

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 January 2016

**Public Authority:** The British Broadcasting Corporation ('the BBC')

**Address:** Broadcast Centre  
White City  
Wood Lane  
London  
W12 7TP

### Decision (including any steps ordered)

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1. The complainant requested the number of seats available for each 'Strictly Come Dancing' recording. 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 was excluded from 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 6 November 2015, the complainant wrote to the BBC and requested information in the following terms:

*'As a BBC Licence payer I would like to know:*

*How many seats are available in total for each Strictly recording in Elstree and Blackpool?*

*How many of these seats are allocated to the general public?*

*Now that the application for tickets has been closed for several weeks, what was the possibility of receiving two tickets for each of the shows?'*

4. On 11 November 2015 the BBC responded and 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. On 12 November 2015 the complainant complained to the ICO about this response.
6. The Commissioner invited the complainant to withdraw his case on 20 November 2015 (citing the decision notices [FS50401168](#) and [FS50394881](#)) as it was his opinion that the requested information was held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.
7. However, the complainant declined to withdraw his case and wrote to the Commissioner on 23 November 2015 to dispute the derogation. He argued:

*"The Supreme Court examples cited are to do with Question Time which relies on interaction with the audience unlike Strictly where the audience is there purely to see the show. How a 'see only' audience can be linked with 'journalism' in this FOI request is tentative at best."*

8. On 8 December 2015 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.

## **Background**

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9. The BBC provided a background to the requested information.
10. Strictly Come Dancing is a talent show that has been broadcast on BBC One since 2004. The programme features celebrities with professional dance partners competing in Ballroom and Latin dances who each week compete against each other to impress a panel of judges and the viewing public. The Strictly Come Dancing production team invites applications from public members to attend the shows to be part of the live audience, and also provides tickets to production guests. Audience members who attend the show may be visible and audible on the broadcast programme, and remain an integral part of the production, which is enhanced at the live broadcast shows.

11. While the specific information requested by the complainant is not included, the BBC has recently disclosed some information that may be of interest to the complainant. In December 2015 the BBC announced that a record-breaking 8.6 million applications were made for tickets to see a BBC TV or radio show in 2015 with Strictly Come Dancing receiving over 5.2 million applications. (e.g. <http://www.mirror.co.uk/tv/tv-news/strictly-come-dancing-live-shows-7071040> )

## Scope of the case

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12. The Commissioner considers the scope of the case is to determine if the requested information (for the number of seats available for each 'Strictly Come Dancing' recording) is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

## Reasons for decision

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13. 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."

14. 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'.
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 added 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).

21. 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.
22. The information that has been requested in this case is for the number of seats available for each 'Strictly Come Dancing' recording.
23. The BBC have argued that
  - The users of this information include the editors of Strictly Come Dancing who are responsible for coordinating the creative output of the show and who make the editorial decisions associated with the programme. The information may also be used by future BBC production teams, whether the team are producing a future series of Strictly Come Dancing or a similar formatted show.
  - The BBC considers that the second element of journalism – the editorial process – within the definition as described in *BBC v Sugar* is relevant in this case. The requested information is created and used in support of the production and broadcast of Strictly Come Dancing.
  - The public anticipates the BBC to have output with participating audiences, and this inevitably requires editors to establish audience selection policies and procedures. The BBC must carefully consider situations when there is a live audience in order to ensure that the uncertainty of output is managed. An editor may therefore decide to have a set number of seats available in the production set/studio for public and non-public members, or decide not to allow for any public seats.
  - With reference to Strictly Come Dancing, it is the editors who decide how the show will be produced and it is editorial decision to have a ballot system and offer seats to members of the public. The editors of Strictly Come Dancing decide how many seats will be offered to the public, to production guests and what participation the audience will have in the show. These decisions may directly affect the level of public participation and the final output of the show, and also contribute to the sense of excitement about the show off-air. Therefore, the requested information is used by the editors to create the output, and the requested information directly influences the journalistic content of the final broadcast show.

- The information is also held for the purposes of planning, managing and broadcasting any future series of Strictly Come Dancing, and will inform future decisions about audience allocation decisions. Makers of the programme regularly review the number of seats provided to the public and guests each year. This review allows the programme makers to determine whether changes should be made to the existing audience composition and size, or whether a new approach should be introduced for any future series. The requested information may also have further production implications; for example, what locations and studios will host each Strictly Come Dancing show.
  - The requested information is also held for administrative purposes in the processing of the audience applications and allocating the successful applicants with audience tickets for the show. Information can still be held for the purposes of journalism, even if it is also held for other, possibly more important, purposes. Therefore, while the requested information is held for administrative purposes, the information is still held for a journalistic purpose and the derogation remains applicable.
24. In response to the complainant's argument that Question Time is an interactive show where an audience's questions and answers form part of the broadcast show "unlike Strictly where the audience is there purely to see the show", the BBC has argued that
- The audience in Question Time participate in a different manner to the audiences on Strictly Come Dancing, but the differences reflect the format and purpose of each respective programme. Of importance, the audience in both shows remain an integral part of the final output of the show. Like Question Time, in Strictly Come Dancing audience members may be visible and audible on the broadcast programme and they are invited by the production team to participate by cheering, clapping and may be filmed for the broadcasted show itself. In both shows, the audience members remain a key component of the show and the editors decide what the audience selection policy is for each respective show, which includes how many seats are assigned to the public.
  - The differences in the format of the two shows do not detract from the application of the legal test to the Strictly Come Dancing show. The information is held and used by the production team of Strictly Come Dancing to make editorial decisions about the programme and future programming of the show, which directly affects the output and the journalistic purpose for which the information is held.

25. The Commissioner accepts that there are differences between the types of audience in FS50401168 and FS50394881 and in this request. However, the principle of the direct link between the requested information and the creation of the BBC's broadcast output, particularly in the relationship between the requested information and the editorial decision-making process, is consistent across all of these cases.
26. In light of submissions made by the BBC in this and previous cases (see also [FS50510015](#) about ticket information for the Radio One Hackney Weekend.) the Commissioner considers that the requested information falls under the definition of journalism and is therefore derogated. He is satisfied that information concerning the number of seats in the audience available to the public is editorial information held for journalistic purposes.
27. 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 previous decision notices.
28. In conclusion, and 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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29. 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>

30. 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.
31. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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