

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 December 2020

**Public Authority:** British Broadcasting Corporation  
**Address:** Broadcasting House  
Portland Place  
London  
W1A 1AA

#### Decision (including any steps ordered)

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1. The complainant requested information regarding policies on climate change programming. The British Broadcasting Corporation ("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 the FOIA.
3. The Commissioner does not require any further steps.

#### Request and response

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4. On 17 October 2020 the complainant sent the following information request to the BBC:

*"What policies of the BBC, in accordance with its Charter(1), are in operation in respect of programming and reporting on all topics associated with the Climate Emergency? (see <https://www.bbc.co.uk/news/uk-politics-48126677> – published 1 May 2019)*

*"When were these policies last set down/amended, and when will they next be reviewed?"*

*"If there is no specific policy relating to the Climate Emergency, will the BBC consider establishing such now, how will this be created, and how will it be made available to the public?"*

5. On 5 November 2020, the BBC responded to the request. The BBC explained that it did not consider that the information was caught by the FOIA because it was held for the purposes of 'art, journalism or literature'.

## Scope of the case

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6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case.
7. The Commissioner wrote to the complainant on 4 December 2020 to offer her preliminary view of the complaint. She explained that, due to the wording of the request, any relevant information was likely to be held by the BBC for the purposes of journalism and therefore would be likely to be covered by the derogation. The complainant did not accept the Commissioner's view and asked for a decision notice.
8. Given the considerable case law in relation to the operation of the BBC's derogation and the wording of the request, the Commissioner considered that she could reach a decision without requiring further submissions from the BBC. She has therefore not viewed the disputed information.
9. 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.

## Reasons for decision

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10. Schedule One, Part VI of the FOIA provides that the BBC is a public authority for the purposes of the Act 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 FOIA where information is held for 'purposes of journalism, art or literature'. The Commissioner calls this situation 'the derogation'.

12. 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)*

13. 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.

14. 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.

15. 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.

16. The Supreme Court affirmed that the original Information Tribunal's definition of journalism (in *Sugar v Information Commissioner* (EA/2005/0032, 29 August 2006)) should be adopted when considering whether material is (or is not) held by the BBC for the purposes of journalism. This definition describes three stages to the journalistic process:

*"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.”*

17. 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’. However, material falling within any of the three stages will be material held for the purposes of journalism.
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.

#### *The complainant's view*

19. The complainant advanced several arguments as to why he believed that the information was not held for the purposes of journalism:
  - The information would not (in his view) put the BBC at a disadvantage in relation to its commercial competitors.
  - The information was required to be published in order that the BBC could fulfil its charter obligations.
  - The Commissioner’s interpretation was over-broad and would effectively remove the BBC altogether from scrutiny via FOIA.
  - The information related to the management of staff and not to the output those staff might produce.

20. In relation to the final point, the complainant noted that:

*"My FoI request is principally concerned about the BBC's management of staff making editorial decisions on how to present climate change – these decisions are made by BBC staff according to its policies – it is these policies that I am seeking to expose to scrutiny since they must be expressed and applied in a way which serves the BBC mission...By seeking policies of the BBC I am not seeking to expose any particular exercise of judgment but on how the BBC manages and educates its staff in exercising judgment."*

*The Commissioner's view*

21. The Commissioner's view is that the requested information would be held by the BBC for the purposes of journalism and would therefore be covered by the derogation.
22. Dealing with each of the complainant's arguments in turn, the Commissioner expresses no view on whether disclosure would or would not put the BBC at a commercial disadvantage. Given that she considers, as will be explained below, that the information relates to the BBC's output, there is no need for her to consider whether the BBC would also be put under a disadvantage in the event of disclosure.
23. Equally, whether or not the BBC needs to publish information to fulfil its charter obligations is not a relevant consideration for the purposes of the FOIA. The Commissioner is not responsible for policing the BBC's charter obligations.
24. When Parliament passed the FOIA it deliberately excluded a significant amount of the BBC's information from the scope of the Act. The breadth of that exclusion has been determined by the most senior courts in the UK. Whatever the public interest might be in particular information, the Commissioner is bound by the wording of the legislation and the rulings of the courts. The complainant's third argument must therefore fall away as it is not the Commissioner's interpretation but those of the courts.
25. Having looked at the precise wording of the request, the Commissioner considers that the request itself makes a direct link between any policy the BBC holds and its "programming and reporting."
26. The complainant appeared to be attempting to draw a distinction between information which directly informed programming and broader training which the BBC required its staff to take. The Commissioner considers that this is a distinction without a difference.
27. It is quite clear from the wording of the request that the whole purpose of having such a policy (if it existed) would be to inform the selection

and content of the programming that the BBC broadcasts. As such, it would fall within the second part of the definition highlighted above as it relates to the editorial function of journalism.

28. In addition, even if the complainant were correct that such a policy was only used to educate and train, that would still mean that the information would fall within the scope of the third part of the definition because it would be used to maintain and enhance future programming.
29. The BBC may hold the information for other purposes as well, but this is irrelevant. The information would be held for the purposes of journalism.
30. The Commissioner is therefore satisfied that there is a direct link between the information the complainant has requested and the BBC's output. Such information as exists would therefore be covered by the derogation and thus the BBC was not required to comply with any obligations under Parts I to V of the FOIA.

## Right of appeal

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31. 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: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

32. 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.
33. 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

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**