

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 January 2014

**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 about the administration of the ballot system and the allocation and sale of tickets concerning the *Last Night of the Proms*. 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. The complainant wrote to the BBC on 16 September 2013 and asked for information of the following description:

*"(i) How many people attended more or at least five concerts during this season?"*

*"(ii) How many people attended at least five concerts, asked to be included in the ballot?"*

*"(iii) How many people who were included in the ballot actually got tickets?"*

*"(iv) How many tickets were allocated to people who had never attended at least five or more concerts during the season?"*

*(v) How many tickets were allocated each year to travel or booking agencies which can then be given to people who have not attended at least five concerts?*

*Please, be aware that I am not complaining about the system for the allocation of tickets but I am complaining about the fairness of the administration of the system."*

4. The BBC responded on 14 October 2013. It stated that it believed that the information requested was excluded from the FOIA because it is held for the purposes of 'journalism, art 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 the 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 request for information.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 16 October 2013 to complain about the way his request for information had been handled. He asked the Commissioner for advice as to whether the BBC is entitled under the FOIA to refuse this information as he believed that his request is statistical and is not as claimed by the BBC "journalism, art or literature."
7. The Commissioner has therefore had to consider whether the BBC was correct to claim that the requested information is derogated.

## **Reasons for decision**

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### **Derogation**

8. 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."*

9. This means that the BBC has no obligation to comply with parts i to v of the FOIA 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 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)*

12. 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.
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,*
- \* *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 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 is for information about the administration of the ballot system and the allocation and sale of tickets concerning the *Last Night of the Proms*.
19. The requested information therefore forms part of the activities and costs involved in creating a series of programmes broadcast by the BBC.
20. The BBC explained that in cases where the requested information is directly related to the creation of the BBC's broadcasting output, it will fall outside the scope of the FOIA. It added that the information about costs incurred and activities undertaken in the making of a programme and the output are created and used for the purpose of managing the production and its associated budget; the information is a key part of the editorial decision making process by which the programme itself is created. After the broadcast, the information will continue to be held to inform the editorial process of reviewing and planning for future programmes.
21. The use of programme-related material for this purpose has been accepted by the Commissioner on a number of previous occasions.

These include decision notices for the case references **FS50422017**, **FS50423423** and **FS50393443**. These decision notices provide details of the use of information relating to programme production and resource allocation within the editorial and creative process.

22. In light of submissions made by the BBC in previous cases and mentioned in the refusal notice to the complainant dated 14 October 2013 and recent submissions to the ICO dated 6 and 13 December 2013, the Commissioner has considered all of the information before him. For conciseness he has focussed on explaining why he has decided that the information requested falls within the derogation.
23. In determining whether information is held genuinely 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; and
  - 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.
24. When considering the purposes for which the information was held at the time of the request, the BBC explained that the BBC Proms is the world's largest classical music festival and a major cultural event which is managed and broadcast by the BBC.
25. It added that money raised from the sale of tickets goes towards the running cost of the festival. It stated that the requested information is operational information which is created and used in support of the production and broadcast of the BBC Proms and as the festival is an annual event, the BBC clarified that information used in the production of the 2013 festival will be used in the planning, management and broadcast of future events.
26. The BBC re-iterated that the requested information is held for the purposes of journalism, art or literature and is therefore excluded from the FOIA. However, the BBC did provide the complainant with a certain amount of information published outside the FOIA.
27. The BBC stated that whilst it is not prepared to volunteer the specific numbers involved as this information directly relates to the financial planning and management of the event, it provided the complainant with a link to the page dealing with booking tickets for the *Last Night of the Proms*. The BBC explained that the link contains information about

the Five-Concert Ballot and the Open Ballot and how tickets are available for purchase without the requirement of prior attendance.

28. The BBC did respond to question 5 of the requested information, it volunteered that neither the BBC nor the Royal Albert Hall (the only official ticket seller for the BBC Proms) allocate tickets directly to travel or booking agencies.
29. Overall, the Commissioner considers that the BBC has evidenced that it genuinely holds the information for the purposes of journalism. He considers that the information falls within the derogation.

### **The Commissioner's decision**

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30. 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 literature and that the BBC was not obliged to comply with Parts I to V of the FOIA.

## Right of appeal

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31. 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)

32. 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.
33. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**