

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 February 2015

**Public Authority:** British Broadcasting Corporation (BBC)  
**Address:** BBC Broadcasting House  
Portland Square  
London  
W1A 1AA

### Decision (including any steps ordered)

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1. The complainant made a freedom of information request to the BBC for details on the salaries of a number of BBC employees and details of how they were recruited. The BBC initially refused the request under the section 40(2) (personal information) exemption. During the course of the investigation the BBC changed its position and disclosed some of the requested information but claimed that the remaining information was covered by the derogation and therefore 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. On 23 June 2014 the complainant made a freedom of information request to the BBC which read as follows:

*"Could you please provide me with detail on how the following BBC employees were recruited. Have their current positions (which have all been taken up over 2013 and 2014, I believe) been formally advertised for? And have they had to go through a formal interview process? If not, please provide details of how the employees were recruited and who made the final decision to hire them. Please also provide the salary (or salary band) each employee receives."*

4. The request named 23 individuals for whom information was requested and which included individuals who appear on air and could be described as 'talent'.
5. The BBC responded to the request on 21 July when it explained that the requested information was being withheld under the section 40(2) (personal information) exemption on the grounds that the information was personal data and disclosure would contravene the first data protection principle.
6. On 30 July 2014 the complainant asked the BBC to carry out an internal review of its handling of the request. He disputed the BBC's position that the request was for personal information and said that if this was not clear then his request should be rephrased as follows:

*"Could you please provide me with detail on how the following BBC positions were recruited for. Have these positions been formally advertised for? If so, was the position advertised for externally or internally? Were there formal, competitive interview processes for candidates applying for the positions – with multiple people interviewed for the roles - and did the current occupants of those positions take part in the interview process? Who made the final decision on which individuals should fill the positions? Please also provide the salary band which each of these positions would fall in to."*

7. The BBC presented the findings of the internal review on 19 August 2014 which upheld the original response to the request.

## **Scope of the case**

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8. On 9 September 2014 the complainant complained to the Commissioner about the BBC decision to withhold the requested information.
9. During the course of the Commissioner's investigation the BBC disclosed to the complainant the information it held relating to those individuals who were not what it described as 'on-air talent' or 'on-screen talent'. For the remaining information it said that the information was covered by the derogation. It explained that the information was excluded from FOIA 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 and is closely associated with these creative activities.

10. The Commissioner considers the scope of his investigation to be to consider whether the requested information which relates to those individuals described by the BBC as 'talent' is covered by the derogation.

## Reasons for decision

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11. 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."*

12. 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'.
13. 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.
14. 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)*

15. 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.

16. 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.
17. 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.
18. 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."*

19. 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'.
20. 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.

21. The information that has been requested in this case is details of how BBC talent were recruited and their salary bands. The BBC explained that the information it holds about those individuals it describes as talent, supports the creation of programme content. It explained that this is because the engagement of talent is one of many 'factors of production' in the creation of a programme – the unique set of characteristics in each programme which help to generate viewing and value. It said that these range from the 'design/narrative/format of a programme, through to its execution/direction/visual appeal to the relevance of its subject/location/story and the lead and supporting performing talent used'.
22. Therefore, it said that decisions about the engagement and selection of talent are creative in nature, involving the review of such considerations as the skills of that presenter and the particular abilities that they will bring to the role that we are asking of them. It argued that the engagement of one presenter or journalist over another was therefore an editorial decision, closely related to the editorial and creative requirements of the programme itself, and one which necessarily influences the subsequent output.

23. It referred to the evidence given by the BBC Director of News at the time, in the appeal to the Information Tribunal in the *Sugar case*:

*Questions about how you make (various) selections or the resources that are available to make selections, might be characterised on the one hand as management, but they are absolutely core to journalism and determine both the quality, nature and character of journalism.*

24. The Commissioner has considered the explanation given by the BBC and accepts that the requested information can be said to be held for the purposes of journalism. In the Commissioner's view the information was held for purposes including editorial and creative decision making. How the BBC appoints its talent and what it pays them is part of the way in which the BBC creates its programmes and this is of course clearly linked to the BBC's output, in this case news current affairs and journalistic activities.
25. As regards salaries of BBC talent, the Commissioner has accepted on a number of occasions that the BBC has a fixed resource in the Licence Fee and resource allocation goes right to the heart of creative decision

making. The Commissioner is satisfied that the same rationale connects the information to the derogated purposes.

26. Overall, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism and therefore falls within the derogation.
27. 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.

## 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: 0870 739 5836

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)

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 .....**

**Pamela Clements  
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