

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 October 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 tickets and entries to the BAFTA television 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. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 9 May 2016, the complainant wrote to the BBC and requested information in the following terms:

'For the 2016 BAFTA television awards could you please state how many tickets the BBC bought for the dinner and what the total cost of these tickets was?

Please state how much the BBC paid to enter individuals and teams into the 2016 awards? Please provide a breakdown showing exactly what

individuals and productions were entered, what category they were entered for and how much their entry fee was?'

4. On 2 June 2016 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 was therefore not obliged to provide any information in response to the request for information.

6. The BBC did however volunteer the following information:

'The BBC purchased 160 tickets to attend the 2016 BAFTA TV Awards. The price is set by BAFTA and in 2016 the cost was £485 per ticket, giving a total cost of £77,600.

In 2016 the BBC had a significantly high number of nominations with 58 of the 98 available shortlist nominations, with 51 of those 58 nominations entered by the BBC. The BBC won more than half of the BAFTA Awards, 14 of the 25 available. It is therefore only fitting that those deserving nominees and production crew attend the awards ceremony.'

7. On 12 August 2016 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 he had made the same request in 2015 and received a full response.

Scope of the case

8. The Commissioner considers the scope of the case is to determine if the requested information, for the cost of entering awards to BAFTA, 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 situation ‘the derogation’.
11. 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.
12. 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)

13. 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.
14. 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.

15. 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.
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 is for the cost of entries to the BAFTA awards and the cost of providing tickets for staff to attend the awards.
19. The BBC has argued that there is a sufficiently direct link between the purposes for which the information is held and the creation of the BBC’s output:

- there is an intimate link between the creation of the BBC's output, the promotion of that output, and any costs incurred by the BBC for that promotion. This is because any decisions that are taken to promote the BBC's output – which content, to which audiences, at what time, and in what manner – are wholly editorial.
 - When considering which productions or performers to enter for a BAFTA award, staff within BBC Television will have reviewed the quality, distinctiveness and performance of each BBC programme broadcast during the period of eligibility, to reach an editorial judgement about which production or individual ought to be nominated. This involves balancing the cost of such promotion against other opportunities and editorial objectives. The disputed information is created and held by the BBC as a direct consequence of those editorial decisions which will have been made across BBC Television.
 - One purpose of the BBC's participation in the awards is to promote the BBC's output and to bring it to the attention of new audiences. This is evidenced by press releases celebrating the success of the awards.
 - Although the BBC volunteered some information, attendance at the awards closely supports the marketing and promotion of current and future television content broadcast by the BBC. This is because it provides an opportunity for the nominees and key members of production in attendance to network with their peers and potentially to be quoted or reported upon.
20. In response to the complainant's argument that he had previously been provided with this information in 2015, the BBC referred to the Commissioner's decision notice which covered the cost of entries to the Sony Radio Academy Awards:
<http://search.ico.org.uk/ico/search/decisionnotice?keywords=608398>
21. In that case, the BBC had explained that the information was held for the purposes of journalism, art or literature and was outside the scope of FOIA. The BBC had volunteered some information outside of FOIA in previous years and although it does have regard to its previous disclosures, it is not bound by them.
22. The Commissioner upheld the decision that there was a link between the BBC's creative output and the cost of any marketing activity, such as awards ceremonies, that seek to promote output. The Commissioner was satisfied that the information was derogated and outside the scope of the FOIA.

23. The Commissioner is satisfied that the same rationale applies in this case.
24. 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.
25. 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

26. 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>

27. 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.
28. 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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