

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 October 2015

**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 the number of complaints made against the NHS question put to parliamentary candidates during a local radio programme in April 2015. 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. 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. The complainant wrote to the BBC on 22 June 2015 and asked for:  
*'1) The number of complaints submitted to the BBC relating to the hustings segment of a local BBC radio programme on 27 April 2015. The programme was called "Jim Hawkins in the morning" on BBC radio Shropshire.*  
*2) The number of complaints that specifically related to the first question put to parliamentary candidates, i.e. relating to the NHS.*  
*I am interested in any and all information held by you regarding my request.'*

4. The BBC responded on 24 June 2015. 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'.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 9 July 2015 to complain about the way her request for information had been handled.
6. In response to the Commissioner's letter of 21 August 2015, the complainant submitted an extensive case to the Commissioner outlining why the information she had requested is not derogated.
7. The Commissioner considers the scope of his investigation to be to consider whether the requested information is covered by the derogation.

### **Background**

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8. The BBC provided a background to the requested information:
9. The complaint relates to an episode of 'Jim Hawkins in the Morning' which is broadcast every weekday morning on BBC Radio Shropshire. The particular episode, 'Hotseat – the Ludlow Debate', was broadcast on 27 April 2015 during an election campaign period and featured candidates from the Conservative, Labour, Liberal Democrat, UKIP and Green parties running for election in the Ludlow constituency. Listeners were encouraged to phone the station in order to put questions to the candidates on the key issues that might sway their decision on how they would vote in the 2015 General Election.
10. The BBC is obliged to report accurately and impartially in its output, and this is closely scrutinised during election campaigns. The BBC publishes 'Election Guidelines' for its editorial staff to refer to specifically when covering elections. These guidelines are in addition to the BBC's Editorial Guidelines which set out the values and standards all BBC content must meet.

### **Reasons for decision**

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11. 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."

12. 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'.
13. 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.
14. 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)
15. 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.
16. 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.
17. 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.
18. 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'."

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 information that has been requested in this case concerns the number of complaints made against the NHS question put to parliamentary candidates during a local radio programme in April 2015.
21. The BBC has provided the following arguments for why the information requested was caught by the derogation:
  - The requested information is held by BBC Audience Services. Information relating to audience feedback, including complaints, is circulated widely amongst BBC staff, including those directly responsible for the creation of the BBC's content.

- In summary, the requested information forms part of the on-going review of the standards and quality of particular areas of BBC output with a view to further enhancing these standards. In this sense, the number of complaints received by the BBC falls within the third element of the definition of journalism accepted by the Supreme Court in *Sugar* (ie the "maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness)").
  - Information relating to the number of complaints about a specific programme is directly linked to the creation of the BBC's output. This is because complaints are about, and are intended to influence, the BBC's content. The number and content of complaints received about a programme provides the BBC with a source of feedback about the content and quality of its programming. Information relating to complaints is used to review and assess compliance with the BBC's editorial obligations and to inform future creative decisions, including decisions about the continued publication of the particular item of output under scrutiny, any necessary corrective output, scheduling, applicable content standards and the BBC's overall editorial direction. Such decisions clearly influence and shape the creation of the BBC's output.
  - Allowing the BBC to consider and review its past performance, and to freely discuss and analyse its future content, is central to the freedoms which the derogation is designed to protect. Disclosure of information held by the BBC about audience feedback, and the nature and processes of internal discussion and analysis of it within the BBC, would necessarily hamper a programme-maker or editor's ability to weigh that feedback and come to a considered and objective judgment on future content.
22. The complainant submitted an extensive case to the Commissioner outlining why the information she had requested is not derogated. In summary, this discussed that the case precedence is not appropriately applied to this case; this request differs from the *Sugar* case; the BBC has not been asked to provide evidence as to how the raw data meets the Schedule 1 derogation test; and, in the past the BBC have stated that numbers of complaints do not inform output and editorial decisions.
23. In response, the BBC stated 'we would like to make it clear that audiences are at the heart of everything the BBC does and audience feedback is invaluable for helping to improve programme quality. We acknowledge that whether a complaint is justified and whether the BBC has acted wrongly is more important than the total number of complaints received and, as the BBC has made clear publicly, while a

high number of complaints are always a matter of concern this is not determinative of the BBC's editorial decision making. However, reviewing the number of complaints received about a particular programme is one way that the BBC measures an audience's reaction to a programme and, whether alone or combined with other feedback, this information is used to inform decisions about programme making.'

24. The Information Commissioner has issued a number of decisions supporting the BBC view that statistical data relating to editorial complaints is held for the purposes of 'journalism, art or literature' and therefore outside of FOIA.
25. The Commissioner has already referred the complainant to two decision notices (case reference [FS50404473](#) on the number and nature of complaints about the royal wedding and case reference [FS50301304](#) concerning the figures for complaints about bias made to the British Broadcasting Corporation Scotland by supporters of certain political parties) where the Commissioner upheld the BBC arguments.
26. The Commissioner understood that the 'consideration of complaints, such as those of political bias, is an important tool, used by the BBC to monitor, maintain and enhance its journalistic, artistic and literary output and to ensure the impartiality of that output.'
27. Another decision notice [FS50514531](#) concerned a similar request for the number of complaints about a specific programme in July 2013 and the Commissioner found that:

'The Commissioner finds that it would be reasonable to expect that information concerning the number of complaints received in respect of an individual programme would inform as to the content of future screening of programmes and also the creation of new programmes.'
28. In all cases, the refusal of the BBC to provide the information was upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation.
29. The Commissioner has also referred the complainant to the recent appeal to First-Tier Tribunal (Information Rights) (EA/2010/0042, 0121, 0123, 0124, 0125, 0187 - [informationtribunal.gov.uk EA20100042](#)) which also concerned information generated by and related to the BBC's process for handling editorial complaints. The tribunal was satisfied that the editorial complaints process was held for the purposes of journalism and upheld the derogation.
30. The BBC has previously explained that it does publish a great deal of information about complaints upheld or resolved by the Editorial Complaints Unit at stage 2 of the complaints process. However, the

tribunal upholds the BBC's position that such voluntary publication "does not intrude upon the defined scope of FOIA". (paragraph 57)

31. The Commissioner considers that the BBC has provided evidence that it holds the complaints information for the purposes of journalism and that this has been supported by the recent appeal to the First-Tier Tribunal (Information Rights).

***Conclusion***

32. Although the complainant has concerns about this programme, the Commissioner can only consider concerns within the scope of the FOIA and therefore the matter of derogation is considered first. The Commissioner is unable to compel the public authority to provide information outside its obligations under FOIA.
33. 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 the previous decision notices cited above.
34. For all of the reasons above, the Commissioner is satisfied that the information requested is derogated. Therefore, 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

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35. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

36. 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.
37. 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**