

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2019

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 information about declaring gifts from and royalties to record artists. 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 10 December 2018, the complainant wrote to the BBC and requested the following information:

"1. Does BBC have a policy that BBC staff are obligated to declare all the gifts and invitations they receive from record artists, film makers e.t.c [sic]?

If no. Why? That's a grey area.

If yes. Are they being monitored that they don't use the corporation returning favours?

2. Please give us the details how much BBC pays royalties to record artists or companies e.t.c [sic] when BBC radio stations play a song.

Is there a difference in the amount paid depending on the time of

airplay and which BBC radio station?

If yes. Please tell us which BBC Radio station pays how much and the amount difference at the time of airplay. We need all the lists.

3. When Drake released his latest album [sic], Scorpion we noticed almost every DJ was so desperate to play a track from his album [sic] until he got to number 1 on the chart in the UK.

As Drake was getting free promotion of his Scorpion from BBC how much in royalties has BBC paid him or his record label to date for playing a track from his album [sic], Scorpion?

4. Not in relation to the above subject, as we all know emotions are high, the British [sic] public are divided over Brexit.

We would appreciate your support if you could get Britain is Great-Remix By Caroline D, which motivates us as a society to stay united whatever the case may be, airplayed across the BBC network.

As a democratic society, It's [sic] imperative that we adhere to the culture and value that we have the right to disagree but we should never fight.

As the copyright owner, I've given BBC permission to do so over the period of 3 years from 6th December 2018 till 7th December 2021.

Please note we don't want to be paid any royalties for airplay unlike other artists whom you pay when their songs get airplay.

If you're not prepared to give us the support we're seeking, please let us know why.'

4. On 7 January 2019 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 12 January 2019 the complainant contacted the Commissioner to complain about the way the request for information had been handled. In particular, he challenged the operation of the derogation in this case.

7. The Commissioner invited the complainant to withdraw the case on 24 January 2019 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. However, the complainant declined to withdraw the case.
8. On 16 May 2019 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.

Scope of the case

9. 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

10. 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."

11. 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'.
12. 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.
13. 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)*

14. 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.
15. 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.
16. 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.
17. 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’.

18. 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.
19. In this case the BBC confirmed that it held information for Q1, Q2 and Q3. Q4 is not a request for information under FOIA.
20. In response to Q1 the BBC has policy documents relating to gifts and invitations that are publicly available and links have been sent to the complainant. However, the BBC maintains that this aspect of the request is derogated: staff policies are used by BBC radio staff when dealing with musical artists and their representatives when producing programming.
(http://downloads.bbc.co.uk/foi/classes/policies_procedures/anti-bribery-policy.pdf#zoom=100
http://downloads.bbc.co.uk/foi/classes/policies_procedures/bbc_expenses_policy.pdf)
21. The BBC explained that the purpose of these staff policies '*ensure that the BBC's output is not negatively affected by practices which could be seen to improperly influence editorial decision making.*'
22. In response to Q2 and Q3 on royalty payments the BBC said that the requested information is held by the BBC's Commercial, Rights and Business Affairs division (CRBA) '*which deals with the BBC's music licences. The majority of the BBC's use of music is covered by the BBC's blanket music licence and is not negotiated directly with artists or their record companies.*' Music licences are negotiated by CRBA and the fees paid as part of the BBC's blanket licence directly facilitate the BBC's use of music throughout its programming on radio.
23. In explaining the relationship of royalty payments with its output, the BBC referred to the Commissioner's previous decision notice which upheld the derogation as royalty payments are '*akin to payments made to talent and is related to programme costs*'.
(https://ico.org.uk/media/action-weve-taken/decision-notices/2009/487970/FS_50207222.pdf)
24. The complainant argued that '*it's within our human rights to know where the fund is going*'.

25. The Commissioner notes that 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 these decisions on staff policies, music licence schemes and royalty payments relate to editorial decisions (the second element - see paragraph 17 above) 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 intimately linked to the corporation's output and it is clear that the Commissioner has no jurisdiction in this matter.
26. 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.
27. 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

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@justice.gov.uk

Website: <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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