

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 October 2015

**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 made a number of requests to the BBC for information about its coverage of the 2015 General Election. 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. On 15 May 2015 the complainant wrote to the BBC regarding concerns he had about its coverage of the 2015 General Election. The complainant's letter included the following requests for information.
  - i. *Was there one particular editor with whom the Conservative Party were engaged and which BBC department dealt with Mr Cameron's campaign. Did Mr Cameron speak personally with the editor and which editor? Did the Prime Minister have direct contact, prior to going on air, with Nick Robinson who has a history of involvement with the Conservative Party or James Lansdale a fellow student at Eton, both BBC correspondents used by the BBC in summarising the political performances of the candidates, surely a potential bias in the making. If such early contacts were made there will be a log – I seek a copy.*

- ii. The BBC allocate air time for each candidate and who should lead the headlines. This must be recorded in BBC logs as it is part of the BBC reply to complaints of bias that logs are retained. I seek release of these logs because they go to the heart of my complaint that logs are retained. I seek release of these logs because they go to the heart of my complaint that there was bias in favour of Mr Cameron in the BBC arrangements for his coverage. Instructions by editors in whatever record, should be available for the information for the public that there was equal air time for each candidate.*
  - iii. Who was the member of the BBC staff allocated to accompany Mr Cameron and was that person, at any time either, employed by a Conservative Member of Parliament or a research for an MP.*
  - iv. What expenses have been claimed by the BBC member who accompanied (a) David Cameron and (b) Ed Milliband?*
  - v. At the Question Time programme on the evening of the 8<sup>th</sup> May a young woman emphasised this matter which was denied by Ms Julia Hartley Brook, a broadcaster, who said there had been research and a document on this issue produced which did not support the contention. This is hard to believe as a constant dripping of anti Labour Party policies must have an effect. Under the Freedom of Information Act I seek a copy of this document.*
  - vi. How many complaint from the public – divided into those from Conservatives and those from Labour – were made during the election campaign especially letters, emails, texts and telephone calls. In particular how many complaints or contentious issues were raised by (a) the Conservatives and (b) the Labour Party.*
4. The BBC responded to the request on 16 June 2015 when 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 and is closely associated with these creative activities. That said, it did provide the complainant with the information in part iii) of the request and for part v) of the request it confirmed that the requested information was not held.

5. As the requested information was not covered by the Act, no internal review was offered.

## Scope of the case

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6. On 22 June the complainant contacted the Commissioner to complain about the BBC's decision not to comply with his request on the basis that the information was derogated.

## Reasons for decision

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7. 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."*

8. 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'.
9. 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.
10. 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)*

11. 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.
12. 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.
13. 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.
14. 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."*

15. 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'.

16. 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.
17. The various pieces of information requested by the complainant in this case all focus on the BBC's coverage of the 2015 General Election and what he saw as its bias towards the Conservative Party. The requested information includes details of how the BBC coverage was organised, the involvement of its correspondents and complaints it may have received about its coverage. In particular the complainant had questioned how the information on the expenses of its correspondents and details of any complaints it may have received could be held for the purposes of journalism.
18. The requested information about the BBC's election coverage, and the role of its correspondents very clearly relates to the editorial element of journalism, and the maintenance of standards and quality of journalism. The information directly concerns part of the BBC's coverage of the 2015 election and is therefore clearly related to its output. The information would have been created by the BBC and used to help inform editorial decisions both in the 2015 election coverage and in similar news events in future. Information regarding complaints about the BBC's coverage would also clearly fall within the element of journalism that deals with the maintenance of standards and quality of journalism. Again, information on complaints is likely to be used by programme makers when reviewing editorial standards and so can be said to be held for the purposes of journalism. Information on complaints, investigations into complaints and the use of the whole editorial complaints process is integral to the BBC's journalistic purpose. It is also worth noting that the Commissioner has in a number of cases accepted that information regarding complaints about the BBC's coverage is held for the purposes of journalism (including case references FS50295017 on complaints on political bias, FS50363611 on complaints about the World Cup and FS50465338 on the number of complaints about Panorama programmes).
19. As regards the expenses of BBC correspondents, the Commissioner has also 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. Any decision taken on costs has a direct impact on the creative scope for programmes because more

money spent on one area or one programme means less available for another. The Commissioner is satisfied that the same rationale connects the information to the derogated purposes. Indeed the complainant has himself suggested that disclosure of the expenses of the BBC's correspondents would allow the public to better understand whether and to what extent the BBC were providing greater coverage to one party or candidate over another. This makes it clear that information on expenses relates very strongly to how the BBC makes decisions about its broadcasting priorities and in this particular case, how it chose to cover the 2015 General Election. The Commissioner understands that the creative output of the BBC in relation to major journalistic events is directly influenced by the allocation of funds. Editorial decisions determine how the funds are allocated. Therefore the information supports the delivery of programme content and relates to the editorial element of journalism.

20. For all of the reasons above, the Commissioner is satisfied that the requested information 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.

## **Right of appeal**

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21. 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)

22. 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.
23. 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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**Information Commissioner's Office**  
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