

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 December 2011

**Public Authority:** The British Broadcasting Corporation  
(‘the BBC’)

**Address:** 2252 White City  
201 Wood Lane  
London  
W12 7TS

### Decision (including any steps ordered)

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1. The complainant has requested information about the number of BBC journalists in China who are competent in Chinese. The BBC has explained that this information falls under a category of information covered by the derogation and therefore the BBC is excluded from its obligations under the FOIA with regard to this information.
2. The Information Commissioner’s decision is that this category of information is held by the BBC for the purposes of ‘journalism, art or literature’ and does not fall under the FOIA. He therefore upholds the BBC’s position and requires no steps to be taken.

### Request and response

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3. The complainant wrote to the BBC on 6 February 2011 and asked:  
*‘I want to know (a) how many of the BBC’s journalists in China have a sufficient command of Chinese by which I mean are competent enough in the language to operate in the country successfully, and can for example conduct interviews with people who speak no English, and (b) how many there are not competent in Chinese.’*
4. The BBC responded on 15 February 2011. It stated that the information requested is excluded from the FOIA because it is held for the purposes of ‘journalism, art or literature.’ It explained that Part VI of Schedule 1 of the FOIA provides that information held by the BBC and the other public service broadcasters is only covered by the FOIA 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.

5. During the Information Commissioner's (the Commissioner's) investigation, the BBC clarified that with respect to China, whilst it will indirectly know the language skills of its journalists based there, there is no record held centrally or at a local level that records the fluency in language of these individuals.
6. The Commissioner informed the BBC that he either required further evidence to be satisfied that the information was not held under the FOIA or he required further arguments in support of the derogation. The BBC was therefore asked to confirm its response to the complainant's request.
7. The BBC explained that if it held the requested information in recorded form, it would be held for the purposes of journalism, and therefore it was applying the derogation. The BBC has set out its arguments with regard to this category of data: the skills of its journalists based in countries and territories around the world. It should be noted that the BBC's explanation as to whether it holds the requested information would not necessarily satisfy the Commissioner if he was carrying out an investigation of a public authority's compliance with section 1 of the FOIA. However, if the information is derogated the BBC has no obligation to comply with section 1, and therefore the Commissioner has concentrated on deciding whether the derogation applies.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case.

## Reasons for decision

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9. Schedule One, Part VI of the FOIA provides that the BBC is a public authority for the purposes of the FOIA but only has to deal with requests for information in some circumstances. The entry relating to the BBC states that the BBC is a public authority:

*"...in respect of information held for purposes other than those of journalism, art or literature."*

10. This means that the BBC has no obligation to comply with Part I to V of the FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner refers to this as 'the derogation'.
11. The House of Lords in *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has the jurisdiction to issue a decision notice to confirm whether or not the information is caught by the derogation.
12. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment was made by Lord Neuberger of Abbotsbury MR who stated that:

*" ..... once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes." (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)*

13. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – ie journalism, art or literature - it is not subject to the FOIA. His role is to consider whether the information was genuinely held for the derogated purposes or not.
14. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was in fact being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.
15. The Court of Appeal adopted the Information Tribunal's definition of journalism which set out that journalism comprises three elements.
  1. *The first is the collecting or gathering, writing and verifying of materials for publication.*
  2. *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; and*
  - *the provision of context and background to such programmes.*
3. *The third element is the maintenance and enhancement of the standards and quality of journalism (particularly in respect of 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."*
16. The information requested in this case is the number of BBC journalists in China who are competent in Chinese. The BBC has argued that the requested information falls under a category of information which is covered by the derogation: the skills of its journalists.
17. In light of the present submissions of the BBC, the Commissioner understands that the information requested falls under the definition of journalism. The BBC has argued that the language skills of its journalists are linked to its editorial role and directly affect its output. The request therefore concerns information that relates to editorial and budgeting decisions and the BBC considers such information is held for the purposes of journalism.
18. In considering whether the information is held genuinely for the purposes of journalism, the Commissioner has considered the following four 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;
  - the users of the information; and
  - the need to ensure a level playing field between the BBC and its commercial rivals.

### **The purpose for which the information was created**

19. The BBC has explained that it considers the disclosure of the requested information (if held) would inadvertently reveal the number of journalists employed in this region.
20. The BBC has argued that its journalistic output is affected by budgetary constraints and operational information such the number of BBC journalists that are employed in a particular region is indicative of the

amount of resource that the BBC has allocated to a particular region of news output (in this instance China).

21. When considering the purposes of the requested information, the BBC has therefore argued that information concerning the language skills of its journalists is linked to the number of journalists it employs. As this number reflects the amount of resource allocated to a region, it is affected by budgetary constraints.
22. The BBC has explained that the decision as to what resource to dedicate to a particular area of news, such as news gathering and broadcasting in China, is a fundamental programme-making decision. The BBC has limited resource (the licence fee, Grant-in-Aid and commercial funding) and it considers that resource allocation goes right to the heart of its creative decision making.
23. The BBC has argued that resource allocation reflects the intended ambition of the BBC News Group for reporting in particular regions, and also clearly affects what the BBC can spend on other outputs from a fixed resource. The decisions around resources and particular decisions regarding funding are closely linked to journalism, as they determine the quality and nature of the particular output and the level of reporting in a country or territory.
24. The complainant does not accept that it would affect the BBC's creative output if the public knew the number of journalists in China. However, the Commissioner considers that the requested information regarding language skills (and therefore the number of journalists employed) is journalistic in its nature and purpose because it is related to resource allocation. It is this resource allocation which affects the BBC's creative output.
25. The Commissioner has accepted on a number of occasions (such as in case reference FS50314106) that the BBC has a fixed resource in the Licence Fee and resource allocation goes right to the heart of creative decision making. The Commissioner is satisfied that the same rationale connects the information to the derogated purposes.
26. Furthermore, the BBC has argued that if it was forced to release information regarding resource allocation with respect to its overseas journalists, this could lead to comparisons between one area of news output with another. It is the BBC's view that editorial management must be able to make judgments based upon what they believe are the editorial merits of covering particular countries or territories, not upon fear of how this spending might appear to the public.
27. The BBC therefore considers that disclosure of information such as that requested would result in an additional unnecessary pressure on

programme makers, and impact on the creative space that the BBC is ultimately trying to protect.

### **The relationship between the information and the programmes' content which covers all types of output that the BBC produces**

28. When considering the connection between the information itself and the programmes' content, the BBC has explained that its News Group employs staff who are responsible for gathering, editing and presenting the news and current affairs worldwide and this includes interviewing individuals where necessary for a report. This group is therefore responsible for providing BBC output and it is clear that a journalist's responsibilities are editorial in nature. The skills of the journalists which enable them to undertake their roles clearly support this editorial role.
29. In addition, the skills that are required of journalists (for example, the ability to speak a particular language or experience of reporting in a particular area) will reflect the nature of the output the BBC wishes to produce and the editorial ambition in relation to coverage of that particular region.

### **The users of the information**

30. When assessing the users of the information, the BBC has argued that information regarding the language skills of its journalists (if held) may be known by programme makers and production teams as part of the creative decisions in assigning stories and producing editorial news content.
31. The complainant has argued it is self-evident that the BBC would make use of this information and that this in itself should not mean it must not be disclosed. However, the Commissioner considers the fact that the BBC would use such information as part of its creative decision making does mean that it would fall under the editorial element of journalism, as given in paragraph 15.
32. Overall, the Commissioner considers that the BBC has evidenced that the requested information would be genuinely held for the purposes of journalism. He is content that this category of information (the skills of its journalists) is held for editorial and budgeting purposes. He therefore considers that the information falls within the derogation.

### **The need to ensure a level playing field between the BBC and its commercial rivals**

33. To support his analysis the Commissioner has considered the BBC's arguments with respect to the fourth factor and been mindful of the purpose of the derogation, which was articulated by Lord Neuberger of Abbotsbury MR at paragraph 45 of his judgment in *Sugar*:

*"The purpose of limiting the extent to which the BBC and other public sector broadcasters were subject to FOIA was 'both to protect freedom of expression and the rights of the media under article 10 of the European Convention on Human Rights, and to ensure that [FOIA] does not place public sector broadcasters at an unfair disadvantage to their commercial rivals'."*

34. The BBC has also argued that its journalists are often deployed to carry out the production of editorial news content in areas of the world that are considered hostile environments and/or where there are authoritarian regimes which suppress press freedoms. Knowledge by these regimes of the journalistic resource deployed, including relevant skill sets, could impact upon their freedom of movement or expression.
35. The BBC has further argued that schedule 1 protects the freedom of its journalists to report news and current affairs from these locations to the world, without comprising the independence and accuracy of their coverage, or their health, safety and security where press freedoms are not respected. It has argued that schedule 1 is therefore underpinned by Article 10 of the European Convention of Human Rights which provides the right to freedom of expression.
36. The complainant has argued that "the independence and accuracy" of a journalist's coverage of events in China would not be compromised by the disclosure of their language skills. He considers that such information would easily be available to an authoritarian regime.
37. However, the Commissioner finds in this case that the disclosure of the skill sets of its journalists in China may impinge the BBC's editorial independence because it may lead to a curtailment in their freedom of movement. It would place the BBC at an unfair disadvantage to its commercial rivals. This supports the Commissioner's conclusions that the requested information would be held for derogated purposes.

## **Conclusion**

38. For all of the reasons above, the Commissioner is satisfied that the requested information is derogated. The Commissioner has therefore found that the request is for information which would be held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of the FOIA.

## Right of appeal

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39. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

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

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed** .....

**Pamela Clements**  
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