

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 December 2013

**Public Authority:** 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 relating to correspondence and or communications with any Director General of the BBC and or Chairman of the BBC exchanged with six individuals of the Royal family. The BBC explained that certain parts of the information was covered by the derogation and excluded from the FOIA.
2. The Commissioner's decision is that the remaining information is held by the BBC for the purposes of 'journalism, art or literature' and does 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. On 24 June 2013 the complainant wrote to the BBC and requested information in the following terms:

*"Please note that I am only interested in information which relates to the period January 1 1997 to the present day.*

*During the aforementioned period has any Director General of the BBC and or Chairman of the BBC exchanged correspondence and or communications with any of the six individuals listed below? If the answer is yes can you please provide copies of all correspondence and communications including emails*

- *His Royal Highness the Duke of Edinburgh and any representative/employee acting on his behalf.*

- *The Princess Royal and or any representative/employee acting on his behalf.*
- *Prince Edward and or any representative/employee acting on his behalf.*
- *Prince Andrew and or any representative/employee acting on his behalf.*
- *The late Queen Mother and or any representative/employee acting on her behalf.*
- *The late Diana, Princess of Wales and or any representative/employee acting on her behalf.*

*Please supply both sides of the correspondence - if still held by the BBC."*

4. The BBC responded to the complainant on 8 August 2013. It stated that it held information of relevance to the request and disclosed to the complainant two documents which fell within the scope of the FOIA – although it withheld the names/signatures of the representatives sending the letters as this is the personal information of third party individuals. This information was withheld under section 40(2). The BBC explained that the remaining information lies beyond the scope of the FOIA because it relates to BBC output. Part VI of Schedule 1 to 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”.

## **Scope of the case**

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5. 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.
6. The scope of this case is to consider whether the BBC is entitled to rely on the derogation under the FOIA.

## **Reasons for decision**

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### **Derogation**

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."*

15. 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'.
16. 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.
17. The information that has been requested in this case is regarding correspondence and communications with any Director General of the BBC and or Chairman of the BBC exchanged with any of the six listed members of the Royal Family.
18. In this case the requested information falls within "the expected remit of the BBC for the purpose of creating content and producing journalistic output", and the fundamental principle – that a programme-maker or journalist undertaking research in order to prepare and create output on the same or a similar subject will make use of material created and gathered in respect of previous programmes – also applies to the information sought by the complainant in his request.

19. The use of programme-related material for this purpose has been accepted by the Commission on a significant number of previous occasions. These include decision notices for the case references **FS50353677** and **FS50465815**.
20. These examples demonstrate the relevant principle in the case of the complainant's request that programme-related material continues to be held by the BBC for the purposes of journalism, art or literature.
21. In light of submissions made by the BBC in previous cases and mentioned in the refusal notice to the complainant dated 8 August 2013 and recent submissions to the ICO dated 21 November 2013, the Commissioner has considered all of the information before him. For conciseness he has focussed on explaining why he has decided that the information requested falls within the derogation.
22. 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 on news and current affairs, including sport, and/or its journalistic activities relating to such output.
23. When considering the purposes for which the information was held at the time of the request, the BBC has explained that the information requested relates to correspondence and or communications with certain BBC employees exchanged with six individuals of the Royal family. The BBC added that certain parts of the information was covered by the derogation and excluded from the FOIA.
24. The BBC had advised the complainant that certain parts of the information held related to BBC output, and was therefore excluded from the FOIA. The BBC also confirmed that two documents fell within the scope of the FOIA; the latter two items were disclosed to the applicant.
25. The remaining information captured by the complainant's request consisted of two letters exchanged between the then Director-General of the BBC, and a representative acting on behalf of the Queen Mother. The correspondence discussed proposed filming as a part of a programme intended for broadcast by the BBC.
26. The correspondence was originally created as part of the editorial-decision making process in respect of a part of our broadcast output. The information remains held by the BBC as such programme-related

material is retained by the BBC as a resource to inform the creation of future content and journalistic output.

27. Overall, the Commissioner considers that the BBC holds the information for the purposes of journalism. He considers that the information falls within the derogation.

### **The Commissioner's decision**

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28. 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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29. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. 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**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**