th November 2007 and/or my "appeal".*

2. On 1 July 2009 the BBC issued its response. It explained that it believed that the request was a repeated request and that it did not need to answer it by virtue of section 14(2) [request was repeated]. It said that it viewed it as a repeat of a request that had its reference number RFI20090829. In light of all the other cases, it explained that it would not carry out an internal review.
3. On 16 October 2009 the complainant referred this particular request to the Commissioner. He expressed particular concern about whether the public authority had complied with its obligations under section 16(1) and whether it had provided reasonable advice and assistance.
4. On 10 November 2009 the Commissioner wrote to the complainant in order to explain that his view was that these requests were for first party personal data and that he would close the case and conduct an assessment under the DPA.

## Annex C – request considered in FS50265747

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1. On 30 June 2009 the complainant also requested the following information (BBC reference RFI20090966):

*'[13] I would be most grateful if you could tell me what "skills" the IEA [independent editorial adviser] has and what is the basis for saying she has those "skills".*

*'[14] I infer from your response that there is in fact a CV or equivalent for her held by the BBC and I would be grateful if you could let me have that.'*

2. On 29 July 2009 the public authority issued a response. It explained that it did not hold any relevant recorded information for either of these requests.
3. The complainant requested an internal review on the same day.
4. On 2 September 2009 the public authority issued its response. It confirmed that it did not hold any relevant recorded information and that it had conducted further searches to be certain. It said that had it held the CV then it would have applied section 40(2) to it.
5. On 16 October 2009 the complainant clarified that he did not believe that no relevant recorded information was held. He explained:

*'The IEA was in fact appointed to a panel by the ESC in 2005, and was reappointed by the Chairman of the ESC in 2007. She has been described as "highly experienced". She is someone well known to the BBC Trust and she is paid from licence payers funds. She has a crucial role in the ESC procedure. It is absurd to suggest that nowhere in the BBC is there any written information about her background. It might be that the BBC do not have a CV as such (which is all the IR looked for) but they must have information about her and indeed from her about herself. My request was not limited to CV- it stated "..or equivalent".'*

6. On 10 November 2009 the Commissioner wrote to the complainant in order to explain that his view was that this request was highly similar to **FS50265739**, that he would consider the same issues in that one and would close this one. However, the Commissioner omitted to include this request in that Notice, so has decided to consider it in this case for completeness.

## Annex D – requests from FS50265749

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1. On 1 July 2009 the complainant also requested the following information (BBC reference RFI20090972):

*"[15] Has there been any communication with or from the Independent Editorial Advisor ("the IEA") concerning my complaints or "appeal" relating to the broadcast "What's Next for Craig?" (Panorama BBC 1 12th November 2007) since the phone call ("the phone call") to her referred to in [Individual D redacted]'s letter dated 29th June 2009 and since the answer given in that letter? What communications have there been? Please produce all notes, letters, faxes, emails or other documents relating to such communications?"*

2. On 29 July 2009 the BBC issued its response. It explained that it believed that the request was a repeated request and that it did not need to answer it by virtue of section 14(2) [request was repeated].
3. On 30 July 2009 the complainant wrote to the BBC to highlight that his requests have picked up on errors and to explain that these purposes were not in his view vexatious. He also wrote to the Commissioner and asked him to take this case forward as he explained that the public authority was not minded to do an internal review in this case.
4. On 3 August 2010 the BBC wrote to the complainant to explain that it viewed its position as correct and that it would not correspond further on this matter. In the Commissioner's view this served as an internal review.
5. On 12 October 2009 the Commissioner wrote to the complainant to explain that he viewed the information to be likely to fall within the derogation and to ask whether the complainant wanted this case to continue.
6. On 16 October 2009 the complainant wrote to the Commissioner to explain that he did want this case to continue. He also stated that while he accepted the request was a repeat of a previous request, he wanted to capture information that had not been generated then and to ask for the information to be provided to him as it came into being. He explained that he believed that section 16(1) should allow him to do this.

7. On 10 November 2009 the Commissioner wrote to the complainant to explain that his view was that the information was first party personal data and that he would consider it in an assessment under the DPA.

*Other requests were submitted under this reference number and not considered in previous Decision Notices by the Commissioner*

8. On 2 October 2009 the complainant requested the following information (BBC reference RFI20091373):

*'I am writing to you in connection with the Panorama broadcast called Kids on Pills in 2000. This was the subject of a complaint made successfully made [Individual D redacted] to [Individual E redacted] of what was then the PCU and to the BSC*

*[16] Please produce the correspondence which [Individual E redacted] had with [Individual D redacted], the submissions made to the BSC and the ruling.'*

9. On 12 October 2009 the complainant also requested the following information (BBC reference RFI20091402):

*'I would like to know:*

*what role [Individual E redacted] played in relation to:*

*[17] the handling of the complaint of [Individual D redacted] against Panorama and/or the BBC,*

*[18] its rejection by the PCU,*

*[19] the submissions made by the BBC and on behalf of Panorama to the Broadcasting Standards Commission including at the contested oral hearing before the Commission- did he act on behalf of the BBC and Panorama in contesting that complaint or advise on it? and*

*[20] remedial action if any taken following the decision of the Commission on 16th July 2001 which upheld [Individual D redacted]'s complaint about how excerpts from his interview had been improperly edited.*

*[21] whether he has acted as a representative or advocate defending Panorama on a complaint about unethical or unacceptable broadcasting. Please provide details.'*

10. On 16 October 2009 the complainant also requested the following information (BBC reference RFI20091431):

*'The Broadcasting Standards Commission made the attached ruling (which related to [Individual D redacted]'s complaint).*

*[22] What remedial steps were taken by [Individual E redacted] or the BBC in relation to the finding?*

*[23] Was there a report by the BBC under section 120 of the Broadcasting Act 1996? Please produce the correspondence, any report, and internal documentation of the BBC concerning this complaint, how it was handled, and by whom both before and after the adjudication that the Panorama broadcast had been unfair to [Individual D redacted].'*

11. On 30 October 2009 the BBC wrote to the complainant to provide a response to the three above requests in a single letter. It explained that it believed that the derogation applied to all the information, but that it could volunteer that there was no complaint to the PCU in this case and therefore it held no recorded information in respect to that element. It also noted that the findings requested in part of request [16] had already been acquired by the complainant who provided the BBC with a copy of them when making the third request. It explained that it did not offer an internal review when the derogation applied and that the complainant should approach the Commissioner directly should he wish to appeal.
12. On 3 November 2009 the complainant referred these requests to the Commissioner. He explained that he did not believe that the derogation was applied appropriately as the information requested would be 'held solely for the complaints process'. He explained that the complaint by [Individual D redacted] was made in 2000-2001 and was partly upheld by the Broadcasting Standards Commission. He explained that he understood that the file had been obtained from the BBC archives by the BBC editorial complaints unit in February 2008.



## Annex E – request considered in FS50265758

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1. On 29 June 2009 the complainant also requested the following information (BBC reference RFI20090974)

*"[24] I would also be grateful for all information obtained by the "independent editorial adviser" in relation to the investigation, my complaints and/or the appeal.*

*[25] I would like to see all communications or correspondence from Panorama which are held by the adviser in connection with my complaints, the investigation or the appeal."*

*(i) Please inform me if the position has changed since the answer given on 29th June 2009 by [Individual F redacted]?*

*(ii) If so please tell me each respect in which the position has changed since the answer given on 29th June 2009.*

*(iii) If the position has changed since the answer given on 29th June 2009 by [Individual F redacted] please produce the information obtained by the IEA since that answer in relation to the investigation, my complaints and/or the appeal;*

*(iv) Since the answer given on 29th June 2009 has the IEA obtained received or acquired any emails, notes, letters. Faxes, internal emails of the BBC, or other documents which relate to or are concerned with or are material to my complaints or "appeal" relating to the broadcast "What's Next for Craig?" (Panorama BBC 1 12th November 2007)? Please produce all documents.*

*(v) If the position has changed since the answer given on 29th June 2009 by [Individual F redacted] please produce the communications or correspondence from Panorama which have since the answer come to be held by the adviser in connection with my complaints, the investigation or the appeal."*

2. On 29 July 2009 the BBC issued its response. It explained that it believed that the request was a repeated request and that it did not need to answer it by virtue of section 14(2) [request was repeated].
3. On 2 July 2009 the complainant wrote to the BBC to explain that the aim of the request was to capture information that did not exist when he made his first request for information. He explained that he wanted

the information to be provided directly to him as soon as it was brought into existence.

4. On 30 July 2009 the complainant wrote to the BBC to highlight that his requests have picked up on errors and to explain that these purposes were not in his view vexatious. He also wrote to the Commissioner and asked him to take this case forward as he explained that the public authority was not minded to do an internal review in this case.
5. On 3 August 2010 the BBC wrote to the complainant to explain that it viewed its position as correct and that it would not correspond further on this matter. In the Commissioner's view this served as an internal review.
6. On 12 October 2009 the Commissioner wrote to the complainant to explain that he viewed the information to be likely to fall within the derogation and to ask whether the complainant wanted this case to continue.
7. On 16 October 2009 the complainant explained his understanding of the derogation and why he believed that this request embraced information that had not yet come into being. He explained that he believed that section 16(1) should allow him to do this.
8. On 10 November 2009 the Commissioner wrote to the complainant to explain that his view was that the information was first party personal data and that he would consider it in an assessment under the DPA.

## Legal Annex - Relevant Statutory Provisions

### *Derogation*

#### **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”*

*Other provisions cited*

## **Freedom of Information Act 2000**

### **Section 12 – Exemption where cost for compliance exceeds the appropriate limit**

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

### **Section 14 - Vexatious or repeated requests**

Section 14 of the Act provides that:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

## **Section 16 – Duty to provide advice and assistance**

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

## **Section 40 – Personal information**

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the [1998 c. 29.] Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the [1998 c. 29.] Data Protection Act 1998 shall be disregarded.

(7) In this section—

- “the data protection principles” means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
- “data subject” has the same meaning as in section 1(1) of that Act;
- “personal data” has the same meaning as in section 1(1) of that Act.

## **Data Protection Act 1998**

### **Section 1 - Basic interpretative provisions**

(1) In this Act, unless the context otherwise requires—

- “data” means information which—
  - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
  - (b) is recorded with the intention that it should be processed by means of such equipment,
  - (c)

is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d)

does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

- "data controller" means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;
- "data processor", in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
- "data subject" means an individual who is the subject of personal data;
- "personal data" means data which relate to a living individual who can be identified—

(a)

from those data, or

(b)

from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

- "processing", in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

(a)

organisation, adaptation or alteration of the information or data,

(b)

retrieval, consultation or use of the information or data,

(c)

disclosure of the information or data by transmission, dissemination or otherwise making available, or

(d)

alignment, combination, blocking, erasure or destruction of the information or data;

- "relevant filing system" means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to

instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

(2) In this Act, unless the context otherwise requires—

(a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.

(3) In determining for the purposes of this Act whether any information is recorded with the intention—

(a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or

(b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.

## **Section 7 – Right of Access to personal data**

(1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,

(b) if that is the case, to be given by the data controller a description of—

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are to be processed, and

(iii) the recipients or classes of recipients to whom they are or may be disclosed,

(c) to have communicated to him in an intelligible form—

(i) the information constituting any personal data of which that individual is the data subject, and



(ii) any information available to the data controller as to the source of those data, and

(d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.

(2) A data controller is not obliged to supply any information under subsection (1) unless he has received—

(a) a request in writing, and

(b) except in prescribed cases, such fee (not exceeding the prescribed maximum) as he may require.

(3) A data controller is not obliged to comply with a request under this section unless he is supplied with such information as he may reasonably require in order to satisfy himself as to the identity of the person making the request and to locate the information which that person seeks.

(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless—

(a) the other individual has consented to the disclosure of the information to the person making the request, or

(b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

(5) In subsection (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subsection is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.

(6) In determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to—

(a) any duty of confidentiality owed to the other individual,

(b) any steps taken by the data controller with a view to seeking the consent of the other individual,

(c) whether the other individual is capable of giving consent, and

(d) any express refusal of consent by the other individual.

(7) An individual making a request under this section may, in such cases as may be prescribed, specify that his request is limited to personal data of any prescribed description.

(8) Subject to subsection (4), a data controller shall comply with a request under this section promptly and in any event before the end of the prescribed period beginning with the relevant day.

(9) If a court is satisfied on the application of any person who has made a request under the foregoing provisions of this section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request.

(10) In this section—

“prescribed” means prescribed by the Secretary of State by regulations;

“the prescribed maximum” means such amount as may be prescribed;

“the prescribed period” means forty days or such other period as may be prescribed;

“the relevant day”, in relation to a request under this section, means the day on which the data controller receives the request or, if later, the first day on which the data controller has both the required fee and the information referred to in subsection (3).

(11) Different amounts or periods may be prescribed under this section in relation to different cases.

## **Section 42 – Request for assessment**

(1) A request may be made to the Commissioner by or on behalf of any person who is, or believes himself to be, directly affected by any processing of personal data for an assessment as to whether it is likely or unlikely that the processing has been or is being carried out in compliance with the provisions of this Act.

(2) On receiving a request under this section, the Commissioner shall make an assessment in such manner as appears to him to be appropriate, unless he has not been supplied with such information as he may reasonably require in order to—

(a) satisfy himself as to the identity of the person making the request, and

(b) enable him to identify the processing in question.

(3) The matters to which the Commissioner may have regard in determining in what manner it is appropriate to make an assessment include—

(a) the extent to which the request appears to him to raise a matter of substance,

(b) any undue delay in making the request, and

(c) whether or not the person making the request is entitled to make an application under section 7 in respect of the personal data in question.

(4) Where the Commissioner has received a request under this section he shall notify the person who made the request—

(a) whether he has made an assessment as a result of the request, and

(b) to the extent that he considers appropriate, having regard in particular to any exemption from section 7 applying in relation to the personal data concerned, of any view formed or action taken as a result of the request.