

## Freedom of Information Act 2000 (FOIA)

### Decision Notice

**Date:** 19 June 2013

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

**Address:** 2252 White City  
201 Wood Lane  
London  
W12 7TS

#### Decision (including any steps ordered)

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1. The complainant has requested information concerning programmes which have been edited by the BBC to meet the expectations of a modern audience and the reasons why editing took place in each case. The BBC explained the information was covered by the derogation and excluded from the FOIA.
2. The Commissioner's decision is that this information is held by the BBC for the purposes of 'journalism, art or literature' and does 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

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3. The complainant wrote to the BBC on 24 January 2013 and made the following request:

*"As you may be aware, the BBC was featured in the news this week after it emerged an episode of Fawlty Towers had been edited to remove lines from a character which could be deemed offensive by a modern audience (link to story: <http://www.dailymail.co.uk/news/article-2266738/Censorship-row-BBC-cuts-racist-lines-classic-Fawlty-Towers-episode.html>).*

*I would like to be provided with a list of programmes which have been edited by the BBC to make them suitable for today's audience. Where*

*possible, I would like the list to feature reasons why each edit was made."*

4. The BBC responded to the complainant on 18 February 2013 and provided him with a letter advising about the BBC's derogation under the FOIA in respect of all matters connected with "journalism, art or literature." It explained that Part VI of Schedule 1 to the FOIA provides that information held by the BBC and the other public service broadcasters is only covered by the FOIA if it is held for "purposes other than those of journalism, art or literature". It stated 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.
5. The complainant submitted a complaint to the Commissioner on 26 March 2013.

### **Scope of the case**

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6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case as he believed there was a clear public interest in the use by the BBC of retrospective editing of programmes to meet the expectations of a modern audience.
7. The scope of this case has been to consider whether the BBC was entitled to rely on the derogation under the FOIA.

### **Reasons for decision - Derogation**

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8. Schedule One, Part VI of the FOIA provides that the BBC is a public authority for the purposes of the 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."*
9. This means that the BBC has no obligation to comply with part I to V of the FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.
10. 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.

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 the FOIA.
15. The Supreme Court said that the 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."*

16. 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 the 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 Commissioner adopts a similar definition for the other elements of the derogation, in that the information must be used in the production, editorial management and maintenance of standards of those art forms.
19. The information that has been requested in this case concerns programmes that have been edited by the BBC to meet the expectations of a modern audience and the reasons why editing took place in each case.
20. The Commissioner has considered all of the information before him, but for conciseness he has focussed on explaining why he has decided that the information requested falls within the derogation.
21. In determining whether the information is held for the purposes of journalism, art or literature, the Commissioner has considered the following factors:
  - the purpose(s) for which the information was held at the time of the request; and
  - the relationship between the purposes for which the information was held and the BBC's output and its journalistic activities relating to such output.
22. When considering the purposes for which the information was held at the time of the request, the BBC has explained that the information was held as a consequence of creating content for output and that the

information held supported or was closely associated with these creative activities.

23. The Commissioner finds that it would be reasonable to expect that information concerning editorial changes to programmes would inform as to the content of future screening of programmes and also the creation of new programmes. The retention of this type of information, which notes and analyses the change in public perception as to what is acceptable to be broadcast, relates directly to the editorial decision making process that is involved every time a decision is made to air a programme.
24. Whenever a programme is broadcast an editorial decision will be made as to the intended audience, current social and legal considerations and the impact of the programme itself. The reasons as to why any particular programme may be edited at a certain point is also likely to inform future programme planning as part of the review and analysis inherent in programme production. Retained editorial commentary facilitates discussion when the re-use of existing material is considered particularly when the material concerned was originally produced some years previously when audience expectations may have been different. Decision making as to the views and likely reaction of an intended audience inform future programming.
25. The Commissioner finds that the requested information could also be held for editorial purposes - for the analysis and review of individual pieces of output and for the provision of context and background to the output. It would also enable a review of the standards and quality of particular programme making, in order to further enhance standards and meet audience expectations, which are likely to change over a period of time.
26. When considering the connection between the information itself and the journalistic activities relating to such output, the Commissioner is satisfied that the information obtained relates directly to output and would be used to inform programme making both present and in the future. The Commissioner is satisfied that there is a direct relationship between the purposes for which the information was held and the BBC's output.
27. Having considered the response of the BBC to the request the Commissioner is satisfied that the BBC has provided sufficient evidence that it holds the information for the purposes of journalism, art or literature. He is content that the information is held for the purposes outlined in the definition namely the collecting or gathering, writing and verifying of materials for publication, editorial purposes and for

maintenance and enhancement of the standards and quality of journalism.

28. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of journalism, art or literature and that the BBC was not obliged to comply with Parts I to V of the FOIA.

### **Other Matters**

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29. As part of his complaint, the complainant also raised the issue that the information is of significant public interest as the actions of the BBC in editing material post programming to reflect audience expectation amounted to censoring on a public service broadcaster and therefore the BBC has a duty to disclose it. As the Commissioner is satisfied that the derogation applies to the requested information the issue of what is in the public interest does not fall to be considered under the FOIA provisions.

## Right of appeal

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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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

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 .....**

**Rachael Cragg**  
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