

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 October 2014

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 operating costs of four regional services. The BBC explained that the information was covered by the derogation and excluded from FOIA. 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

2. The complainant wrote to the BBC on 3 June 2014 and asked:

Can you please advise me the operating costs, for each of the last 5 financial years, for each of the following regional/local BBC UKPSB services:

BBC Channel Islands News

BBC Radio Guernsey

BBC Radio Jersey

BBC Isle of Man'

3. The BBC responded on 9 June 2014. 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 12 July 2014 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 Commissioner invited the complainant to withdraw his case on 4 August 2014 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 14 August 2014 to reiterate the fact that he did not believe that his requests on the total operating costs for four regional services was held for the purposes listed in Schedule 1. He provided the following arguments:

'My request does not seek information about the costs of any specific programme or event.... I have asked for the total expenditure on each regional service.... The global annual figures, which cannot be regarded as held either wholly or partly for the purposes of journalism, art or literature. They are aggregated at too high a level to relate to these activities.'

'The Supreme Court's ruling Sugar, supports this view.... In the Supreme Court decision Lord Wilson endorsed the above tripartite definition of journalism. But tellingly he added that financial information could also be held for the purposes of the journalism if

it is "directly related to the making of a particular programme, or group of programmes" (my emphasis) [para 42]. The undifferentiated global figure for a radio station's expenditure does not directly relate to its journalistic, artistic or literary output. A change in the figure from one year to the next may have nothing to do with programme costs... The protection was intended to apply to "work in progress" [Lord Walker, para 78]. The global expenditure on a service in past years does not fall within those criteria.... '

In particular the complainant referred to the 'First Tier Tribunal's decision in EA/2009/0015, BBC v IC, which sought information about spending on BBC radio stations and radio budgets....The Tribunal's view was that the global amount of spending by BBC station was not held for the purposes of journalism; only the breakdown of that total was.'

8. On 20 August 2014, the Commissioner contacted the BBC for further arguments in response to the complainant's original request and the arguments outlined above. The BBC responded on 18 September 2014.
9. The Commissioner considers the scope of the case is to determine if the BBC was correct to apply the derogation.

Reasons for decision

10. 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."

11. 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'.
12. 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.

13. 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)

14. 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.
15. 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.
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 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'.

17. 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.
18. The information that has been requested in this case concerns the operating costs for the four services. The BBC has provided the following arguments for why the information requested was caught by the derogation.

BBC Channel Islands News

19. *BBC Channel Islands News* is not a separate regional service as such, but a dedicated television programme which provides the latest news, sport and weather for the Channel Islands. *BBC Channel Islands News* is broadcast weekdays on BBC One in the Channel Islands only.
20. The budget for *BBC Channel Islands News* is contained within the budget for BBC News. The operating costs '*will inform the editorial process of reviewing and planning for future programmes and therefore affects the creative output of the BBC*'.
21. The Commissioner has already referred the complainant to a number of previous decision notices ([FS50404473](#), [FS50497318](#), [FS50319492](#) and [FS50363611](#)) as relevant to the request and that support the BBC's position.
22. The Commissioner understood 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.

23. The complainant thought that his case was different but the BBC disagreed. *'The requested information is held for the purposes of creating the BBC's output (in this case a particular news programme), and the same arguments apply, regardless of whether the request is for the budget in relation to a particular episode of BBC Channel Islands News or the annual budget for every episode broadcast in the last five years.'*

BBC Radio Guernsey and BBC Radio Jersey

24. To report on its performance, the BBC publishes high level financial information in the Annual Report and Accounts, including station by station spending.
(<http://www.bbc.co.uk/annualreport/2014/home/>)
25. The BBC reports radio expenditure by service licence. The majority of these service licences relate to a particular radio station.
26. In the case of BBC Radio Guernsey, BBC Radio Jersey, and the 38 other local radio services across the English Regions, the budgets are amalgamated and reported against the 'BBC Local Radio' service licence. The BBC considers the data available at Local Radio service licence level for all stations to be the most appropriate level of disclosure. From the published information, the public can estimate the approximate cost per radio station and any variances are entirely driven by the need to produce the appropriate output.
27. It is the BBC's view that the budget for BBC Local Radio is analogous to that of a station or a channel and that the individual station budgets are akin to programme costs within that station. The BBC manages its costs according to editorial decisions that relate to the Local Radio service licence as a whole, rather than by station.
28. The allocation of funds within the Local Radio service licence reflects the editorial judgments of the Controller, English Regions. The bulk of a station's budget can be categorised as a purely editorial resource as 80% of a station's budget consists of staff and talent costs. Only a small proportion of the budget could be considered general business management or organisational in nature (administrative or engineering staff) and this also serves to support the editorial resource.
29. In decision notice FS50302135 the Commissioner considered a request for the annual budget of BBC Coventry and Warwickshire

(over a similar five year time period) and concluded that the information was derogated. In decision notice FS50386740 the Commissioner also concluded that the annual budget for Radio Cornwall fell outside the FOIA.

BBC Isle of Man

30. BBC Isle of Man is an online source of news, sport and weather for the Isle of Man. The operational budget for BBC Isle of Man is contained within the budget for BBC English Regions which itself is contained within the overall budget for BBC News. The costs of the BBC Isle of Man service are included in the BBC Online service licence which like that for BBC Local Radio is published in total in the BBC Annual Report.
31. The budget for BBC Isle of Man will closely inform the editorial process of reviewing and planning for future content and therefore affects the creative output of the BBC.
32. The Commissioner has accepted on several occasions that the decision about how much resource to dedicate to a particular piece of BBC output is a fundamental programme making decision.
33. In decision notice [FS50314106](#) the Commissioner accepted 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.
34. In answering the complainant's reference to the First Tier Tribunal's decision in *BBC v Information Commissioner EA/2009/0015* as an 'exact precedent' in this case, the BBC disputes this.
35. The original request in that case was for station by station spending broken down by topic (eg talent costs, production, rights, royalties). The request was not for the annual budgets of each BBC radio station, and it was noted in the Commissioner's decision notice that the BBC already makes public high level financial information on station by station spending in its Annual Report and Accounts. The appeal which was allowed by consent in the light of the High Court judgments *BBC v Information Commissioner [2009] EWHC 2348* and *BBC v Sugar [2009] EWHC 2349*, confirmed that the BBC was not required to disclose station by station spending broken down by topic. The Tribunal was not being asked to determine whether station by station

spending per se was held at the relevant time for the purposes of journalism, art or literature.

36. The Commissioner notes that the outcome of the tribunal was that 'the BBC was therefore entitled to decline to disclose the information on the basis that FOIA did not apply to it.'
37. For all of the reasons above, the Commissioner is satisfied that the BBC has provided sufficient evidence that it holds the information for the purposes of journalism. He considers that there is a direct link between the information being sought and the BBC's output. Therefore, the Commissioner has found that the information falls within the derogation, which means that the BBC is not obliged to comply with Parts I to V of the FOIA.

Right of appeal

38. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

39. 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.
40. 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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