

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

### **Decision notice**

**Date:** 20 June 2022

**Public Authority:** British Broadcasting Corporation (BBC)  
**Address:** 2252 White City  
201 Wood Lane  
London  
W12 7T

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

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1. The complainant made a request for information relating to contacts with BBC Scotland News relating to BBC Scotland's News output.
2. The BBC explained the information was covered by the derogation and excluded from FOIA.
3. The Commissioner's decision is that this information would be held by the BBC for the purposes of 'journalism, art or literature' and would not therefore 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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4. On 22 April 2022 the complainant made a request for the following information:

"During the months January to March 2022 (inclusive) -

- 1) How many contacts by email or other electronic message sending system, phone call, letter or other method of communication were made by the following to BBC Scotland News on the subject of BBC Scotland's News output:
  - a) the SNP
  - b) ministers of the Scottish Government or civil servants of the Scottish Government

c) Special Advisors (SPADs) on behalf of the Scottish Government.

The information sought must include contacts by agents or any other intermediaries acting on behalf of the said groups mentioned in (a), (b) and (c)?

Further, what percentage of these contacts (1) urged a change in the BBC Scotland's existing news output or (2) urged that certain information being supplied to the BBC in the contact should become a news story which BBC Scotland included in its output?"

5. The BBC responded on 16 May 2022 and refused to provide the requested information. It stated that it was exempt from disclosure under the 'derogation'.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 16 May 2022 to complain about the way his request for information had been handled.
7. 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**

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8. 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."
9. 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'.
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 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).

12. The Supreme Court endorsed this approach in *Sugar (Deceased) v British Broadcasting Corporation* and another [2012] UKSC 4<sup>1</sup> 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.
13. 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.
14. 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.
15. 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,

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<sup>1</sup> <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>

- 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.
16. 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 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. 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;
    - 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.
  20. The complainant has argued that, "I haven't asked for any information on the BBC's news output. Instead I have asked for the number of times BBC Scotland has been contacted by specified outside agencies."
  21. The Commissioner considers that the information that has been requested in this case is the number of specified contacts with BBC Scotland News relating to BBC Scotland's News output. The request also

asks for the percentage of contacts that urged a change in output or urged that specific content was included. The request is therefore directly related to the output of the BBC in terms of selection of matters for broadcast/publication.

22. 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 FOIA.

## Right of appeal

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23. 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@Justice.gov.uk](mailto:grc@Justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

24. 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.
25. 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.....**

**Gemma Garvey**

**Senior Case Officer**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**