

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 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 has requested the payments to the contributors, viewing figures and the number of complaints made against the programme 'Welsh Heartland: The Llŷn Peninsula'. 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 6 July 2015 and asked for:  
*'Under FOI Please confirm how much the various Contributors to Welsh Heartland who appeared on screen were paid'*
4. The BBC responded on 21 July 2015. The BBC explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.
5. The complainant made a second request on 26 July 2015:

*'I would also ask for the weekly viewing figures and complaint numbers for this programme'*

6. The BBC responded on 20 August 2015. The BBC explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism or literature'.
7. The complainant contacted the Commissioner on 25 July and 20 August 2015 to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation to these requests. He argued that:

*'Other contributors were given 3 minutes to talk about Llyn and the Community.*

*[Name of contributor redacted] was given 21 minutes to make discriminatory divisive and prejudiced comments regarding people not born here.*

*Clearly if [name of contributor redacted] was paid by the BBC to make arguably racist comments then that fact is in the public interest.*

8. In response to the Commissioner's letter of 3 September 2015, he further argued that his request did not fall under the derogation as

*'Whether [name of contributor redacted] was paid is not information currently HELD FOR THE PURPOSE OF OUTPUT.*

*The Number of Complaints received is not information currently HELD FOR THE PURPOSE OF OUTPUT.'*

## **Scope of the case**

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9. The Commissioner considers the scope of the case is to determine whether the information requested is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

## **Background**

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10. The BBC stated that the complaint relates to a four-part series titled *Welsh Heartland: The Llŷn Peninsula* which was broadcast on BBC One Wales in May and June 2015. The series was an observational documentary which falls within the factual genre. As described by the Producer, Dylan Huws, the aim of the series was to look at the true

nature of the community of Pen Llŷn as part of the Real North Wales season from BBC Wales:

*'We had an open brief and wanted to focus on the Llŷn Peninsula, to offer an insight into how people really live there - not just the scenery, the coastline and beaches but how people live there all year round. We wanted to reveal the Pen Llŷn community as we know it and present this to the world. We're trying to show the balance between living in a desirable and beautiful area and the pressures of economy, tourism and language.'*

11. The complainant provided a background to his requests. One contributor to the programme was given prominence over the other contributors and made *'discriminatory divisive and prejudiced comments regarding people not born here ...Because the woman is a regular Arts and Political Commentator ... appearing usually under her media company[name redacted], her views are well known in this community, but as she appeared on this programme portrayed as [name redacted] farmers wife, just another contributor, albeit given massive prominence, we felt it legitimate to ask if the producers paid her (or her company) to take part in the programme, and how that compared with "ordinary" contributors.*

## **Reasons for decision**

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12. 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."  
  
13. 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'.  
  
14. 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.  
  
15. 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)*

16. 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.
17. 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.
18. 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.
19. 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’.”

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 is in 3 parts: whether any payments were made to the contributors, the viewing figures for the programme and the number of complaints that have been made against the programme.

### ***Payments to contributors***

22. The BBC argues that
  - the requested information falls within the second element of the definition of ‘journalism’ accepted by the Supreme Court in *Sugar* (ie the selection, prioritisation and timing of matters for broadcast or publication). This is because the BBC’s record of the costs involved in making the programme, including any contributor costs which may have been paid, will have been created for the purpose of managing the production and its associated budget. The requested information will also inform the editorial process of reviewing and planning for future programmes, and in this way it directly affects the creative output of the BBC.
  - Decisions around which contributor (or presenter) to engage and how much resource to allocate to secure their services are essentially editorial decisions. In refusing to disclose whether the BBC paid a fee to any of its contributors, the BBC is seeking to protect its editorial integrity by allowing programme makers to produce programmes free from interference and scrutiny and any undue pressure.
23. The Information Commissioner has issued a number of decision notices on this issue of payments to contributors of programmes. Case reference [FS50422017](#) covered whether fees were paid to any

individuals interviewed for an episode of *Panorama* and case reference [FS50531231](#) covered the gross salary of a presenter. In both cases the Commissioner concluded that the requested information was held by the BBC for derogated purposes.

24. The Commissioner has accepted on a number of occasions (such as in case reference [FS50314106](#) ) 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 applies in this case.
25. Any decision taken on costs has a direct impact on the creative scope for the programme and for other programmes because more money spent on one area or one programme means less available for another. The Commissioner recognises that any payments relate to editorial decisions about the content that the BBC wants to offer its customers and this in turn relates to the overall editorial decision making process and resource allocation. It is therefore linked to the corporation's output and it is clear that the Commissioner has no jurisdiction in this matter.

### ***Viewing figures***

26. The BBC argues that
  - Reviewing audience viewing figures is one way that the BBC measures an audience's reaction to a programme and, whether alone or combined with other feedback, this is then used to inform decisions about programme making. This may include decisions about scheduling as well as future programme content. Accordingly, there is a direct relationship between the requested information and the creation of the BBC's output.
27. The BBC stated that it should have been explained to the applicant in the BBC's original response that television viewing figures are provided to the BBC by the Broadcasters' Audience Research Board (BARB). BARB is a not-for-profit company that is responsible for providing official estimates of the number of people watching television. BARB is owned by BBC, ITV, Channel 4, Channel 5, BSkyB and the Institute of Practitioners in Advertising, and is not covered by FOIA.
28. Some summary TV audience figures are available free of charge via the BARB website, ([www.barb.co.uk](http://www.barb.co.uk)) but for more detailed information, including viewing figures for *Welsh Heartland: The Llŷn Peninsula*, the applicant would need to subscribe to BARB's services.
29. The BBC's agreement with BARB provides that the data it receives is only to be used for internal purposes, should be treated as confidential,

and should not be disclosed to any person; to do so would put the BBC in breach of this agreement.

30. The Commissioner has previously accepted the link between audience viewing figures and the purposes of journalism, art and literature in his decision notices. For example, in 2009 case reference [FS50193785](#) was about the estimated viewing figures for the programme *Wanted Down Under* and case reference [FS50184496](#) was about a request for listening figures relating to two radio programmes. In both cases the Commissioner upheld the BBC's use of the derogation.
31. In light of these previous cases, the Commissioner considers that the requested information for viewing figures, investigations into viewing statistics and the use of the whole editorial feedback process is integral to the BBC's journalistic purpose.

### ***Complaint numbers***

32. The BBC argues that
- Information relating to the number of complaints about a specific programme or series is intrinsically linked to the creation of the BBC's output. This is because complaints are about, and are intended to influence, the BBC's content.
  - Complaints received about the content of programmes provide the BBC with a source of feedback about the content and quality of its programming. Information relating to complaints is used to review and assess compliance with the BBC's editorial obligations and to inform future creative decisions, including decisions about the continued publication of the particular item of output under scrutiny, any necessary corrective output, scheduling, applicable content standards and the BBC's overall editorial direction. Such decisions clearly influence and shape the creation of the BBC's output.
  - Allowing the BBC to consider and review its past performance, and to freely discuss and analyse its future content, is central to the freedoms which the derogation is designed to protect.
33. The BBC referred to the decision notice, case reference [FS50514531](#) (2013 complaint statistics about a particular programme), in which the Commissioner upheld the BBC's arguments as he was satisfied that the requested information was held for journalistic purposes and therefore fell under the derogation.
34. The Commissioner has issued other decisions supporting the BBC view that information relating to editorial complaints, quality reviews and

standards is held for the purposes of 'journalism, art or literature': FS50295017 (complaints on political bias), FS50363611 (complaints about the World Cup) and FS50404473 (the number and nature of complaints about the royal wedding).

35. In addition, the recent appeal to the First-Tier Tribunal (Information Rights) (EA/2010/0042, 0121, 0123, 0124, 0125, 0187 [informationtribunal.gov.uk](http://informationtribunal.gov.uk) EA20100042 ) concerned requests for information about an edition of *Panorama* and information generated by and related to the BBC's process for handling editorial complaints.
36. The tribunal accepted that "the maintenance and enhancement of output standards (arising, by virtue of quality reviews in terms of accuracy, balance and completeness)" (paragraph 41) is held for the purposes of journalism, art or literature. The tribunal identified the key issue as being to what extent information about editorial complaints formed "post-transmission editorial scrutiny and review and was held...for the purposes of journalism" (paragraph 12)
37. The tribunal unanimously dismissed each of the Appellant's appeals and accepted that information held for the purposes of the editorial complaints process provides a "valuable tool and resource for research for other programmes" (paragraph 110).
38. In summary, the Commissioner has accepted that complaints and investigations into complaints is integral to the BBC's journalistic purpose and that this has been supported by the recent appeal to the First-Tier Tribunal (Information Rights).

### **Conclusion**

39. Although the complainant has concerns about this programme, the Commissioner can only consider concerns within the scope of the FOIA and therefore the matter of derogation is considered first. The Commissioner is unable to compel the public authority to provide information outside its obligations under FOIA.
40. Having applied the approach to the derogation set out by the Supreme Court and the Court of Appeal, which is binding, the Commissioner is satisfied that the requested information falls under the definition of journalism and is therefore derogated. The Commissioner sees no basis for deviating from the approach as the complainant argues; the information clearly falls within the derogation. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes. The conclusion reached by the Commissioner is also consistent with the previous decision notices cited above.



41. For all of the reasons above, the Commissioner is 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.

## Right of appeal

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42. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

43. 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.
44. 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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