

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 October 2011

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

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

### Decision (including any steps ordered)

---

1. The complainant has requested information about how empty audience spaces are filled in shows such as Question Time. In particular he wanted to know if spaces were filled by volunteers. The BBC explained the information was covered by the derogation and therefore excluded from the FOIA.
2. The Commissioner's decision is that this information was held by the BBC genuinely for the purposes of 'journalism, art or literature' and did not fall inside the FOIA. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

### Request and response

---

3. On 28 April 2011, the complainant requested the following information from the BBC:

*"Do you have a policy on how empty spaces are filled in live audience type shows such as Question Time, The Big Questions etc.?"*

*When such empty spaces occur, are they filled by volunteers?"*

4. The BBC responded on 25 May 2011. It stated that the information requested is excluded from the FOIA 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 the 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

---

5. On 01 June 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
6. The complainant challenged the application of the derogation in this case. He did not agree that a seating policy fell within the definition of journalism, art or literature. He went on to describe the derogation as a "catch-all" and "too wide-ranging".
7. On 25 August the Commissioner contacted the complainant with an initial verdict upholding the BBC application of the derogation. The complainant, at this point, no longer challenged the derogation. However, the complainant requested a Decision Notice to be served as it was never explained to him which of the categories within the derogation was being applied.

## Reasons for decision

---

8. Schedule I, 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 refers to this as '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.
11. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment 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 Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – i.e. journalism, art or literature – it is not subject to the FOIA. His role is to consider whether the information was genuinely held for the derogated purposes or not.
13. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.
14. The Court of Appeal adopted the Tribunal's definition of journalism which set out that journalism comprises three elements.
  - "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."*
15. The Commissioner adopts a similar three pronged 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.

16. The information that has been requested in this case relates to the BBC seating policy of shows where audiences participate in debate.
17. The Commissioner understands that the BBC must carefully consider situations when there is a live audience in order to ensure that the uncertainty of output is managed. The public anticipates the BBC to have output with participating audiences and this inevitably requires editors to establish audience selection policies and procedures.
18. It follows that the Commissioner is satisfied that the information used to select audiences was held for the purposes outlined in the second part of the definition of journalism – the editorial process. It will be used in the decision making process of editors for the production of future programming output and will inform audience allocation decisions in future programmes.
19. The Commissioner also considers that the information would also be used when considering the enhancement of the standards and quality of journalism which fell within the third paragraph of the Tribunal's definition of what 'journalism' means. This is particularly so if the BBC receives editorial complaints about potential bias in audience selection and this adds further weight to the fact that the information was being used for journalistic purposes.
20. It follows that the Commissioner supports the BBC in its view that this category of information is also held for one of the derogated purposes – journalism. It is not therefore caught by the FOIA.
21. To support his analysis, the Commissioner considers that the status of information should be judged against the following three key criteria:
  - the purpose for which the information was created;
  - the relationship between the information and the programmes content which covers all types of output that the BBC produces; and
  - the users of the information.
22. The information that has been requested relates to the information used for audience selection by the BBC. It was created to enable the BBC to choose an appropriate audience and was kept to ensure that its audience selection was appropriate in future programming. It follows that this criterion supports the BBC's contention that the information was held for the purposes of journalism.

23. The second criterion also favours the BBC. The audience is a key part of an interactive show where their questions and answers are the foundation of the programme. There is a real relationship between this information and the content. This relationship continues considering that the balance of the audience is assessed on an ongoing basis in order for there to be balance in a series of programmes as a whole.
24. The third criterion also favours the BBC. The users of this information are the editors responsible for coordinating the creative output of the show. For the same reasons as above, the relationship continues beyond the time that the programme was broadcast.
25. After considering all the information in this case, the Commissioner finds that the BBC genuinely holds the information for the purposes of journalism. Therefore, the BBC was not obliged to comply with Parts I to V of the FOIA.

### **Other matters**

---

26. The derogation applies to information that relates to 'journalism, art or literature'. Each of these categories are intimately linked to each other and ultimately serve the production remit of the BBC. Bearing this in mind, the Commissioner is satisfied that the BBC can apply the derogation without stating which of the three categories the information applies to. The BBC should however provide a substantive response.

## Right of appeal

---

27. 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)

28. 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.
29. 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, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**