

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2017

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 how much the BBC paid to Sandi Toksvig. 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 22 May 2017, the complainant wrote to the BBC and requested information in the following terms:

"Payments made by the BBC to Sandi Toksvig of the Women's Equality Party

On 08/05/2015, Sandra Birgitte ("Sandi") Toksvig founded the Women's Equality Party. The BBC has since employed Toksvig on a regular basis (not as an occasional guest) as the host of the BBC2 quiz show QI.

As a publicly funded organisation, the BBC has an obligation towards political neutrality. The Women's Equality Party is contesting the constituency of Shipley in the forthcoming general election. The BBC are using public funds to provide financial support to a senior member of a political party at a time when that party is actively engaged in an election campaign. It is clearly in the public interest that the BBC should disclose these payments in full.

The Information Commissioner has ruled that salaries paid by public sector bodies fall within the scope of FOI requests. See the "Salaries and Bonuses" section of

https://ico.org.uk/media/1187/section_40_requests_for_personal_data_about_employees.pdf

The BBC Trust has also previously found it appropriate to enquire into payments made to politicians by the BBC. See

<http://www.bbc.co.uk/news/uk-politics-19423658>

This freedom of information request is for two figures;

1. Please provide the total amount of money (including all expenses) the BBC has paid in return for services rendered by Sandi Toksvig from 08/05/2015 to 17/04/2017 inclusive.

2. Please also provide the total amount of money (including all expenses and anticipated payments) the BBC has paid in return for services rendered by Sandi Toksvig from 18/04/2017 to 08/06/2017 inclusive. In the event that this figure is calculated before 08/06/2017, please include all anticipated payments (e.g. regular royalties) due to be made within the same date range.

Please note that this request is not limited to money paid directly to Sandi Toksvig as a salary. It includes all payments made by the BBC in return for services rendered by Toksvig (for example, payments made to production companies owned or controlled by Toksvig).'

- 4. On 24 May 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. 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 24 May 2017 the complainant contacted the Commissioner to complain about the way the request for information had been handled. He argued that 'the purpose for which the information is held is of secondary concern. A publicly funded body is providing financial support to a senior politician during a General Election campaign. This financial support is not being provided to other political parties of similar size and*

agenda. This raises questions about whether public money is being used 'directly or indirectly' to support a particular political agenda."

7. The Commissioner invited the complainant to withdraw his case on 7 June 2017 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. The Commissioner explained that she can only consider concerns within the scope of the FOIA and therefore the matter of derogation is considered first. The Commissioner is unable to compel the public authority to provide information outside its obligations under FOIA.
9. However, the complainant declined to withdraw his case and wrote to the Commissioner on 9 June 2017 arguing that *'in this case it is more important to scrutinise political figures than protect the interests of the creative process.'*
10. On 12 June 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

11. The Commissioner considers the scope of the case is to determine if the requested information, for the total monies paid to Sandi Toksvig, 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 total monies paid to Sandi Toksvig from 2015 to 2017.
22. The BBC have argued that payments to presenters or guests involve editorial decisions and fall within the second limb of the definition of journalism:
 - Information relating to 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.
 - the requested information is financial information that is directly related to the BBC's journalistic output as expenses affect production costs and are considered by news producers and editors when making editorial content decisions. Payments made to include particular content, talent or guests will have implications for decisions to include other content, talent or guests on a programme.
 - The Supreme Court in Sugar confirmed that financial information has a direct link to the creation of output. Referring to the Tribunal's earlier 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". [42]

23. The complainant argued that payments to a politician should be revealed:

- it is not relevant to argue that the publication of these particular payments will substantially inhibit the BBC's future creative output. The BBC has never recruited any other active politician to a regular presenting role.
- The BBC is paying public money to a politician of national prominence. It is clearly in the public interest that such payments be revealed. The argument revolves around the idea of Sandi Toksvig not as a creative talent but as a political figure. It is not possible to regard her as one but not the other - she is both.

24. The BBC replied that it is not BBC policy to publish expenses or other payments made to guests or contributors that appear on BBC programmes, including politicians or people with political affiliations

- The BBC recognises that there is a public interest in promoting accountability and transparency in the BBC's work, given that it is funded by the public through the licence fee. On balance however, the BBC believes there is a public interest in providing producers and others in editorial decision-making positions with the scope to produce journalistic output in a way that enables them to exercise judgement without 'restrictions on the programme maker's ability to exercise free speech'.
- Sandi Toksvig was not engaged by the BBC in her capacity as the co-founder of the Women's Equality Party, nor was she engaged to provide political commentary. The content of the programmes 'QI' and 'I'm Sorry I haven't a Clue' have no relation to news, politics, public policy generally or the politics of the Women's Equality Party. Ms Toksvig stepped down from her role as host of 'News Quiz' when she co-founded the Women's Equality Party.

25. The Commissioner notes the specific arguments concerning payments to politicians above. The Commissioner also notes that on 19 July 2017 the BBC published details of its on-air and on-screen talent for the first time following the requirements of the BBC's new Royal Charter. However, the Commissioner can only consider concerns under FOIA and therefore must first consider whether the payments are covered by the derogation.

26. Any decision taken on costs has a direct impact on the creative scope for the programme and for other programmes because more money spent on one area or one programme means less available for another. The Commissioner recognises that the decision to employ Sandi Toksvig relates to editorial decisions about the content that the BBC wants to offer its customers and this in turn relates to the overall editorial decision making process and resource allocation. It is therefore intimately linked to the corporation's output and it is clear that the Commissioner has no jurisdiction in this matter.
27. The Commissioner has already referred the complainant to a number of previous decision notices where the Commissioner has accepted (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 Commissioner is satisfied that the same rationale applies in this case.
28. 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.
29. 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

30. 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>

31. 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.
32. 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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