

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 February 2012

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

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

Decision (including any steps ordered)

1. The complainant has requested information about the costs of a particular Panorama television programme. The BBC explained the information was covered by the derogation and excluded from the FOIA.
2. The Commissioner’s decision is that this information is held by the BBC genuinely 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

3. On 11 October 2011 the complainant made the following request to the BBC:

‘I’d like to make a request for information from you under the Freedom of Information Act.

It concerns your Panorama television program entitled “BNP: The Fraud Exposed” which aired on Monday, 10th October 2011.

Could you tell me whether any of the individuals interviewed in the show received any fees or payments for appearing on show, either from Panorama or the BBC itself? If they did, can you tell me their names and the amounts, or just the individual or total amounts paid, if you cannot reveal their names.

Could you also tell me what the total budget or cost of making the program was?'

4. The BBC responded on 17 October 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.

Scope of the case

5. The complainant contacted the Information Commissioner (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

6. 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."

7. This means that the BBC has no obligation to comply with Parts 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'.

8. 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.
9. 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).

10. 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.
11. 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.
12. 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 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."*
13. The information that has been requested in this case is about programme costs incurred by the BBC in the making of the Panorama programme 'BNP: The Fraud Exposed'. The requested information is details of payments made to individuals interviewed in the show and the total budget or cost of the programme.
14. In light of submissions made by the BBC in previous cases the Commissioner considers the second element of journalism within the definition above (the editorial process) to be relevant to this case. The record of the costs involved in making the programme will have been created for the purpose of managing the production and its associated budget. The requested information will inform the editorial process of reviewing and planning for future programmes and therefore affects the creative output of the BBC.
15. In considering whether information is held genuinely for the purposes of journalism, the Commissioner has considered the following three factors with respect to each question:
- 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.
16. The Commissioner understands that the BBC regards the decision as to how much resource to dedicate to a particular piece of BBC output to be a fundamental programme making decision. The BBC has a fixed resource (the licence fee) and resource allocation goes right to the heart of creative decision making. The Commissioner has accepted this argument on a number of occasions (such as in the decision notice for the case reference FS50314106).

17. The journalistic output of the BBC is therefore affected by budgetary constraints. Operational information such as type and nature of payments made to individuals interviewed on a programme will be held for budgetary reasons. This also applies to the total cost of making a programme: the records of the related costs will have been created for the purpose of managing the production and associated costs of the programme.
18. The creation of programmes such as Panorama therefore involves the consideration of logistical issues such as the cost of covering the news item and the question of payment for interviews. Such editorial and budgetary considerations are integral to the BBC's production of its news programmes and are therefore inextricably linked to its content.
19. When assessing the users of the information, the Commissioner also accepts that a record of the cost of producing a programme would be held by its makers to inform decisions on the content and production costs of future programmes of a similar nature.
20. The complainant has argued that the BBC is a public funded body and as such is accountable for the spending of its licence fee income. He does not accept that the disclosure of the requested information would jeopardise the BBC's ability to report news and make future programmes. The complainant considers that the public should have the right to challenge the BBC's viewpoints as he argues it has a history of political bias.
21. However, there are a number of decision notices that concern information about production and talent costs incurred by the BBC (FS50359727, FS50404473 and FS50363786). These cases consider requests for different types of cost information but in each one the Commissioner found that this category of information is held for editorial and journalistic purposes and is therefore derogated.
22. The Commissioner is therefore satisfied that in this case the BBC holds the information for the purposes of journalism. He is content that the information is held for editorial purposes as outlined in the second point of the definition.
23. For all the reasons above, the Commissioner is satisfied that the requested information is derogated. Therefore, the BBC was not obliged to comply with Parts I to V of the FOIA.

Right of appeal

24. Either party has the right to appeal against this decision notice to the First-Tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-Tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

25. 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.
26. 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

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