

## Freedom of Information Act 2000 (FOIA)

### Decision Notice

**Date:** 11 February 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 a copy of all emails and meeting/telephone conversation notes between the Health Correspondent Fergus Walsh (or on his behalf) and the Department of Health from 1 December 2011 to 31 July 2012. 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 10 August 2012 and asked for:  
*"... all emails and meeting/telephone conversation notes between the health Correspondent Fergus Walsh (or on his behalf) and the Department of Health, from 1 Dec 2011 to 31 July 2012."*
4. The BBC responded to the complainant on 16 August 2012 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."
5. On 17 August 2012 the complainant requested an internal review.

6. On 4 September 2012 the BBC sent the complainant its response. It confirmed that the information requested fell under the BBC derogation as it was held for the purposes of "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 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 did not provide any information in response to the request for information. In addition it advised that as the derogation applied it would not be conducting an internal review in this matter.
7. The complainant submitted a complaint to the Commissioner on 6 September 2012.

### **Scope of the case**

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8. 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 maintained that the aim of his request was to uncover whether the government has applied pressure to the BBC to suppress journalism on a specific topic. He stated that his request was to discover whether journalistic freedom had been compromised.

### **Reasons for decision**

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9. 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."*
10. 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'.
11. 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.

12. 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)
13. 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.
14. 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.
15. 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.
16. 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.”*

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 emails and meeting/telephone conversation notes between the Health Correspondent Fergus Walsh (or on his behalf) and the Department of Health.
20. In light of submissions made by the BBC in previous cases, the Commissioner understands that the collation and retention of information from many sources is an important tool used by the BBC to monitor, maintain and enhance its journalistic, artistic and literary output, and to ensure the impartiality of that output.
21. 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.
22. In determining whether the information is held for the purposes of journalism, 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 on news and current affairs, including sport, and/or its journalistic activities relating to such output.

23. When considering the purposes for which the information was held at the time of the request, the BBC has explained that the information was obtained and held to substantiate Mr Walsh's creative output as a news and current affairs correspondent. The Commissioner finds that it would be reasonable to expect a Health Correspondent to communicate with the Department of Health to enable the creation of further news and current affairs output. This contact enables access to information which is directly related to the journalistic role of the correspondent. The retention of information also enables access to materials previously used to create content, allows the re-use of existing content and facilitates research. In addition, the requested information was also 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. The BBC also maintain that this enables a review of the standards and quality of particular programme making, in order to further enhance standards.
24. When considering the connection between the information itself and its output on news and current affairs and/or its journalistic activities relating to such output, the BBC has explained that Mr Walsh only used the information obtained to create output in his role as a news and current affairs correspondent for the BBC. On occasions this information may have been used by colleagues in assisting Mr Walsh create journalistic content. The BBC has confirmed that the information relating to this request is used by him in the process of collecting, gathering, writing and verifying materials for publication. It has also confirmed that the information is used directly in journalistic output or the creation of that output as part of his journalistic responsibilities as a news and current affairs correspondent.
25. Overall, the Commissioner considers that the BBC has provided sufficient 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 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.
26. 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 FOIA.

## Right of appeal

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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** .....

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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