

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 29 September 2022

**Public Authority:** The British Broadcasting Corporation (the BBC)  
**Address:** 2252 White City  
201 Wood Lane  
London  
W12 7TS

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from the BBC about programs that were advertised by way of a trailer. 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 would not therefore not fall inside 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 30 December 2021, the complainant wrote to the BBC and made a request for the following information:

"Please advise me which programs were advertised by way of a trailer in 2021, on BBC 1, between 1500 and 2100 and how many times these programs were trailed."

4. The BBC responded on 12 January 2022. The BBC refused to provide the requested information on the basis that it was exempt from disclosure under the 'derogation'.

#### **Scope of the case**

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5. The complainant contacted the Commissioner on 17 January 2022 to complain about the way their request for information had been handled.

In particular, they challenged the operation of the derogation in this case.

6. The Commissioner considers the scope of the case is to determine whether the requested information is excluded from FOIA because it was held for the purposes of "journalism, art or literature".

## Reasons for decision

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7. 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."

8. 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'.
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.
10. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment 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).

11. The Supreme Court endorsed this approach in *Sugar (Deceased) v British Broadcasting Corporation and another* [2012] UKSC 4<sup>1</sup> and concluded that if the information is held for the purpose of journalism,

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<sup>1</sup> <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>

art or literature, it is caught by the derogation even if that is not the predominant purpose for holding the information in question.

12. 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.
13. 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.
14. 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.
15. 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'.
16. 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.

17. The Commissioner therefore 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. In his view, art is comprised of the same three elements, that is:
  - The preparation and creation of the artistic output.
  - The editorial process.
  - The maintenance and enhancement of the standards and quality of artistic output.
18. The information that has been requested in this case relates to the preparation and creation of artistic output.
19. The Commissioner has considered all of the information before him, but for conciseness he has focused on explaining why he considers that the information requested falls within the derogation.
20. In considering whether information is held genuinely for the purposes of art, the Commissioner has considered the following factors:
  - The purpose(s) for which the information was created;
  - The relationship between the information and the programmes' content which covers all types of output that the BBC produces; and
  - The users of the information.
21. When considering the purposes for which the information was created, the BBC has explained the information requested is held for the purposes of 'art, journalism or literature'. It went on to explain that the FOIA provides that the BBC is not obliged to disclose this type of information and therefore would not be disclosing the information.
22. When considering the connection between the information itself and the programmes' content, the BBC is satisfied that the requested information directly links to the BBC's output and broadcasting.

23. Overall, the Commissioner considers that the BBC would hold the information for the purposes of Art.
24. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the request is for information held for the purposes of art and that the BBC was not obliged to comply with Parts I to V of FOIA.

## Right of appeal

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25. 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: 0203 936 8963

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)

26. 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.
27. 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 .....**

**Claire Churchill**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**