

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 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 has requested information on the moderation of 'user-generated' content on the BBC Radio 2 Facebook page and Twitter account. The BBC explained that 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 January 2013 and 5 March 2013. On 28 January he asked for:

*The number of Facebook followers (i.e. those who have "Liked" the Radio 2 page) who have had their "Like" removed by the BBC, so stopping the automatic display of page updates on their Facebook news feed.*

*- The number of Facebook users who have been "banned" (a term and setting used by Facebook) from following the official BBC Radio 2 Facebook page, so preventing them from leaving comments on the page.*

*- The circumstances under which Facebook users could be "banned" from following the official BBC Radio 2 Facebook page".*

And on 5 March 2013:

*- The number of Twitter users who have "Followed" the Radio 2 page who have been subsequently "Blocked" by the BBC, so stopping the automatic display of updates on their Twitter news feed and preventing them from responding to or contacting Radio 2 via Twitter.*

*- The circumstances under which Twitter users could be "Blocked" from following the official BBC Radio 2 Twitter account".*

4. The BBC responded on 25 February 2013 and 3 April 2013. It explained that it believes that the information requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature.'
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 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**

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6. 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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7. 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."

8. 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'.
9. 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.
10. 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)
11. 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.
12. 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.
13. 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.
14. 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 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,
- \* 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." 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'."

15. 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.
16. The information that has been requested in this case is the number of Facebook and Twitter followers of the BBC Radio 2 pages who have been banned or blocked by the BBC and the circumstances under which followers could be banned.
17. The Commissioner wrote to the BBC on 21 May 2013 for their detailed arguments and the BBC responded on 2 July 2013.
18. In light of this submission from the BBC, the Commissioner understands that as well as promoting TV and radio programmes, the BBC's Facebook pages and Twitter accounts are themselves online content – they are creative spaces serving an editorial purpose. The pages and websites provide details of forthcoming programmes, links to related materials, commentary and the audiences can interact with and contribute to the output.
19. The Commissioner has considered all of the information before him, but for conciseness he has focussed on explaining why he has decided that the information requested falls within the derogation.

20. 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;
- The relationship between the purposes for which the information was held and the BBC's output on news and current affairs, including sport, and/or its journalistic activities relating to such output.

21. When considering the purposes for which the information was held, the BBC explained that all content published by the BBC on the Radio 2 Facebook pages and Twitter accounts and all user-generated content removed (or moderated) by the BBC is the result of editorial decisions by the editor with responsibility for the website. Similarly, the reasons or circumstances in which an individual may be blocked (and therefore prevented from contributing to the page) are also the result of editorial decisions about the form and content of the page itself. The BBC explained such actions must follow the BBC's Editorial Guidelines and accompanying Editorial Policy Guidance Notes.<sup>1</sup>

22. The decision notice for the case reference [FS50154312](#) is relevant as that case considered a request for information concerning message boards in which the BBC monitored and removed inappropriate content as part of the editorial and creative process. The refusal of the BBC to provide the information was upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation.

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<sup>1</sup> <http://www.bbc.co.uk/editorialguidelines/page/guidelines-accuracy-managing-content-online/>

<http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidance-blogs-bbc-summary>

<http://www.bbc.co.uk/editorialguidelines/page/guidelines-interacting-phone-in/#user-generated-content-online>

<http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidance-moderation-summary>

23. In a further decision notice, [FS50206742](#), the Commissioner considered that there is a clear link between the BBC's creative output and any marketing activity which seeks to promote that output. Hence, using Facebook pages and Twitter accounts to support and promote broadcast output is held for journalistic purposes and falls under the derogation.
24. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the requests are 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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25. 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)

26. 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)

27. 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.

28. 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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**Water Lane**  
**Wilmslow**  
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