

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2013

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 on the funding of programmes on wind farms. The BBC explained that the specific information was not held; but, if held, it was covered by the derogation and excluded from FOIA. The Commissioner considers that this information is not held but, if it was held, it 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

2. The complainant wrote to the BBC on 3 August 2013 and asked:
'How much is the BBC being paid to run government propaganda programmes on wind farms?
How much does the government pay the BBC annually for programmes of government information & which programmes are they.'
3. The BBC responded on 9 August 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.'

4. 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

5. On 9 August 2013 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. He argued that *'it is therefore of prime importance that licence payers are given information regarding other sources of income.'*
6. The Commissioner invited the complainant to withdraw his case on 28 August 2013 as it was his opinion that the requested information was held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.
7. The complainant declined to withdraw his case and wrote to the Commissioner on 28 August 2013 to reiterate the fact that he did not believe that his requests on BBC funding was held for the purposes listed in Schedule 1. He provided the following arguments:

'It should be perfectly obvious to anyone who sees this complaint that it is about FINANCE.'

1. *How much is the BBC being paid*
2. *How much does the government pay the BBC'*

8. On 29 August 2013, the Commissioner contacted the BBC for further arguments in response to the complainant's original request and his statement that the complaint is about finance. The BBC responded on 24 October 2013.

9. The BBC addressed the specific wording of the applicant's request:

'the applicant's request appears to include his personal view that programmes broadcast by the BBC about the subject of wind farms are "government propaganda", which the BBC is "paid to run" by the government. An objective reading of the request would indicate that these same programmes are the "programmes of government information" specified in the second part of the request.'

10. The BBC then referred to the BBC's Royal Charter of 2006 which sets out the independence of the BBC; the Agreement between the Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation which further affirms the BBC's independence and the BBC Editorial Guidelines which explain the principles of impartiality, editorial independence, editorial values and external relationships and funding.¹
11. The BBC advised that *'the circumstances specified by the applicant do not exist – specifically, the BBC does not receive payment from the government to broadcast programmes in the sense implied by the applicant in his request. Therefore, the requested information, as the applicant has described it, is not held by the BBC.'*
12. The Commissioner accepts that as the specific circumstances do not exist then the information requested is not held. However for the sake of completeness the Commissioner has gone on to consider the application of derogation to the complaint about finance.

http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf
http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf
<http://www.bbc.co.uk/editorialguidelines/page/guidelines-editorial-values-editorial-values/>

Reasons for decision

13. 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."

14. 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'.
15. 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.
16. 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)
17. 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.
18. 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.

19. 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.
20. 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'.

21. 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.

22. The complainant's request for financial information (how much the BBC was paid for programmes) is well within the expected remit for the purposes of creating content and producing output.
23. The Commissioner considers that the second element of journalism within the definition above, the editorial process, is relevant in this instance. He recognises that funding for programmes relates to editorial decisions about the content that the BBC wants to offer its customers and this in turn relates to the overall editorial decision making process and resource allocation. It is therefore intimately linked to the corporation's output and it is clear that the Commissioner has no jurisdiction in this matter.
24. The decision notices for the case references [FS50404473](#), [FS50497318](#), [FS50422017](#) and [FS50363611](#) are relevant to this request as they also considered requests for financial information relating to programme making. 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.
25. In addition, the BBC detailed the use of budgetary information in the creation of broadcasting output in its evidence to the High Court² in 2009 and this was referred to by the Supreme Court in 2012 (*Sugar (Deceased) v British Broadcasting Corporation* [2012] UKSC 4):

'if financial information is directly related to the making of a particular programme, or group of programmes, it is likely to be held for purposes of journalism'. (paragraph 42)
26. 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 applies in this case.

² *The British Broadcasting Corporation v Information Commissioner* [2009] EWHC 2348 <http://www.bailii.org/ew/cases/EWHC/Admin/2009/2348.html>

27. 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

28. 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

29. 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.
30. 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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