

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 February 2018

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

**Address:** Broadcast Centre  
White City  
Wood Lane  
London  
W12 7TP

### Decision (including any steps ordered)

---

1. The complainant has requested the disclosure of a leaked document (the Section 166 Report). 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. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

### Request and response

---

3. The complainant wrote to the BBC on 6 December 2017 and asked for:

*'My Request relates to a specific document that you have told the Public is in your possession.*

*That document is:*

*A Section 166 Skilled Persons PHASE 1 FINAL Report into RBS GRG's activities between 2008 and 2015 in relation to the "Tomlinson Allegations" from Dr Tomlinson's Report for then Business Secretary Vince Cable in 2013.'*

4. The BBC responded on 8 January 2018. 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'.

5. 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 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 requests for information.

## Scope of the case

---

6. The complainant contacted the Commissioner on 8 January 2018 to complain about the way the request for information had been handled. In particular, he challenged the operation of the derogation in this case.

7. He argued that his request

*'I am still listening to the debate in the main chamber about RBS/GRG.....it is still live as I type this email.....'*

*The BBC has obtained a copy of the S166 Report which had it been PUBLISHED would not have been a "BIG STORY".....however the BBC leaked selected elements of the report and therefore generate NEWS.*

*I submit that the BBC and or ICO should now release the S166 Report into the public domain and that this is very much within the CHARTER of the BBC and is indeed its rationale for its very existence whilst taxing the general PUBLIC for its FEE...'*

8. In response to the Commissioner's letter of 18 January 2018, he further argued for the report to be disclosed.
9. The Commissioner considers the scope of the case is to determine if the requested information is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

## Reasons for decision

---

10. 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."

11. 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'.
12. 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.
13. 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)
14. 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.
15. 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.
16. 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.
17. 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'."

18. 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.
19. In this case, the information that has been requested is the Financial Conduct Authority (FCA) section 166 Report on the Royal Bank of Scotland (RBS).
20. The BBC has confirmed that the information was held at the time of the request by the BBC's editorial staff within the BBC's News division as a source material to support News output:

*"FCA agrees to RBS report scrutiny", dated 17 October 2017 available at <http://www.bbc.co.uk/news/business-41652883>*

*"RBS may face further action by financial regulator", dated 23 October 2017 available at <http://www.bbc.co.uk/news/business-41725553>.'*

21. The BBC argues that the requested information is held to support the work of editors, journalists and programme makers in the collection, gathering and verification of factual information and analysis on current event topics: *'the requested information is intended to provide factual information, which will directly influence editorial decisions, and the final publication and broadcast of BBC's news stories.'*
22. The Commissioner considers that the information requested in this case, relating to the source document, falls under the first and second element explained above, the collecting or gathering, writing and verifying of materials for publication and the editorial process. The information requested therefore falls squarely within the definition of journalism.
23. The Commissioner has therefore found that this information is 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

---

24. 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>

25. 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.
26. 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**