

## Freedom of Information Act 2000 (FOIA)

### Decision Notice

**Date:** 01 July 2013

**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 information concerning meetings and correspondence with a named individual before and after a *Question Time* programme. The BBC explained the information was covered by the derogation and excluded from the FOIA.
2. The Commissioner's decision is that this information is held by the BBC for the purposes of 'journalism, art or literature' and does 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. Following the broadcast of *Question Time* on 7 March 2013, the complainant requested information concerning the programme:

- "1. Was [name redacted] introduced to David Dimbleby or any other member of BBC staff before the filming of Question Time?"*
- 2. Has [name redacted] had meetings or correspondence with David Dimbleby or any other member of BBC staff prior to or since the Dover edition of Question Time on 7th March?"*
4. The BBC responded on 12 April 2013. It explained that the requested information is excluded from the FOIA because it is held for the purposes of "journalism, art or literature" and it is therefore not obliged to provide this information.
5. It explained that Part VI of Schedule 1 to the FOIA provides that information held by the BBC and the other public service broadcasters is only covered by the FOIA if it is held for "purposes other than those of journalism, art or literature". It stated 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.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 12 April 2013 to complain about the way his request for information had been handled.
7. He argued that David Dimbleby is a neutral moderator of *Question Time* and that there is no editorial preparation or research on his part before the broadcast. He does not accept that the information he has requested falls under the Supreme Court's definition of journalism. He also considers the BBC has an obligation to demonstrate openness and transparency, particularly where the question of impartiality is concerned.
8. The scope of this case has been to consider whether the BBC was entitled to rely on the derogation under the FOIA.

### **Reasons for decision - Derogation**

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9. 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."*

10. 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'. This is referred to as '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.
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.
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 the FOIA.
16. The Supreme Court said that the 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."*
17. 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 the 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 determining whether the information is held for the purposes of journalism, art or literature, the Commissioner has considered the following factors:
    - the purpose(s) for which the information was held at the time of the request; and
    - the relationship between the purposes for which the information was held and the BBC's output and its journalistic activities relating to such output.
  20. The information that has been requested in this case relates to meetings and correspondence which may have taken place before and after *Question Time*. The Commissioner considers that this is well within the expected remit of the BBC for the purpose of creating content and producing journalistic output.

21. The Commissioner understands that the BBC must carefully consider situations when there is a live audience in order to ensure that the uncertainty of output is managed. The organisation of any meetings and consideration of any correspondence prior to a *Question Time* programme clearly falls into this editorial decision making process.
22. Although David Dimbleby himself may not hold this editorial role, information held by the BBC concerning any meetings and correspondence prior to any individual programme would be held by the BBC for the purposes of editorial preparation and programme monitoring.
23. Furthermore, any complaints concerning the impartiality of the BBC are used by its programme editors as a means to monitor its journalistic output and to ensure the impartiality of that output. Such information therefore falls under the definition of journalism as it is used to inform the BBC's editorial consideration of the standards and quality of its programmes.
24. In coming to his conclusion, the Commissioner has considered the response of the BBC to previous similar requests and his decisions as given in the decision notices for the cases FS50405825, FS50401168 and FS50394881.
25. As explained in these decision notices, the questions chosen for *Question Time* and the audience selection are fundamental to the editorial decision making process. In particular, the production of programmes with participating audiences inevitably requires editors to follow audience selection policies and procedures.
26. The Commissioner is therefore satisfied that the BBC holds the information for the purposes of journalism, art or literature. He is content that the information is held for the purposes outlined in the definition, namely the collecting or gathering, writing and verifying of materials for publication, editorial purposes and for maintenance and enhancement of the standards and quality of journalism.
27. For all of the reasons above, the Commissioner is satisfied that the requested information is held for the purposes of journalism, art or literature and is derogated. The BBC is therefore not obliged to comply with Parts I to V of the FOIA with respect to this request.

## Right of appeal

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28. 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)

29. 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.
30. 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**  
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