

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 June 2019

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

**Address:** BC2 A4 Broadcast Centre  
White City  
201 Wood Lane  
London  
W12 7TP

### Decision (including any steps ordered)

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1. The complainant has requested information about the selection of guests and audience members for the Question Time and Andrew Marr programmes. 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

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3. The complainant wrote to the BBC on 14 January 2019 and asked for:  
*'Please provide a breakdown of the following for Question Time for each series between the General Elections of 2010 and 2015 and then from 2015 to 2017 and since the 2017 election to date.*
  1. *Number of programmes in each series*
  2. *Number of appearances by representatives of Labour, Conservatives, Liberal Democrats, SNP, Plaid Cymru, UKIP, Scottish Greens, Green Party of England and Wales, the various Northern Ireland parties.*
  3. *the number of appearances by other organisations and their names e.g. Institute of Economic Affairs, Taxpayers Alliance, trade unions*

*4. The names and organisations, where applicable, of anyone who has been on Question Time more than once in a series.*

*5. The number of programmes recorded in Scotland, the different regions of England, Wales and Northern Ireland.*

*Please also provide details of how politicians and others are selected to be on the programme and also how audiences are selected. Has this policy changed at any time and what were the changes and when did they happen.*

*For Andrew Marr the same information is requested that audience selection is not required and as the vast majority of programmes are recorded in one venue the breakdown in 5 is not required but it would be appreciated if the number of times and venues that it has been recorded away from the main studio can be provided'*

4. The BBC responded on 21 January 2019. 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. 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 requests for information.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 8 February 2019 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 his case on 11 April 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. She referred the complainant to previous decision notices (FS50690052 and FS50587101) as relevant to the request.
8. However, the complainant declined to withdraw his case and wrote to the Commissioner on 11 April 2019 to reiterate the fact that he did not believe that his request was held for the purposes listed in Schedule 1.

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

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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.”

18. 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'.

19. 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.

20. The Commissioner adopts a similar definition for the other elements of the derogation, in that the information must be used in the production, editorial management and maintenance of standards of those art forms.

21. In this case, the information requested is about the selection of guests and audience members for Question Time and the Andrew Marr Show.
22. The BBC explained that some of the requested information is not held. Only Question Time has a live audience and therefore recorded information relevant to audience selection is only held with respect to Question Time. Also, the *'granularity of some of the information requested by the complainant is not held. Specifically, part 4 of the complainant's request seeks "the names and organisations, where applicable, of anyone who has been on [the programme] more than once in a series"... how often a person has appeared, and which organisations they represent, is not recorded. This information would need to be manually collated and may require consulting external sources.'* Outside of the FOIA, the BBC said that it publishes the names of all guests and panellists and it would be possible for the complainant to use this publicly available information to determine how many times a guest or panellist has appeared. The BBC provided the following links: <https://www.bbc.co.uk/programmes/b006t1q9/episodes/player> and <https://www.bbc.co.uk/programmes/articles/4NvYDF1DWSQyKVQJWB8bypQ/previous-guests>

*Composition and selection of guests*

23. The BBC said that for both Question Time and the Andrew Marr Show, guest selection is a major editorial judgment and *'takes into account the news agenda and the likely issues for debate. Levels of appearances by political party representatives are determined by a number of factors – including topicality and previous electoral support. Non-elected panellists are also chosen to ensure there is a broad spread of views across a range of areas.'*
24. The information requested is also held for the purposes of enabling programme producers to assess the success, or otherwise, of the programmes' broadcast output. Both programmes adhere to the BBC's Editorial Guidelines and it is open to members of the public to make editorial complaints if they consider the guidelines are breached, including the choice of interviewees. In this context, the requested information is also held for the purposes of assessing compliance against the BBC's Editorial Guidelines and responding to editorial complaints. These activities are undertaken as part of the process of reviewing and enhancing the standards and quality of the BBC's output.

*Selection of audiences*

25. The BBC said that the Question Time audience is a key component of the programme's output: *'audience selection is a major undertaking and great care is taken to ensure that members of the audience reflect a broad spectrum of views and that no one cause, viewpoint or political*

*party dominates, in line with the BBC's commitment to impartiality'*. The information is collated by the audience producer and is used for the purposes of audience research and selection, which are editorial decisions.

26. As with the make-up of the panels, the BBC said that Question Time aims to achieve due impartiality in the membership of the audience across the series as a whole: *'this is in line with the requirement for the BBC to be inclusive and reflective of a breadth and diversity of opinion across its output as a whole (section 4.4.1 of the BBC's Editorial Guidelines)'*.

*Location*

27. The BBC said that information about the location of the programmes in each series, although factual, is information used by the programme makers to inform decisions about the prioritisation and scheduling of content and therefore, relevant to the editorial decisions that are made.
28. In summary the BBC said that the requested information falls within the second and third limbs of the Information Tribunal's definition of journalism: *'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'* and the *'maintenance and enhancement of the standards and quality of journalism'*. (See paragraph 17 above)
29. In light of submissions made by the BBC in this and previous cases the Commissioner considers that decisions concerning the selection of guests for both programmes and the selection of audience members for Question Time clearly fall under editorial judgements. The information requested therefore falls squarely within the definition of journalism and the Commissioner is satisfied that the information requested is derogated.
30. 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.
31. In conclusion, and for all of the reasons above, the Commissioner finds that the information falls within the derogation and that the BBC is not obliged to comply with Parts I to IV of the FOIA in respect of the complainant's request.

## **Other matters**

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32. The BBC has explained that The BBC Editorial Guidelines apply to all of its content and sets out the standards expected of everyone making or presenting BBC content. If a member of the public wished to make an allegation that the BBC's output was not impartial, independent or it was not serving the public interest, the appropriate forum is to make a complaint to the BBC Executive. (*BBC Editorial Guidelines*, <http://www.bbc.co.uk/editorialguidelines/guidelines>)

## Right of appeal

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33. 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](mailto:grc@justice.gov.uk)

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

34. 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.

35. 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.....**

**Gemma Garvey**

**Senior Case Officer**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**