

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 August 2018

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

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

Decision (including any steps ordered)

1. The complainant requested the average cost of Idents. 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. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 5 May 2018 the complainant wrote to the BBC and requested the following information:
 1. *What is the average cost of Ident's e.g. The Paper's Mona Lisa?*
 2. *How many of such Ident's are produced in-house?*
 3. *What is the average cost of BBC promotional adverts [PA]?*
 4. *How many PA are produced in-house?*
 5. *What is the broadcasting time allocated to Idents and PA:
i. per hour? ii. per day?.'*
4. On 3 May 2018 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. 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.
6. On 23 May 2018 the complainant contacted the Commissioner to complain about the way the request for information had been handled.
7. The Commissioner invited the complainant to withdraw his case on 18 June 2018 as it was her 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.
8. However, the complainant declined to withdraw his case and wrote to the Commissioner on 28 June 2018 to reiterate the fact that he did not believe that his request was held for the purposes listed in Schedule 1.
9. On 29 June 2018 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.

Background

10. The BBC provided the following as a background to the requested information.
11. The BBC refers to promotional slots in its own channel schedule as trails as they are not advertisements in the traditional sense.
12. The BBC's Marketing & Audiences division (M&A) is responsible for pan-BBC marketing activities and decides which content will be promoted to audiences in any given year. M&A formulates the BBC's annual marketing strategy as well as the BBC's annual marketing plan with the input of relevant division leads and marketers. This process allows M&A to determine the marketing priorities for the year having regard to the objectives that have been agreed with divisions.
13. BBC Creative, which was set up in 2016, sits within M&A and functions as the BBC's in-house creative agency. BBC Creative has overall responsibility for idents and trails across all BBC channels and programmes, either as producer or commissioner.

14. The briefs for all idents and trails are formulated by the lead marketers in M&A in consultation with division leads. All briefs are then provided to BBC Creative. BBC Creative formulates the creative response to the brief (i.e., the idea or concept for the ident or trail). Once the creative response is formed and approved, BBC Creative carries out production of the ident or trail in-house or, in cases where this is not possible, commissions an external production company. In this way, BBC Creative exercises creative control over the production of all idents and trails across all BBC channels and programmes.
15. The lead marketers in M&A also provide the briefs for idents and trails to the Brand & Media Planning department within M&A. This team is responsible for determining the allocation of media resources (i.e., air time) for idents and trails.
16. The BBC explained that, outside of the FOIA, it proactively publishes information about how the licence fee revenue is spent. In particular, the financial statement contained in the BBC Annual Report and Accounts sets out the costs incurred in relation to the BBC's marketing, audiences and communications. For the most recent information, see page 196 of the BBC Annual Report and Accounts 2017/18, available at <http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/reports/pdf/bbc-annualreport-201718.pdf>
17. Also outside of the FOIA, the BBC has committed to publishing information about promotions, including the number of minutes of promotions in each UK Public Service which broadly relates to Q5 of the request. (See page 149 of the BBC Annual Report and Accounts 2017/18.)

Scope of the case

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

Reasons for decision

19. 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."

20. 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'.

21. 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.

22. 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)

23. 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.

24. 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.

25. 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.

26. 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'.

27. 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.
28. The information that has been requested in this case is for the cost of Idents, the numbers of Idents produced in-house and the broadcasting time allocated to Idents.
29. The BBC have argued in some detail that such marketing information is inextricably linked to the output that these activities are designed to promote and *'the ability of the BBC to make these editorial and creative decisions freely is central to freedoms which the derogation is designed to protect.'*
30. The BBC confirmed that the requested information about the average cost of idents and trails is held by BBC Creative and the amount of air time allocated to idents and trails per hour and per day is held by Brand & Media Planning.
31. The BBC explained how the budget is allocated:

'the monies spent on promotional activity come from M&A's budget. From this, BBC Creative is allocated an annual fixed budget for trails and idents, and this is categorised as a production budget. BBC Creative

apportions this budget across the various programmes and channels based on the annual marketing strategy and plan, and the priorities for the year.'

'M&A uses information about average costs in combination with information about how the BBC content and the marketing activity have performed for future marketing planning. This information therefore informs M&A's editorial and creative decisions, including the prioritisation of particular marketing campaigns.'

'Information about the average cost of idents and trails is also used by BBC Creative in planning for the apportionment of its annual production budget.'

32. The BBC argued that the requested information falls within the second limb of the Information Tribunal's analysis – editorial judgement:

'The information requested relates to how the BBC seeks to promote its output and increase the number of people watching and listening to BBC programmes and accessing BBC online services...

determining the allocation of the production budget and air time for trails and idents across BBC channels and programmes, consideration is given to the BBC's corporate objectives, the annual marketing strategy and priorities, audience analytics and how BBC content has performed...

the decisions that the BBC makes regarding how it will promote its content, to which audiences, at what times and the manner of the promotions are editorial and creative decisions and directly support the production of content itself.

33. The BBC explained that editorial sign off is required from the programme or channel;

'to ensure that the ident or trail will be an accurate representation of the content and intent of the programme that the ident or trail is promoting, as idents and trails are used to set the tone and expectations for programmes and brands. This demonstrates how decisions relating to marketing activities are an integral part of editorial decision making.'

34. The Commissioner has accepted on a number of occasions (such as in case reference FS50314106 https://ico.org.uk/media/action-veve-taken/decision-notices/2010/566958/fs_50314106.pdf) 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.

35. 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 her previous decision notices.
36. In conclusion, and for all of the reasons above, 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

37. 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

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

38. 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.
39. 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
Water Lane
Wilmslow
Cheshire
SK9 5AF