

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 March 2016

**Public Authority:** British Broadcasting Corporation  
**Address:** Room BC2 A4  
Broadcast Centre White City  
Wood Lane  
London  
W12 7TP

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the September 2013 BBC One Panorama programme Saving Syria's Children (SSC) and related BBC News reports. The BBC explained that 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 within the scope of 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. On 14 January 2016 the complainant sent the following information request to the BBC:
  1. All internal BBC communications, documents and reports relating to the commissioning, planning and production of SSC.
  2. All subsequent internal BBC communications, documents and reports pertaining to SSC and related BBC News reports.
  3. All internal BBC communications, documents and reports pertaining to complaints made by myself and others about SSC and related BBC News reports.

4. All video footage shot by [named individual] of the aftermath of the alleged incendiary attack on "The Iqraa Institute", Urm Al-Kubra, Aleppo, Syria, on 26 August 2013, sections of which were broadcast in SSC and related BBC News reports.
5. All footage and still images shot by members of the SSC team (including reporter [named individual], cameraman [named individual] and BBC News security personnel) on 26 August 2013, retaining time codes.
6. All footage and still images shot by members of the SSC team (including reporter [named individual], cameraman [named individual] and BBC News security personnel) on a subsequent visit to "The Iqraa Institute", Urm Al-Kubra, Aleppo, Syria on 28 August 2013, retaining time codes.
7. All correspondence between BBC personnel and the personnel, executives and trustees of the charity Hand in Hand for Syria during the planning and production of SSC and all subsequent related correspondence.
8. All correspondence between BBC personnel and [named individual] during the planning and production of SSC and all subsequent related correspondence.
9. All correspondence between BBC personnel and SSC fixer/translator [named individual] during the planning and production of SSC and all subsequent related correspondence.
10. Recordings or transcripts of interviews with members of the SSC team conducted by the BBC Trust Unit's Independent Editorial Adviser (IEA).
11. A recording or transcript of the IEA's interview with freelance journalist [named individual].
12. All other recordings or transcripts, correspondence, documents and reports pertaining to investigations and deliberations at Stages 1, 2 and 3 of the BBC complaints process in respect of complaints made by myself and others about SSC and related BBC News reports.
13. All correspondence between BBC personnel, including SSC fixer/translator [named individual], and the Diskapi Yildirim Beyazit Training and Research Hospital in Antakya, Turkey, relating to the SSC team's attempts to secure permission to film inside the unit.
14. All correspondence between the BBC's Istanbul Producer and Turkish health officials relating to the SSC team's attempts to secure permission to film inside the Diskapi Yildirim Beyazit Training and Research Hospital.
15. All correspondence between BBC personnel and Human Rights Watch (HRW) in respect of the alleged incidents of 26 August 2013, including the chain of correspondence between the BBC and HRW commencing on 29 August 2013 and any appended reports and the IEA's correspondence with the Advocacy Director of HRW's Arms Division.

16. All correspondence between BBC personnel and UK and foreign state agencies relating to the planning and production of SSC and all subsequent related correspondence.
4. On 26 January 2016 the BBC responded to the request. 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 11 February 2016 to complain about the way his request for information had been handled.
6. The Commissioner considers the scope of the case is to determine whether the information requested is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

### **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 'the derogation'.
9. 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)*

10. 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.
11. 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.
12. 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.
13. 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’.
14. 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.
15. The information that has been requested in this case is information relating to the September 2013 BBC One Panorama programme Saving Syria's Children (SSC) and related BBC News reports.
  16. The Commissioner considers that the requested information is directly related to the BBC's output as it relates to planning and production of a programme that was aired on the BBC in September 2013. In particular it relates to the gathering and collecting of material for broadcast and any reviews of the standards and quality of the production on the back of any complaints received.
  17. Having applied the approach to the derogation set out by the Supreme Court and the Court of Appeal, which is binding, the Commissioner is satisfied that the requested information falls under the definition of 'journalism, art or literature' and is therefore derogated. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes.
  18. The Commissioner has therefore 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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19. 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: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

20. 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.
21. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**