

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 August 2016

Public Authority: British Broadcasting Corporation
Address: Room BC2 A4
Broadcast Centre White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information relating to the BBC's submission (October 2015) to the Department for Culture Media and Sport's Green Paper 'BBC Charter Review Public Consultation 16 July – 8 October 2015'. 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 within the scope of FOIA. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 5 January 2016 the complainant sent the following information request to the BBC:

"This request for information relates to the BBC's submission (October 2015) to the Department for Culture Media and Sport's Green Paper 'BBC Charter Review Public Consultation 16 July – 8 October 2015'. (1) Please provide the underlying data relating to the graphic titled 'Commissioning cost per hour for BBC Programmes 2013/2014

(£000s)' which appears on p.54 of the submission. (2) Please provide the underlying data for the average prices per hour of production by BBC in-house and the UK production sector which are included in the third row of the graphic titled 'BBC production provides distinct benefits to the BBC' which appears on p.56 of the submission."

4. On 22 February 2016 the complainant sent the following information request to the BBC:

"This request for information relates to the BBC's submission dated October 2015 to the Department for Culture Media and Sport's Green Paper 'BBC Charter Review Public Consultation 16 July – 8 October 2015. (1) With regards to the graphic titled 'Commissioning cost per hour for BBC Programmes 2013/2014 (£000s)' which appears on p.54 of the submission, please provide: a. the underlying data relating only to the qualifying and non-qualifying independents sections of the graphic; and b. please provide information about how this data for qualifying and non-qualifying independents was obtained. (2) With regards to the graphic titled 'BBC production provides distinct benefits to the BBC' which appears on p.56 of the submission, please provide: a. the underlying data relating only to the UK production sector column of the graphic; and b. please provide information about how this data for the UK production sector was obtained."

5. On 28 January and 4 March 2016 respectively, the BBC responded to the requests. The BBC 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'.

Scope of the case

6. The complainant contacted the Commissioner on 30 March 2016 to complain about the way his requests for information had been handled.
7. During the course of the Commissioner's investigation, whilst the BBC confirmed that it remained of the position that all of the requested information was derogated, it provided information in response to parts 1b and 2b of the request of 22 February 2016 outside of FOIA.
8. The Commissioner considers the scope of the case is to determine whether the information not provided to the complainant is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

Reasons for decision

9. 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.”

10. 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 ‘the derogation’.

11. 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)

12. 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.

13. 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.

14. 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.
15. 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'.
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 requested in this case relates to the BBC's submission dated October 2015 to the Department for Culture Media and Sport's Green Paper 'BBC Charter Review Public Consultation 16 July – 8 October 2015. The first request is wider and relates to underlying data for the average prices per hour of production by BBC in-house and the UK production sector whereas the second request just requests underlying data for UK production sector and independents.

18. The complaint has made the following arguments as to why the requested information is not derogated (these arguments relate to the second request and the first request so far as it relates to the UK production sector and not the BBC):

Information on the independent production sector may be argued to be related to the activities of the BBC but only because they form part of the same broadcasting industry and not because that information is held for the derogated purposes.

Applying the correct legal test, the complainant argues that part of the information requested in its first FOI request, and all the information requested in its second FOI request, concerns independent production companies and not BBC in-house production.

Data on independent production companies is not information held by the BBC for the purposes of its output to the public to inform, educate and entertain the public. The information requested, at least in its second FOI, therefore falls outside of the Schedule 1 derogation and should be provided by the BBC.

19. The BBC has provided the following arguments as to why it considers that the requested information is derogated:

The appropriate test to be applied is whether there is a sufficiently direct link between the purposes for which the information is held and the creation of the BBC's output.

The BBC considers that the second element of journalism (the editorial process) as described by in *BBC v Sugar* is relevant in this case. The BBC expanded upon this by grouping the requested information together as follows:

A. Commissioning cost per hour for BBC Programmes

B. The UK production sector:

i. Financial information (i.e. cost of indie programmes, commercial investment to contribute to programme costs, revenue generated from secondary sales data, net-profits, spend on external suppliers outside of London)

ii. Non-financial information (i.e. the quality of programmes, and the range of genres and specialisms of programmes, and the range of companies in the UK production sector).

C. How the BBC obtained the data for the UK production sector

Commissioning cost per hour for BBC commissioned programmes

The disputed information concerns a request for the BBC's commissioning cost per hour for BBC in-house, non qualifying independent and independents programmes. The BBC is subject to a number of formal quotas and targets relating to who makes content, and therefore commissions both in-house and non-BBC produced programmes.

The underlying data for the commissioning cost per hour of BBC programmes is primarily held within the BBC's broadcasting management system. This system holds information about all programmes commissioned by the BBC, including the cost. The information is therefore held in its raw form and also the aggregated form, which was disclosed in the BBC's Submissions to DCMS. The information can be accessed and used by BBC channel controllers, commissioners, schedulers and editors. These individuals all hold editorial roles at the BBC, and use the information in the planning, commissioning and scheduling of television programmes. For example, the cost of producing a BBC commissioned programme is held to inform decisions on the content and production costs of future programmes of a similar nature.

The Supreme Court in *Sugar* confirmed that financial information has a direct link to the creation of output. Referring to the High Court decision, the Supreme Court agreed that,

"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 ... costs referable to its broadcast of "EastEnders", about its annual budget for "Newsnight" and about the price paid for its right to cover the winter Olympics in Turin in 2005/06, was held at an operational level in order to assist in the making of editorial and creative choices and so was held partly (and, if relevant, predominantly) for purposes of journalism." [42]

The creative output of the BBC in relation to commissioning a programme, whether the BBC commissions an in-house, a non qualifying independent or independent producer, is directly influenced by the allocation of funds which are, in turn, determined by editorial decisions. Editorial and budgetary considerations are integral to the BBC's Television production and are therefore inextricably linked to its content.

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 Information Commissioner has also issued a number of decision notices supporting the BBC's position that financial and budgetary information in respect of programming, and production costs are excluded from the Act.

The UK production sector

Data about the UK production section (i.e. from the third column on page 56 of the BBC's Submissions) is sourced from third party sources that are publicly available, including PACT and Ofcom. The information is held by numerous teams within BBC Television, including the BBC's Television Central Planning team who collated the underlying data requested. This team holds overall responsibility for the planning of the BBC's output and collects data on television output. Audience appreciation data for both the BBC commissioned programmes and the UK sector is held by BBC Marketing and Audiences, but the data is still used by programme makers in the editorial decision making process for future BBC programmes.

As with the information about BBC programmes, information held about the UK production sector is also used by BBC Television channel controllers, commissioners, schedulers and editors, who use the information in the planning, commissioning and scheduling of BBC television programmes.

Financial information.

The financial information about third party programmes (i.e. non in-house BBC programmes) is held in both raw and aggregated form by the BBC and provides an important benchmark for performance and programming output and strategic direction across BBC Television. Financial information about the UK industry will undoubtedly influence the planning and management of BBC commissioned programmes, and will inform decisions about the costs of producing future programmes.

Financial information about the UK sector is held and used by those who hold editorial roles in the BBC and influence the BBC's own commissioning activity and the BBC's budgetary considerations, which are integral to the production of programmes. The disputed information is therefore inextricably linked to its content and directly implicates the output of the BBC programming.

Non-financial information: Quality of programmes, range of genres and

specialisms of programmes and range of production companies

Like financial information, the non-financial information requested about the UK Production sector is used in the planning, commissioning and scheduling of BBC programmes.

The AI (or Appreciation Index) is the main method by which the BBC and other broadcasters measure how much the audience appreciates and enjoys different programmes. The Appreciation scores are collected via the 'Pulse' panel; an online panel of 19,000 adults aged 16+ (representative of the UK) run by an independent research agency. Information about the quality of non-BBC programmes helps inform the BBC's editorial decision makers about what types of programmes it should commission, de-commission, and/or when to schedule particular programmes.

Similarly, information held by the BBC about the range of genres of specialisms of programmes (for example drama, comedy, sports) with the UK production sector, and the incentives and priorities of other UK production companies will be used by editors to help determine whether changes should be made to the existing format or style of programmes, or whether a new approach should be introduced in accordance with the BBC's requirement to produce distinctive content. This information is held for the purposes of influencing editorial decisions about what types of programmes should be commissioned and broadcast, which is directly related, and implicates, the output of the BBC.

Information relating to the scheduling of programmes and decisions around what programmes should or should not be broadcast, is necessarily directly related to the output of the BBC, and supports and/or reflects the exercise of editorial judgement about material for broadcast. As mentioned in paragraph 18 the Supreme Court accepted the definition of journalism as including '*the selection, prioritisation and timing of matters for broadcast or publication... the analysis of, and review of individual programmes*'. The requested information therefore falls within the second limb of the tri-partite test identified by the Tribunal.

The Information Commissioner has previously held in Decision Notice FS50586208 of 25 August 2015, which was a complaint that related to the scheduling of a programme, that:

...There is a clear and direct link between the information being sought and the BBC's journalistic activities. Specifically, the editorial activities it undertakes to produce its journalistic output.

The Commissioner found that the request for scheduling information was information held for the purposes of journalism, art or literature.

Even if non-editorial staff now hold the information, it does not prevent the information from being held and used for the purposes of journalism, art or literature. For example, at the time of the request, some of the disputed information was also held by the BBC Policy and Strategy department, which supports the Director-General and Executive Board in setting the strategic direction of the BBC and defining the BBC's future. The BBC's Television Planning team supplied information to Policy and Strategy for the purposes of drafting the BBC's Submissions to DCMS.

Information about how the BBC obtained the data

The BBC holds information about how the underlying data was obtained; that is, the source(s) of the underlying data.

It is enough that information is held "to any significant extent" for purposes of journalism. The Information Commissioner has interpreted that phrase to mean:

"...where the requested information is held to a more than trivial (or insignificant) extent for journalistic, artistic or literary purposes the BBC will not be obliged to comply with Parts I to V of the Act. This is the case even if the information is also held for other purposes. Thus, provided there is a relationship between the information and one of the purposes listed in Schedule 1, then the information is derogated. The information relevant to the request need not be journalistic, artistic or literary material itself."

Aggregated statistical information which is drawn from derogated information is, itself, derogated. Irwin J held in *BBC v Information Commissioner* [2010] EMLR 6 at para 93:

"...information which comes to be aggregated continues to be held within the BBC at an operational level and for journalistic, literary or artistic purposes"

The underlying data is clearly held and used by the BBC for journalistic purposes, which directly influences the creation of the BBC's output. It follows that information about how the BBC obtained the data, while the BBC may hold the information for other purposes, continues to be held for the purposes of journalism.

20. Based upon the arguments submitted by the BBC, the Commissioner considers that the requested information does relate to the BBC's output as it relates to editorial decisions surrounding planning and production of a programme either based upon financial factors or non-financial factors such as scheduling and what material to broadcast. The Commissioner considers that the requested information feeds into editorial decision making whether it relates to the BBC's own production or third party UK production. As the Commissioner considers that this information is derogated, he also considers that information about how it was obtained would also be derogated.
21. 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, art or literature' and is therefore derogated. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes.
22. The Commissioner has therefore 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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23. 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: www.justice.gov.uk/tribunals/general-regulatory-chamber

24. 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.
25. 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

Gemma Garvey
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