

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2016

Public Authority: The British Broadcasting Corporation ('the BBC')

Address: Broadcast Centre
White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant requested the cost of entries to the Sony Radio Academy Awards. 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

3. On 26 September 2015, the complainant wrote to the BBC and requested information in the following terms:
'In a previous response to a FoI request [Ref RFI20121550] you disclosed a breakdown of the cost of entries to the Sony Radio Academy Awards for 2012 broken down by radio station as well as the cost of providing staff with tickets to attend the event. Could you please supply me with a comparable response for the 2014 awards?'
4. On 20 October 2015 the BBC responded and explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism 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.

6. On 7 December 2015 the complainant contacted the Commissioner to complain about the way the request for information had been handled. In particular, he challenged the operation of the derogation in this case. He argued that his request was similar to previous requests where the information had been provided without recourse to the derogation. (RFI 20121550 and RFI 20131613)

Background

7. The BBC provided a background to the requested information.
8. The Radio Academy Awards, which first began in 1983, were an annual celebration of the UK radio industry. It was announced by the Radio Academy in November 2014 that the annual awards were being discontinued. The awards were previously referred to as the Sony Awards, after their sponsor of 32 years, and were renamed the Radio Academy Awards when that sponsorship ended in 2013. Although the 2014 awards were not called the 'Sony Radio Academy Awards', we have interpreted the complainant's request as clearly relating to the 2014 Radio Academy Awards.
9. The awards were organised by the Radio Academy which is a charity dedicated to: '... the encouragement, recognition and promotion of excellence in UK radio broadcasting and audio production.'
10. The 2014 Radio Academy Awards ceremony was held on 12 May 2014 and was the main annual radio industry awards event, receiving entries from both the BBC and commercial UK radio stations. The BBC won 22 of the 34 categories.

Scope of the case

11. The Commissioner considers the scope of the case is to determine if the requested information, for the cost of entries to the Radio Academy Awards is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

Reasons for decision

12. 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.”

13. 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’.
14. 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.
15. 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)
16. 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.
17. 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.

18. 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.
19. 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’.
20. 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.
21. The information that has been requested in this case is for the cost of entries to the Awards and the cost of providing tickets for staff to attend the awards.
22. The BBC have argued that

- The decisions about which content, service or individuals/teams to enter for an award are ultimately editorial decisions. For example, in relation to the 'UK Station of the Year Gold' category, editorial staff in BBC Radio will have reviewed the quality and distinctiveness of the output and performance of each BBC UK station over the previous year to reach an editorial judgement of which station's output ought to be nominated and promoted, and to what extent, balancing the cost of such promotion against other opportunities and editorial objectives. The information which the complainant has asked for is created and held by the BBC as a direct consequence of those editorial decisions which will have been made across the BBC.
 - One of the primary purposes of the awards was to recognise and promote excellence in UK radio. Accordingly, the BBC's participation in the awards was intended to promote its creative output in radio broadcasting and bring it to the attention of new audiences. Although many of the nominees, and some of the categories, were for local radio output, since such output can now be accessed online and is no longer limited by the reach of radio wavelengths, the promotion of such output not only to local but to national audiences is particularly worthwhile. The awards carried international prestige and attracted considerable media interest. The BBC would expect that winners (and nominees) of awards to receive greater recognition, a higher profile, and ultimately new listeners as a result.
 - The amount spent by the BBC on entering the awards and sending talent and key production staff to attend the awards, which provides an opportunity to further promote the BBC's output by networking with their peers and opinion formers and potentially to be quoted or reported upon, closely supports the marketing and promotion of current and future radio content broadcast by the BBC.
 - The BBC believes that it is not possible to separate the cost of entries and the cost of tickets for attending the Radio Academy Awards from the BBC's editorial decisions about how to promote its content and services, including the decisions about how much resource to dedicate to that promotion.
23. In response to the complainant's argument that he had previously been provided with this information in 2012 and 2013 the BBC stated that
- 'the BBC considers that the information it has previously released is similarly held for the purposes of 'journalism, art or literature'*

However, at the time of the complainant's previous request, the BBC decided to volunteer the requested information.

We appreciate that the complainant may feel frustrated that the BBC has decided not to volunteer the requested information on this occasion. Although the BBC does have regard to its previous disclosures, it is not bound by them.

The relevant question remains whether at the time of the request there was a sufficiently direct link between the BBC's holding of the information and the achievement of its journalistic purposes, having regard to the proximity between the subject matter of the request and the BBC's journalistic activities and end-product. In this case the information serves to closely support and publicise the BBC's creative output and therefore falls squarely within the derogation.'

24. The Commissioner has previously accepted that there is a link between costs and the BBC's output in many decision notices. (for example, case references [FS50404473](#), [FS50497318](#), [FS50319492](#), [FS50363611](#))
25. In addition, the Commissioner accepts that there is a clear link between the BBC's creative output and the cost of any marketing activity which seeks to promote that output. In the decision notices, [FS50206742](#) and [FS50488408](#) the Commissioner accepted the BBC's arguments that marketing activity supports and promotes broadcast output. He upheld the refusal of the BBC to provide the information as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation. The Commissioner is satisfied that the same rationale applies in this case.
26. Having applied the approach to the derogation set out by the Supreme Court and the Court of Appeal, which is binding, the Commissioner is satisfied that the requested information falls under the definition of journalism and is therefore derogated. The Commissioner sees no basis for deviating from the approach as the complainant argues; the information clearly falls within the derogation. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes.
27. In conclusion, and for all of the reasons above, 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

**Pamela Clements
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