

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 December 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 ticket information for the Radio One Hackney Weekend 2012. The BBC explained the information was covered by the derogation and excluded from FOIA. 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. 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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2. The complainant wrote to the BBC on 10 August 2013 and asked for:

*'Please provide all information held concerning numbers of tickets distributed and used for entry to the Radio One Hackney Weekend 2012, in the form in which it came to be held by the BBC, and details of how the information came to be held by the BBC.'*

*In particular I am seeking to obtain the following information:*

1. *The number of tickets distributed to individuals in each of the registered address categories (Hackney, other Olympic boroughs, other UK addresses) through the online booking system. The relevant address should be that of the named person on the ticket.*

- 2. The number of tickets that were allocated by other means eg competitions*
  - 3. The total number of ticketholders of each type (Hackney, other Olympic boroughs, other UK addresses) recorded as entering the event on each day.*
  - 4. If information is not held to answer 1) and 3) , the overall number of tickets issued for each day, and the total number of ticket holders recorded as entering the event on each day.'*
3. The BBC responded on 19 August 2013. It explained that it believes that the information requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature.' 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 it 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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4. On 21 August 2013 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.
5. The Commissioner invited the complainant to withdraw his case on 17 September 2013 as it was his opinion that the requested information was held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.
6. However, the complainant declined to withdraw his case and wrote to the Commissioner on 31 October 2013 to reiterate the fact that he did not believe that his requests were held for the purposes listed in Schedule 1.
7. The complainant argued that
  - 1.The definition of the BBC's 'output' should be as described in article 5(1) of its Charter, ie broadcast by means of television,*

*radio, online or other technologies. The 2012 Radio One Weekend was a music festival run by commercial events promoter, Live Nation (who also produce other large music festivals such as Wireless and Hard Rock Calling), and as such the live event itself and associated ticketing matters should not be considered part of the BBC's output.*

*2. Similarly the BBC also broadcasts from the Glastonbury festival, and it is evident that the festival itself and the process of ticket sales and related data is not part of the BBC's output or within its remit - so there is no reason why this should be the case for the Radio One Weekends.*

*3. While broadcast material was derived from the Radio One Hackney Weekend and so formed part of the BBC's output, the information requested is incidental and had no effect or influence on this output and lacks any 'directness of purpose' as Lord Walker puts it at para 83 of the Sugar Judgment. Nor would be relevant to the production of any future Radio One Weekend, as each year it is of a different scale and held in a different location.*

*4. The principles of the ticket distribution were publicised here : <http://www.bbc.co.uk/programmes/b01d77xq/profiles/tickets-rules> and all matters concerning ticketing appear to me to be related to the practical and political issues involved in staging an oversubscribed large scale event on public open space and with associated impacts and expense for the local population: [http://www.hackneygazette.co.uk/news/free\\_radio\\_1\\_concert\\_costs\\_hackney\\_residents\\_750\\_000\\_1\\_2292096](http://www.hackneygazette.co.uk/news/free_radio_1_concert_costs_hackney_residents_750_000_1_2292096)*

*5. Comments from BBC Radio 1's Ben Cooper in this article indicate that the purpose of staging the event is not for the purpose of creating 'output' but primarily a form of marketing : <http://www.entertainmentwise.com/news/79066/Radio-1s-Hackney-Weekend-Slammed-By-Festival-Boss>*

*6. The Commissioner has observed in previous decision notices that "the ultimate purpose of the derogation (Schedule 1) is to protect journalistic, artistic and literary integrity by carving out a creative and journalistic space for programme makers to produce programmes free from the interference and scrutiny of the public." Applying the derogation in the case of the information I have*

*requested does not accord with this purpose as the information is not genuinely relevant to the creative space of programme production.*

*7.It concerns me that assuming connections between any information that happens to be held by the BBC and its output, regardless of how remote or incidental, in effect places the BBC outside the scope of the FOIA. This was emphasised by Lord Walker at para 82-84 of the Sugar Judgment. I would therefore respectfully disagree with the Commissioner's statement that "All that must be evidenced is that the information requested has a relationship with the BBC's output", since without giving careful consideration to the nature of the relationship "literally every piece of information held by the BBC could be said to be held for the purposes of journalism"*

*8.While this was not explicitly stated in the request, I was seeking to confirm whether any of the information is not held. Where any of the requested information is not held, I believe there should be a denial in accordance with s1 of the FOIA.*

*9.The preliminary conclusion confirms with regard to the BBC derogation "This means that information held for the purposes of journalism, art or literature is not covered by the FOIA but is derogated"*

*10.However the derogation cannot apply to information that is not held, since information not in the possession of the BBC is evidently not "held for the purposes of journalism, art or literature" nor for any purpose. Furthermore it does not seem valid to be required to speculate on the potential purpose for which non-existent information might be held. It is therefore logical that where requested information is not held the derogation does not apply.*

*11.Decision Notices FS50401168 and FS50394881 are referred to in the preliminary conclusion but though the requests concern information about tickets and audiences, the nature of the productions is entirely different from the Radio One Weekends.*

*12.These decisions refer to participatory studio programs produced by the BBC and over which it has full control eg. Question Time and as stated in FS50401168 s17 "The audience is a crucial*

*component of an interactive question and answer panel show. Information about the composition of the audience would be used by the editors of it to ensure that the selection and balance of it reflected the output objectives of the programme"*

*13. This is not the case with the information I have requested. The audience for the Radio One Weekend events is incidental to the broadcast output and not actively selected by the BBC as part of any genuine editorial or creative process. As explained above, the Radio One Weekends are held in different locations and circumstances each year, with different sizes of venues and audiences. So it is hard to conceive of a way that this information could have a genuine relevance to editorial or artistic decisions regarding future output, even if one accepts, which I do not, that that these live audience and ticketing records relate to broadcast output rather than non-output 'event' matters.*

8. On 7 November 2013 the Commissioner wrote to the BBC requesting further arguments and these were provided on 9 December 2013.

## **Reasons for decision**

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9. 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."*
10. 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'.
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. The Commissioner's analysis will now focus on the derogation.
12. The scope of the derogation was considered by the Court of Appeal in the case of *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. This is the test that the Commissioner will apply.
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 FOIA.
16. 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'.

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 information that has been requested in this case concerns the ticket distribution for the Radio One Hackney Weekend 2012.
19. The BBC provided responses to all of the specific points raised by the complainant in paragraph seven above, some of which are repeated here:

**1, 2** - The Radio 1 Hackney Weekend 2012 was managed and broadcast by the BBC; the Radio 1 Big Weekends are "owned" and run by the BBC. Such events therefore clearly form part of the BBC's output. The requested information forms part of the operational information which supports the production and creation of this output; the direct link between 'operational information' and the BBC's output has been addressed in a number of the Commissioner's published decisions, and in detail in *British Broadcasting Corporation v Information Commissioner* [2009] EWHC 2348 (<http://www.bailii.org/ew/cases/EWHC/Admin/2009/2348.html> ); see particularly paragraphs 35-43, and 87, where Irwin J concluded that, *"It seems to me difficult to say that information held for 'operational' purposes is not held for the purposes of 'journalism, art or literature'."* Again, citing Irwin J, the Information Commissioner in FS50272469 confirmed that information does not itself need to be 'journalistic' in nature for it to fall within 'the derogation' (paragraphs 19-20).

**3** - For Glastonbury, the BBC is the broadcast partner with rights to broadcast the festival; in contrast, the Radio 1 Big Weekends are managed and produced by the BBC.

**4, 5, 6** - The BBC would strongly disagree with the applicant's assertions here. Particularly, the live audience – and the make-up of the audience – are a vital component in the creation of output concerning the broadcast of live performances; far from being 'incidental' to the output created, the live audience makes a significant and tangible contribution to the subsequent output. (At the most basic level, this represents an editorial choice – and clear difference – between live and studio performances). In this case, key editorial objectives shaping the output were the placement of the 2012 Big Weekend within the "cultural Olympiad" – a series of events accompanying the Olympics 2012, and the close association with the Olympics in terms of location... the requested information is related to the decisions regarding programme content and production output which reflect the ambitions of the production itself; ... the information is retained by the BBC to enable post-transmission review of broadcast output and to inform future planning for similar events.

**6** - ... information about marketing and publicity activities also fall outside the scope of the Act, as the purpose of these activities is to promote and support the BBC's output. The Information Commissioner has supported this position in FS50488408, FS50498129 and FS50206742.

**9, 10, 11**- It noted that while the phrase 'held for the purposes of journalism, art or literature' is widely used, Schedule 1 of the Act sets out that the British Broadcasting Corporation is subject to the Act only "in respect of information held for purposes *other* than those of journalism, art or literature" (emphasis added). As it is the BBC's position that the requested information is not held for purposes other than those of journalism, art or literature, Parts I-V of the Act do not apply in this instance, and there is therefore no requirement to confirm whether the requested information is held under section 1(1)(a).

**12, 13, 14** - It is accepted that there are differences between the type of audience in FS50401168 and FS50394881 and in this request. However, the principle of the direct link between the requested information and creation of the BBC's broadcast output, particularly in the relationship between the requested information and the editorial decision-making process, is consistent across these cases **and** this request.



20. In light of submissions made by the BBC in this and previous cases relating to the Radio One Hackney weekend, the Commissioner understands that the staging of such concerts is undertaken by the BBC with an intention to broadcast them. Hence, creating and staging these concerts can be considered as part of the BBC's programme-making remit and part of the corporation's broadcast schedule plans as well as a musical event for the public to attend. To this extent, much like any other concert-like programme, coverage of the event broadly falls within the expectations of BBC creative output.
21. It follows then that information on costs and ticket distribution form part of the decision making process that concerns the selection, prioritisation and timing of content for broadcast by the BBC. Staging concert productions are not unique to the BBC and the requested information will be valuable for the BBC to inform editorial decisions for future events.
22. The Commissioner recognises that neither the High Court nor the Court of Appeal cases specifically considered information about ticketing for a radio event. Nevertheless the Commissioner considers the comments made by Mr Justice Irwin regarding the need for a relationship between the requested information and the derogated purposes are relevant and therefore he has considered them here.
23. The Commissioner understands that the information, if held, would be held to assist those involved in the creation of output for the BBC – in this case Radio One's weekend and the audiences that it has. In view of the fact that the requested information is likely to be used to inform allocation decisions about future programmes he is satisfied that there is a relationship between it and the purposes listed in Schedule 1.
24. This outcome means that very few requests for information escape the derogation. Indeed the Court of Appeal provided its comments about this matter:

'...Relatively little information held by the BBC will be within the ambit of FOIA if the Judge's interpretation is correct. However, although "the public's right to know", in the sense of having access to information held by government and other public bodies, is a very important aspect of a modern, free and democratic society, it is a general right, which, as it seems to me, can be expected to yield to society's more specific public interest in the media being free from the sort of constraints which would arise if journalism-

related thoughts, investigations, or discussions could not be freely conducted within organisations such as the BBC.<sup>1</sup>

25. 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.

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<sup>1</sup> At paragraph 48.

## Right of appeal

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26. 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: [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)

27. 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.
28. 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, Complaints Resolution**  
**Information Commissioner's Office**  
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**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**