

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 October 2015

**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 the number of complaints made about perceived political bias. 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 steps to be taken in this case.

### Request and response

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3. The complainant wrote to the BBC on 4 July and asked:

*'Please inform me of the figure that you have for complaints accusing you of being left wing and backing the Labour party or right wing and backing the Conservative party. Your answer should look something like this:*

*Complaints that accuse of being biased to the Labour party XXXX.  
Complaints that accuse us of being biased to the Conservative party XXXX. All you need do is fill in the X's.'*

4. The BBC responded on 21 July 2015. The BBC explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.

## Scope of the case

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5. The complainant contacted the Commissioner on 16 August 2015 to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case.

## Background

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6. The BBC stated that under the terms of the Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the BBC, the BBC is obliged to *'...do all it can to ensure that controversial subjects are treated with due accuracy and impartiality in all relevant output'*, which means in news and other output dealing with matters of public policy or political or industrial controversy.
7. The BBC's Editorial Guidelines (<http://www.bbc.co.uk/editorialguidelines/>) set the standards required of the BBC's output and content, which include the overarching values of truth, accuracy, impartiality, and editorial integrity and independence.
8. In respect of politics and public policy, the Editorial Guidelines specifically provide that the BBC *'must treat matters of politics and public policy with due accuracy and impartially in new and other output'*. The BBC aims to give due weight and prominence to all main strands of argument and to all the main parties.

## Reasons for decision

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9. 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."  
  
10. 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'.
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 FOIA.
16. 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'."

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 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 information that has been requested in this case is the number of complaints that have been made about perceived political bias.
19. The Information Commissioner has issued a number of decisions supporting the BBC view that information relating to editorial complaints is held for the purposes of 'journalism, art or literature'.
20. The Commissioner has already referred the complainant to two decision notices, [FS50404473](#) (covering the number and nature of complaints about the royal wedding 2011) and [FS50301304](#) (concerning the figures for complaints about political bias made to BBC Scotland). The refusal of the BBC to provide the information was upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation.
21. The complainant was also referred to the 2012 appeal to the First-Tier Tribunal (Information Rights) (EA/2010/0042, 0121, 0123, 0124, 0125, 0187) which concerned requests for information about the BBC's process for handling editorial complaints.
22. The tribunal accepted that "the maintenance and enhancement of output standards (arising, by virtue of quality reviews in terms of accuracy, balance and completeness)" (paragraph 41) is held for the purposes of journalism, art or literature.
23. The tribunal unanimously dismissed each of the Appellant's appeals and refused permission to appeal to the Upper Tribunal.

24. The BBC argues that this request for information is for editorial complaints which form part of the on-going review of the standards and quality of programme making and is held to help inform future editorial discussions and decisions to improve the quality of journalistic output. The BBC provided the following arguments in support of their position:
- The complaints themselves and the information associated with them plays a significant role in helping to inform editorial discussion content and improve the quality of journalistic output.
  - Information concerning editorial complaints is intrinsically linked to the BBC's output. Complaints are about, and are intended to influence, the BBC's content. Information relating to complaints is used to review and assess compliance with the BBC's editorial obligations and to inform future creative decisions.
  - Allowing the BBC to consider and review its past performance and freely to discuss and analyse its future content is central to the freedoms which the designation is designed to protect. Disclosure of information held by the BBC about audience feedback, and the nature and processes of internal discussion and analysis of it within the Corporation, would necessarily hamper a programme-maker or editor's ability to weigh that feedback and come to a considered and objective journalistic judgment on future content. This is particularly the case in relation to complaints regarding impartiality.
25. The BBC also referred to further decision notices: [FS50514531](#) (2013 complaint statistics about a particular programme) and [FS50563849](#) (2014 Scottish Independence coverage) in which the Commissioner upheld the BBC's arguments as he was satisfied that the requested information was held for journalistic purposes and therefore fell under the derogation.
26. In summary, the Commissioner has accepted that complaints, investigations into complaints and the use of the whole editorial complaints process is integral to the BBC's journalistic purpose.
27. The complainant argued that:
- 'The information I requested was provided by the paying public and belongs to the public not the BBC. The information I have requested has nothing to do with any exemption.'*
28. The Commissioner has accepted on a number of occasions (such as in case reference [FS50314106](#) that the BBC has a fixed resource in the Licence Fee and resource allocation goes right to the heart of creative

decision making. The Commissioner is satisfied that the same rationale connects the information to the derogated purposes.

29. Overall, the Commissioner considers that the BBC has provided evidence that it holds the complaints information for the purposes of journalism and that this has been supported by the appeal to the First-Tier Tribunal (Information Rights).
30. For all of the reasons above, the Commissioner is 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 FOIA.

## Right of appeal

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31. 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: 0870 739 5836

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

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

32. 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.
33. 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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