

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 November 2011

**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 asked the BBC for all information about 'secondary explosions' at the World Trade Centre between 9:00 and 18:00 on 11 September 2001. The BBC explained the information was covered by the derogation and excluded by the Act. The complainant referred this case to the Information Commissioner ('the Commissioner').
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 Act. 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 12 September 2011 and asked for:

*'Under the FOI Act 2000, I would like made available to me all documentation of press releases, documentation, reports, audio footage, video footage, or indeed anything in regards to secondary explosions 'reported' or 'heard' by pedestrians, first responders, police, fire & rescue workers, journalists or anyone else at, in or around the world trade centre between 0900 hrs to 1800 hrs of September 11th 2001.*

*As there were plenty of US news stations reporting secondary explosions on that day, and because I am now curious for the fact that within the link you included in my last FOI request to yourselves, in relation to my questioning of "who gave the order*

*for the press release of the Solomon building collapsing almost half an hour early?"; The pitiful excuse/lie given by [Individual A redacted] was that they had been listening/reacting to/on other news reports etc, etc, etc..*

*So there must be documentation, reports, footage or other relating to this new request as US News reports contained comments of 'secondary explosions within the buildings', yet none were aired again after that day for some reason.'*

4. The BBC responded on the same day. It explained that it believes that 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 the Act 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 to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case and explained that he believed that the information should be made available to the public.
6. The complainant also explained that there was a considerable public interest in understanding the events in 11 September 2001 (9/11) and he also explained why he had suspicions about the accuracy of its portrayal particularly in relation to the third building that was lost. The Commissioner's role is only to consider the operation of FOIA.
7. In this case, the only thing that the Commissioner can consider whether the information is held genuinely for the purposes of 'art, journalism and literature' because if it is, then it is not within the remit of the FOIA. He considers for the reasons outlined below that the information is caught by the derogation and so is not covered by FOIA.

## Reasons for decision

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8. Schedule One, Part VI of FOIA provides that the BBC is a public authority for the purposes of the Act 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 Parts I to V of the Act 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 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 Act. 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 Information 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. In this case, the Commissioner's request embraces what was said in the BBC's published content and its broadcast coverage. The published content is connected to journalism. The Commissioner considers that the BBC's broadcast coverage, and the decisions about it, can be best considered to be a mixture of art and journalism. Journalism as the content amounts to news of current events and art because it must be presented in a way that is congenial to its audience. He will consider whether the requested information can be said to correctly be held for the purposes that are specified in the definitions set out above.
17. The information that has been requested in this case constitutes all the journalistic and documentary material that is about "secondary explosions" and 9/11. This request potentially includes material that was not broadcast either on the day or subsequently.
18. The Commissioner has considered all of the information before him, but for conciseness he has focussed on explaining why he considers that the information requested falls within the derogation.
19. The Commissioner considers that a different explanation is required for the information that the BBC has broadcast or published and that which it has not. He will consider each in turn:

*The material that the BBC has broadcast or published*

20. In light of submissions made by the BBC in previous cases and mentioned in the refusal notice the Commissioner considers that the BBC holds the information that is broadcast or published (its content) for the purposes outlined in the second element of journalism within the definition above - the editorial process.
21. The BBC's content is held so that its editors can analyse and review their programmes. Information about the decisions taken to feature certain content would be used by the editors of it to ensure that the content meets its output objectives. It will continue to be held to assess the success or otherwise of such a selection and to inform the planning process for future programming.
22. The Commissioner therefore considers that there is a relationship between it and the derogated purposes. This is particularly so for the information the BBC holds about 9/11. There is considerable controversy about the events that occurred on that day and the BBC periodically broadcast programmes about that controversy. For example, for the 10 year anniversary on 9 September 2011 (three days prior to the request), the BBC produced a programme about some of the conspiracy theories that are within the public conscience<sup>1</sup>.
23. This view follows a number of previous decisions of the Commissioner. For example in **FS50358104**, the Commissioner considered whether an old edition of Panorama could be provided under the Act. In that case, the Commissioner recognised that copies of previously broadcast programmes are retained so that they can be used for repeat broadcasts, as potential content in other BBC programmes and as a source of research when creating output. He considered that the requested information was retained and used to provide context and background to the BBC's output and was still held as a resource which may be used for future programmes. He found that the information was held for the second part of the definition of journalism. In the Commissioner's view, his previous decision is analogous to the position of the components of the information requested in this case. It follows that his view is supported by his previous conclusions.
24. Furthermore, the Commissioner also considers that the broadcast and/or published content would also be held for the third part of the definition

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<sup>1</sup> An appraisal of it is found: <http://www.bbc.co.uk/programmes/b0148yz5>

as well. This is because the BBC would need at least this information to assess the standards and quality of particular areas of programme making, in the event that it received a complaint about the coverage given to 9/11.

25. It is necessary to consider whether information was still held genuinely for the purposes of journalism on 12 September 2011 (ten years after the events on 9 September 2011). It is not material whether the information is also held for other purposes too, providing that it is held genuinely for the purposes of journalism.
26. 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.
27. The information that has been requested relates to the information broadcast by the BBC across all media forms. It was created to enable the BBC to provide content to its audience and would be kept to enable the BBC to review the success of those programmes against its editorial objectives. It follows that this criterion supports the BBC's contention that the information was held for the purposes of journalism.
28. The second criterion also favours the BBC. The material that the BBC chooses to broadcast constitutes a key part of that content. The relationship between the broadcast and/or published information and the output of the BBC continues as the BBC reflects on what coverage to use in future coverage about 9/11. The assessment is made by directors and editors as they produce further content about 9/11 on an ongoing basis.
29. The third criterion also favours the BBC. The users of this information are the editors responsible for coordinating the BBC's creative output. The BBC has provided the Commissioner with evidence in **FS50327965** that 91% of requests that its archives receive are from production divisions in the BBC. This adds further support that the broadcast and/or published information would continue to be held in order to produce content. The relationship between the derogated purposes and the information continues beyond the time that the programme was broadcast.



30. The complainant has argued that his interest lies in understanding how the BBC portrayed the events of 9/11. The Commissioner considers that this argument actually supports the BBC's position because in his view the process itself concerns an editorial decision and any information held about that decision would be held in line with the second branch of the definition of journalism above.
31. The Commissioner also considers that on the date of the request – 12 September 2011 the content broadcast in the programme three days previously would have been under editorial review and the information would need to be considered in the event that the BBC received editorial complaints about the new programme. The BBC was likely to receive such complaints because a lot of the audience of this programme would feel strongly about its content. This adds further support to the Commissioner's view that the broadcast and/or published information is held for the derogated purposes.
32. It follows that the Commissioner supports the BBC in its view that this category of information is held for one of the derogated purposes – journalism. It is not therefore caught by the Act.
33. The complainant has invited the Commissioner to consider whether the derogation would enable the BBC to escape outside oversight and whether this was Parliament's intention. He said that *'Acts and Statutes these days are more and more seemingly there to protect Corporations instead of people that give their express consent to be governed by them'*. While the Commissioner appreciates that transparency and accountability are the key principles of the Act, they cannot be taken into account when considering whether or not information is held for a set purpose or not. Similarly, the Commissioner must regulate the law as it has been enacted.
34. The complainant has also invited the Commissioner to consider that the failure to disclose the information requested has led to public surprise, concern and even anger. It constitutes a matter of public concern and gives rise to suspicions about the fairness, impartiality and integrity of the BBC. These issues can also not be considered because they do not relate to what the Commissioner has to decide – whether the information is held for the derogated purposes or not.
35. Similarly, the complainant explained that he anticipated that the provision of this evidence may lead to *'a new "independent" investigation into the attacks that have taken the UK into a ten year war on terror'*. The Commissioner can only consider the operation of FOIA and cannot take into account what the consequences of potential disclosure would be when the information is not covered by FOIA.

36. For all of the reasons above, the Commissioner is therefore satisfied that the broadcast information 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 the Act.

*The material that the BBC has not broadcast*

37. The Commissioner considers that the BBC is likely to hold two sorts of relevant information that it hasn't broadcast:
1. The footage and material that its editors considered were not required for its coverage ('type one'); and
  2. Any other material that was gathered from sources on the ground but was not considered by its editors ('type two').
38. The Commissioner is satisfied that the choice about which material to broadcast or publish relates directly to the editorial process.
39. The Commissioner considers that the type one information satisfies both the first paragraph (the collecting, gathering, writing and verifying of materials for publication) and the second paragraph (editorial, the selection, prioritisation and timing of matters for broadcast) of the Information Tribunal's definition of journalism. He considers that unused content is retained for reference by those involved in the creation of future broadcasts and it is held directly for journalistic purposes. This is supported by the arguments already covered in paragraphs 23 and 29 above.
40. Finally, the Commissioner also considers the type two information would be held for journalistic purposes. The information was obtained in the process of gathering and verifying of materials for publication and therefore it falls within the first paragraph of the definition. Where preserved, it is kept in its archives in case the production teams and/or journalists require it for future coverage. In the Commissioner's view, the information continues to be genuinely held for the purposes of journalism. This is also supported by the arguments already covered in paragraphs 23 and 29 above.
41. To support his analysis the Commissioner has also considered the purpose of the derogation, which was articulated by Lord Neuberger of Abbotsbury MR at paragraph 45 of his judgment in *Sugar*:

*"The purpose of limiting the extent to which the BBC and other public sector broadcasters were subject to FOIA was 'both to protect freedom of expression and the rights of the media under article 10 of the European Convention on Human Rights, and to ensure that [FOIA] does not place public sector broadcasters at*



*an unfair disadvantage to their commercial rivals.' This is apparent, to my mind, as a matter of common sense, looking at FOIA on its own, but it was also stated in terms to be the policy in a letter from the Department of Constitutional Affairs in 2003, which was admitted in evidence by the Tribunal – hence the quotation marks."*

42. The Commissioner finds in this case that the disclosure of unused material would be likely to impinge the BBC's editorial independence. This is because it would mean that the BBC's journalistic content would receive additional scrutiny and this would mean that its freedom of speech would be restricted. It would also enable the BBC's rivals to capitalise on the BBC's journalistic work without inputting the same resources. Both of these factors would place the BBC at an unfair disadvantage to its commercial rivals and this offers support to the Commissioner's conclusions that the information is held for the derogated purposes.
43. 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 and that the BBC was not obliged to comply with Parts I to V of the Act.

## Right of appeal

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44. 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)

45. 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.
46. 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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