

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 April 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 concerning the 2013 series of Strictly Come Dancing. The BBC explained the information was covered by the derogation and excluded from FOIA.
2. 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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3. The complainant wrote to the BBC on 9 January 2014 and made the following request:
  1. *Please indicate the total numbers of votes cast in all forms (telephone, mobile or online) made for each programme of the series where a vote took place. These figures cannot possibly be absolutely confidential as approximate total for the final was given on air (as "more than 6 million")*
  2. *If possible, please break down these into proportions of votes cast by landline, mobile telephone or online.*

*These questions refer to the page*

<http://www.bbc.co.uk/programmes/b006m8dq/features/terms-and-conditions:>

3. *Where that page states, in the introductory sections, "The voting for each show is verified by an independent verification service", please identify the provider of that verification service.*
  4. *Regarding the section "Does the BBC receive any revenue from the calls?" on that page, please identify the charity or charities benefitting.*
  5. *For a vote which would have been cast by BT landline telephone (for which it is stated on air that the cost of the call is 15p), please indicate what proportion of that cost is payable to the charity/charities as above and what proportion, if any is retained by BT.*
  6. *For a vote which would have been cost by using the Mobile Short Dial Code (for which that page as above states that the cost of the call is 15p), please indicate what proportion of that cost is payable to the charity/charities as above and what proportion, if any, is retained by the mobile network operator.*
4. The BBC responded on 4 February 2014. It volunteered information within the scope of request 4. However, it stated that it believed the information requested in requests 1, 2, 3, 5 and 6 was excluded from the FOIA because it was 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 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. 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 to requests 1, 2, 3, 5 and 6.

## **Reasons for decision**

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6. 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."*

7. 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'.
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 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)*
10. 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.
11. 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.
12. 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.
13. 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'.

14. 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.
15. 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.
16. The information that has been requested in this case concerns voting information from the 2013 series of Strictly Come Dancing.
17. The complainant raised a number of arguments as to why he believes the information sought in request 1, 2, 3, 5 and 6 is not derogated.
18. Specifically he argued that the information requested does not directly relate to the content or creative output of the programme. He also argued that if the information within the scope of requests 1, 2, 3, 5 and 6 was released, "it would not give any indication of the public preference

*which could possibly influence the content of any subsequent programme, or any public vote for the same or any other programme”.*

19. The complainant further argued that even if the Commissioner found that the information was derogated, it is in the public interest for the information to be released. The Commissioner accepts that there is public interest in this information but has also reminded himself that this factor in itself does not have a bearing on the central question of whether information is derogated. In this case the Commissioner has found that the information requested has a direct link to the BBC's output and therefore is derogated. The reasons for this are explained in the subsequent paragraphs.

### **Request 1**

20. The BBC explained that the votes the programme receives represents an editorial choice being made by the viewers of the show and therefore the voting figures form a key part of the editorial content of the programme.
21. The BBC referred to an argument made by the complainant, in which he explained that *"these figures cannot possibly be absolutely confidential, as the approximate total for the final was given on air (as 'more than 6 million'".* The BBC explained that this was an editorial decision made by the makers of the programme and the decision was made to *"contribute towards the sense of excitement about the level of audience interaction as the series reached its conclusion”.*
22. In a previous decision notice<sup>1</sup> the Commissioner upheld the BBC's position that information on voting figures is held for the purposes of journalism, art or literature. The Commissioner holds the same position in this case and considers that the information sought in request 1 is closely linked to the BBC's output.

### **Request 2**

23. The BBC explained that the makers of the programme will regularly breakdown the voting figures in to the different methods that can be used to vote. This review allows the programme makers to determine whether any changes should be made to the existing methods for future shows, or whether new methods should be introduced for any future series.

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<sup>1</sup> [http://ico.org.uk/~media/documents/decisionnotices/2009/FS\\_50231775.ashx](http://ico.org.uk/~media/documents/decisionnotices/2009/FS_50231775.ashx)

24. The BBC further explained that "*the BBC must ensure that the robustness of the voting mechanism and its administration matches the vote's editorial significance*".
25. The Commissioner considers that the information sought within the scope of request 2 is directly linked to output. This is because the BBC will use this information in the future to make editorial decisions. He is satisfied that the information is held for the purposes of journalism, art or literature and is therefore derogated.

### **Request 3**

26. The BBC explained that it must handle all votes with rigorous care and integrity in order to maintain public trust in the BBC. The Commissioner understands that one of the ways it does this is by engaging an independent verification service to ensure that all of the votes that are received for competitors in the show are genuine, and that couples are never 'pre-chosen' to progress in the competition. The BBC therefore argued that this is directly related to "*the creation of the show and maintaining the integrity of the vote*".
27. The Commissioner would consider that the independent verification service would oversee the outcome of the vote and therefore relate to the editorial content of the programme. He is therefore satisfied that this information would be held for the purposes of journalism, art or literature and therefore derogated.

### **Request 5 and 6**

28. The BBC stated that due to the popularity of the programme and the high level of audience interactivity, the BBC requires the services of an external service provider and network operator to run the public vote. It therefore argued that the information requested in this request concerns the costs of running the programme.
29. The BBC did confirm that the telephone lines for the programme are not designed to raise money for charity, but there can be incidental revenues from these lines after all service provider and network operator costs have been met. It explained that "*any such money goes to the BBC performing Arts fund, except in the week of BBC Children in Need*".
30. The BBC further argued that detailed information relating to the costs referenced in requests 5 and 6 is operational information which is created and used in support of the broadcast of Strictly Come Dancing. It further explained "*this operational information relating to the broadcast of the 2013 series is likely to be used in the planning, management and broadcast of any future series*".

31. The BBC referred to Mr Justice Irwin's comments at paragraph 85 in the case of *BBC v ICO & Steven Sugar* in which he stated:

*"It seems to me difficult to say that information held for 'operational' purposes is not held for the purposes of 'journalism, art or literature'. It has not been contended that journalism, art and literature are not the product of the operations of the BBC. This does not mean that everything the BBC does is done for the purpose of journalism, art or literature. As Davis J said, that would be far too broad a reading. The cost of cleaning the BBC boardroom is only remotely linked to the product of the BBC, whereas the operating cost of creating an episode of a programme is much more closely linked to the designated purposes. Yet those costs could aptly be termed 'operational'".*

32. The Commissioner accepts the BBC's position in relation to requests 5 and 6. In particular he considers that the information sought in is directly linked to the BBC's output and is therefore derogated.
33. Overall, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism. He is content that the information is held for the purposes outlined in the second and third point of the definition namely editorial purposes and for the maintenance and enhancement of the standards and quality of journalism. Consequently, he has found that the information falls within the derogations, which means that the BBC was not obliged to comply with Parts I to V of FOIA.

## **Right of appeal**

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34. 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)

35. 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.
36. 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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