

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 February 2012

**Public Authority:** The British Broadcasting Corporation  
**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 the prize featured on the BBC Three competition show *Hot Like Us*. The BBC explained the information was covered by the derogation and excluded from the FOIA.
2. The Commissioner's decision is that this information was held by the BBC genuinely for the purposes of 'journalism, art or literature' and did not fall inside the 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 05 October 2011 the complainant requested information concerning the prize on offer as part of the BBC Three programme *Hot Like Us*, in the following terms:

*"I make a request under the Freedom of Information Act 2000 for (i) the name of the 'top agency' concerned. (ii) Full details of the 'modelling contract'."*

4. On 19 October 2011 the BBC issued a response. The BBC explained that it did not believe that the information was embraced by the FOIA because it was held for the purposes of 'art, journalism or literature'. It explained that Part VI of Schedule 1 of the FOIA provides that information held by the BBC and the other public service broadcasters is only covered 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 request for information.

## Scope of the case

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5. On 21 October 2011 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.

## Reasons for decision

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6. 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."*

7. 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'.
8. 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.
9. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment 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 Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes –

i.e. journalism, art or literature - it is not subject to the FOIA. His role is to consider whether the information was genuinely held for the derogated purposes or not.

11. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.
12. The Court of Appeal adopted the Tribunal's definition of journalism which set out that journalism comprises three elements.

*"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."*

13. The Commissioner has adopted a similar approach with regard to art, one of the other two limbs of the BBC derogation. In his view, art is comprised of the same three elements, that is:

- The preparation and creation of the artistic output.
- The editorial process.
- The maintenance and enhancement of the standards and quality of artistic output.

14. *Hot Like Us* is a series of programmes in which eight couples compete against each other to win a contract with a modelling agency. The

contract awarded by the agency forms the entirety of the prize in this show. The information that has been requested in this case is the name of the modelling agency and all other details of the contract.

15. In light of present submissions from the BBC, the Commissioner considers that the information falls within the first and second element of art.
16. The Commissioner has considered all of the information before him, but for conciseness he has focussed on explaining why he considers that the information requested falls within the derogation.
17. In considering whether information is held genuinely for the purposes of art, the Commissioner has considered the following three factors:
  - The purpose for which the information was created;
  - The relationship between the information and the programmes content which covers all types of output that the BBC produces; and
  - The users of the information.
18. When considering the purposes for which the information was created, the Commissioner is mindful that the requested information in this case consists of the name of the agency and details of the modelling contract – effectively then, the requested information is ‘the prize’ for which the contestants compete. The BBC explained that the requested information – ‘the prize’ – was created as a goal for the programme, effectively as an editorial end point.
19. It follows then that there is a strong relationship between the requested information and the programme’s content in this instance. In this case specifically, key editorial decisions and considerations were intrinsic to the requested information. All decisions based on the competitive element of the show were judged with the details of the prize in mind and all programme content which is based specifically on the competitive element of the show is based on the prize. For example, tasks, assignments and events which form the output are constructed in order to adjudicate which contestants would be most suitable to win the prize. Decisions and judgements made by the producers off screen and the judges who are contributors on screen – who are deciding the outcome of the competition – continually refer to ‘the prize’ as the ultimate goal of the show.
20. The BBC explained that, firstly, the information is being used by producers to create editorial content for the show – coming up with ideas and events that move the show and the contributors towards the

ultimate award of 'the prize'. Secondly, the judges – who are key contributors and decide the final outcome of the show – are aware of the detail of the information and make decisions based on that information. The relationship between the requested information and the contents of the programme – the output itself – is a direct one.

21. When assessing the users of the information, the Commissioner is satisfied, bearing in mind the arguments above, that the information is essentially used by producers to create editorial content.
22. The information continues to be held by the BBC in order to assess the success of the programme against its editorial objectives and to inform the planning process for future programming; in future series, the editorial process is ongoing and review of the information is a starting-point to inform further key editorial decisions about, for example, casting, production, location, and format. The information must also be available for research by other programme makers. The relationship between the derogated purpose and the information therefore existed at the time of the complainant's request and continues beyond the time that the programme was broadcast.
23. 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 art and that the BBC was not obliged to comply with Parts I to V of the FOIA.

## Right of appeal

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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: 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)

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**  
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