

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 January 2021

**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 on Covid-19 recovery rates. The British Broadcasting Corporation ("the BBC") explained that 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 7 November 2020 the complainant requested information in the following terms:

*"Under the Freedom of (so called) Information. Please send me the statistics on the recovery rates in line with what is being fear reported by the BBC in deaths. That ought to clear 'being impartial.' The recovery is by far outweighed by deaths, hopefully your impartial stats to will. I await your response." [sic]*

5. On 7 December 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 on 7 December 2020 to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case, arguing that:

*"The BBC need to be open, transparent seeing as I pay their salaries and have a biased view which is not line with their own reporting standards."*

7. The Commissioner wrote to the complainant on 12 January 2021 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. The BBC was asked whether it wished to add to its previous response but did not respond. The Commissioner 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. In rejecting the Commissioner's preliminary view, the complainant noted that:

*"Whilst the BBC maintains its being 'impartial and Independent' I for one and many others cannot fathom the degree to which Covid has been reported in a one way argument of death and destruction and everything surrounding the 'infection rates' the 'death rates', all of which appears to be government lead than being independent and impartial. The journalism being pushed is not journalism is the fullest sense when people are recovering and have recovered, being Boris himself! This news or the lack of it needs reporting by the BBC.*

*"Failing this the BBC needs to be self funding! White privilege cannot continue within this organisation which doesn't represent the people as a whole and is far from independent. Tax is what the license fee is." [sic]*

*The Commissioner's view*

20. 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.
21. The BBC is not an organisation with a public health function. The only reason the BBC would hold information on Covid-19 recovery rates (if indeed it did hold them) would be if the information had been collected for the purposes of being broadcast (or of being considered for broadcast). Such information would clearly fall within the first stage of the definition of journalism, as set out in *Sugar*. Even if the information had been collected but not broadcast (as the complainant appears to be suggesting) it would still have been acquired for the purposes of journalism and would remain held for that purpose.
22. 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.
23. 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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24. 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)

25. 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.
26. 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**  
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