

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 June 2017

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

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

### Decision (including any steps ordered)

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1. The complainant requested information on payments to MPs. 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

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3. On 23 March 2017, the complainant wrote to the BBC and requested information about payments made to 64 MPs since October 2015 which is summarised as:

*'All payments (including expenses, disturbance fees, travel booked on their behalf and complementary hotel stays) to or on behalf of the following people listed below to be involved in or appear on BBC broadcast content on TV and radio including the relevant dates.'*

4. On 19 April 2017 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. The BBC provided further information from their editorial guidelines about when MPs can be paid:

(<http://www.bbc.co.uk/editorialguidelines/guidelines/politics/political-interviews>):

10.4.7 - We should not normally pay MPs, or others clearly identified as representing political parties, for appearances or other contributions to any BBC output in which they are speaking as a member of their party or expressing political views. They can, where appropriate, be paid a limited and realistic disturbance fee and/or any reimbursement for genuine expenses.

10.4.8 - They may be paid for contributions to non-political output, where they are appearing on the basis of their expertise outside politics or of their celebrity, and are not taking part as a member of their party or expressing political views.

6. On 19 April 2017 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 *'there is an intrinsic matter for the BBC about the case for transparency over payments made contrary to editorial guidelines. These were payments made in the exception rather than the norm and authorised by one specific person.'*
7. The Commissioner invited the complainant to withdraw his case on 28 April 2017 citing a number of previous decision notices concerning costs (case references [FS50404473](#), [FS50497318](#), [FS50319492](#), [FS50363611](#)) as it was her 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.
8. However, the complainant declined to withdraw his case and wrote to the Commissioner on the same day to dispute the derogation. He wished to work out the activities of a parliamentary group by using IPSA expenses and BBC payments.
9. On 10 May 2017 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.

## Scope of the case

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10. The Commissioner considers the scope of the case is to determine if the requested information for payments to MPs is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

## Reasons for decision

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11. 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."

12. 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'.
13. 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.
14. 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)*

15. 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.

16. 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.
17. 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.
18. 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’.

19. 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.

20. The information that has been requested in this case is for all payments made to 64 MPs.

21. The BBC have argued that

- information relating to any payments made to programme guests or contributors, (including expenses, disturbance fees, travel booked on their behalf and complementary hotel stays), is an editorial matter as decisions about which guests or contributors should appear on a programme will involve editorial judgment about production costs and the guest's availability. Editorial content decisions necessarily involve consideration of the budget for a programme, including any expenses paid to contributors.
- the requested information is a matter of journalistic standards, particularly relating to the BBC's requirements to uphold balance and impartiality and to ensure compliance with the BBC's Editorial Standards. Impartiality is critical to the work of the BBC as the BBC is entrusted to provide balanced news and programming.
- the requested information would be used to review and assess compliance with the BBC's editorial obligations.
- maintaining records of expenses paid to MPs for travel or other expenses incurred when attending BBC studios to take part in news programmes, is important to ensuring impartiality and that the BBC is not seen to be favouring one party or individual over another by paying the expenses of political representatives from one party disproportionately to other parties, for example.
- the requested information is financial information that is directly related to the BBC's journalistic output as expenses affect production costs and are thus considered by news producers and editors when making editorial content decisions.

22. The complainant has argued that the BBC is

- making payments or hospitality contrary to the editorial guidelines for this specific list of people because they were specifically sought out to appear in your broadcasts as opposed to others, often by researchers, because they are identified as de-facto "spokespersons" for a certain political group which is not a political party. It's not an editorial decision, more often than not, in the occasions when the individuals have appeared, it's because they have indicated they wish to in order to pursue the co-ordinated

objectives of that political group. I believe there is a public interest case to be made in transparency over the payments made to or on behalf of the individuals specified.

23. The Commissioner recognises that these decisions taken on payments relate to editorial decisions and standards and therefore falls under the second and third limbs of the definition of journalism.
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. The conclusion reached by the Commissioner is also consistent with previous decision notices.
25. For all of the reasons above, the Commissioner is 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

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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](mailto: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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**