

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 July 2013

**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 made a request to the BBC for information on the costs to produce specific parts of two television programmes, Bargain Hunt and Flog It. The BBC explained the information was covered by the derogation and excluded from FOIA.
2. The Commissioner's decision is that this information was held by the BBC for the purposes of 'journalism, art or literature' and did not fall inside FOIA. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

### Request and response

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3. The complainant wrote to the BBC on 28 March and made the following request:

***"Bargain Hunt***

*What is the cost to The BBC of that five minute or so slot of air time when the presenter goes off to some far flung stately home to expound upon anything that happens to be round. I want including in those costs, but not necessarily detailed individually, the fees and expenses and the fees and expenses of the cameramen and sound engineers along with the admin cost of arranging these visits.*

***Flogit***

*Exactly the same information here as well."*

4. The BBC responded on 2 May 2013. It explained that the requested information is excluded from FOIA because it is held for the purposes of 'journalism, art or literature' and it is therefore not obliged to provide this information
5. It explained that Part VI of Schedule 1 to FOIA provides that information held by the BBC and the other public service broadcasters is only covered by FOIA if it is held for 'purposes other than those of journalism, art or literature'. It concluded that it 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**

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6. The complainant contacted the Commissioner on 3 May 2013 to complain about the way his request for information had been handled.
7. The complainant challenged the operation of derogation in this case as he maintained the BBC had an obligation to account for the way they spend public money.
8. The scope of this case has been to consider whether the BBC was entitled to rely on derogation under FOIA.

### **Reasons for decision**

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

*"The British Broadcasting Corporation, 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 Act where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation '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. The Commissioner's analysis will now focus on the derogation.

12. The scope of the derogation was considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715, and later, on appeal, by the Supreme Court (*Sugar (Deceased) v British Broadcasting Corporation* [2012] UKSC 4). The leading judgment in the Court of Appeal case 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 Supreme Court endorsed this approach and concluded that if the information is held for the purpose of journalism, art or literature, it is caught by the derogation even if that is not the predominant purpose for holding the information in question.
14. In order to establish whether the information is held for a derogated purpose, the Supreme Court indicated that there should be a sufficiently direct link between at least one of the purposes for which the BBC holds the information (ignoring any negligible purposes) and the fulfilment of one of the derogated purposes. This is the test that the Commissioner will apply.
15. If a sufficiently direct link is established between the purposes for which the BBC holds the information and any of the three derogated purposes – i.e. journalism, art or literature – it is not subject to FOIA.
16. The Supreme Court said that the Information Tribunal's definition of journalism (in *Sugar v Information Commissioner* (EA/2005/0032, 29 August 2006)) as comprising three elements, continues to be authoritative
  1. *The first is the collecting or gathering, writing and verifying 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, 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."*

17. However, the Supreme Court said this definition should be extended to include the act of broadcasting or publishing the relevant material. This extended definition should be adopted when applying the 'direct link test'.
18. The Supreme Court also explained that "journalism" primarily means the BBC's "output on news and current affairs", including sport, and that "journalism, art or literature" covers the whole of the BBC's output to the public (Lord Walker at paragraph 70). Therefore, in order for the information to be derogated and so fall outside FOIA, there should be a sufficiently direct link between the purpose(s) for which the information is held and the production of the BBC's output and/or the BBC's journalistic or creative activities involved in producing such output.
19. In determining whether the information is held for the purposes of journalism, the Commissioner has considered the following factors:
  - the purpose(s) for which the information was held at the time of the request; and
  - the relationship between the purposes for which the information was held and the BBC's output and its journalistic activities relating to such output.
20. The information that has been requested in this case relates to costs to produce a specific part of two television programmes. The Commissioner considers that this is well within the expected remit of the BBC for the purpose of creating content and producing journalistic output.
21. The Commissioner understands that the creative output of the BBC in relation to producing a programme is directly influenced by the allocation of funds which are, in turn, determined by editorial decisions. The records that show the costs incurred to produce a specific part of the programmes in question would be held by programme makers to inform decisions on the content of future programmes of that nature.
22. In coming to his conclusion, the Commissioner has considered the response of the BBC to similar requests and his decisions as given in the decision notices for the cases FS50319492, FS50393443 and FS50352659. Although these decision notices are based on the cost of covering large events, the same principle applies to the cost of producing a programme.

23. 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.
24. The complainant has argued that the BBC is a public body spending public funds and the general public are unable to opt out of paying the licence fee. He also argues the BBC should be accountable for the way they spend public funds and there is no justification to withhold the information.
25. However, overall, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism. He is content that the information is held for the purposes outlined in the definition namely editorial purposes relating to costs. He considers that the information falls within the derogation.
26. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of FOIA.

## Right of appeal

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27. 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)

28. 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.
29. 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 .....**

**Rachael Cragg**  
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