

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 November 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 the percentage of men that produce or direct programmes on radio 4. 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. 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 6 August 2013 and asked for:  
*What percentage of programmes on radio 4 were produced by men from 1<sup>st</sup> August 2012 – 1<sup>st</sup> August 2013? Including programmes made or managed for the BBC by other parties. Please also provide the numbers for each gender.*  
*What percentages of programmes on radio 4 were directed by men from 1<sup>st</sup> August 2012 to 1<sup>st</sup> August 2013? Including programmes made or managed for the BBC by other parties. Please also provide the numbers for each gender.*
4. The BBC responded on 4 September 2013. It stated that it believes the information requested is excluded from the Act because it is held for

the purposes of 'journalism, art or literature.' 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.

## Scope of the case

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5. The complainant contacted the Commissioner 10 September 2013 to complain about the way his requests for information had been handled. In particular, he challenged the operation of the derogation in this case.
6. The Commissioner has therefore had to decide whether the derogation applies to the requested information.

## Reasons for decision

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7. 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."*

8. 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'.
9. 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.
10. 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)*

11. 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.
12. 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.
13. 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.
14. 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'.

15. 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.
16. 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.
17. The information that has been requested in this case concerns the percentage of programmes on radio 4 that were directed or produced by men over a 12 month period, as well as the exact numbers by gender of the relevant producers and directors. The complainant's main argument against the derogation is that the information is already available on the BBC website. The information available shows what programmes have been shown or are scheduled to be shown on a daily basis. From the information available, the complainant has explained he wants a breakdown in percentages of the number of men that produce or direct the radio 4 programmes listed on the BBC's website.
18. When considering the purposes for which the information is held, the BBC has explained that it would use the information for the purposes of creating content and producing output. The Commissioner would accept that this in turn closely relates to editorial decision making. The requested information can be considered to be integral to the editorial process of reviewing and planning for future programmes. Therefore the information requested has a direct link with the creation of output.
19. Flowing from this, the Commissioner understands that the information has a wider strategic value to the BBC. In particular, he acknowledges that it will be used to inform staffing decisions about future programmes. He is therefore satisfied that there is a relationship between it and the purposes listed in Schedule 1. Therefore he agrees with the BBC that the information is held to a significant and genuine

extent for the purposes of 'art, literature or journalism' and falls outside of FOIA.

20. It should be stressed that although the BBC makes some information available on its website concerning the scheduling of radio 4 programmes, the BBC's voluntary release of this information into the public domain does not change the fundamental position of the BBC that the information remains held for the purposes of journalism, art and literature. The Commissioner similarly agrees that, in principle, the issue of whether information is already publicly available does not have a bearing on whether this same information is derogated. In other words, the fact that information has been published, albeit in a piecemeal fashion, does not bring it within the fold of FOIA.
21. Overall, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism. He is content that the information is held for the purposes outlined in the second and third point of the definition namely editorial purposes and for the maintenance and enhancement of the standards and quality of journalism, which means the information falls within the derogation. The effect of this finding is that the Commissioner has decided that the BBC was not obliged to comply with Parts I to V of FOIA in responding to the request.

## Right of appeal

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22. 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)

23. 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.
24. 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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