

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 January 2012

**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 requested a breakdown about the number of people who work in a BBC radio department and the number of hours that they work. The BBC explained the information was covered by the derogation and excluded from the FOIA.
2. The Commissioner's decision is that this information was held by the BBC genuinely for the purposes of 'journalism, art or literature' and did not fall inside the 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 31 March 2011 and asked for four items, including the following two that constitute the scope of the Commissioner's investigation:

*1) In each calendar year 2009 to 2011 inclusive, how many people in Radio Drama whose principal place of work is in BBC premises in Central London :-*

- *have been or are engaged to produce and direct radio drama output;*
- *how many are specifically engaged as a producer/director as the primary job function [in contradistinction to, say, a Broadcast Assistant or Editor or Head of Department who might occasionally produce and direct];*
- *how many producer/directors were/are:*

*o on staff contracts;*

*o on fixed-term contracts;*

*o full-time;*

*o part-time;*

*o on secondment from another department and in each case for how long;*

*o on secondment to another department and in each case for how long;*

*o left in each year and was this permanent [staff contract] or temporary [fixed term contract] and in each case full or part-time;*

*o joined in each year and was this permanent [staff contract] or temporary [fixed term contract] and in each case full or part-time;*

*3) What in each of the foregoing years is the median, mode and range of number of hours of output per producer/director for intended broadcast: -*

*o by full-time producer/directors [staff or fixed term]*

*o by part-time producer/directors [staff or fixed term]'*

4. It should be noted that the request was made on 31 March 2011 and can only apply to information that was held then.
5. The BBC responded on 4 May 2011. It explained that it believes that the information requested is excluded from the FOIA because it is held for the purposes of 'journalism, art or literature.' 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 the 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 request for information.

## 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. On 19 August 2011 the complainant agreed that the Commissioner would consider the operation of the derogation to parts 1 and 3 of the original request dated 31 March 2011.

## Reasons for decision

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8. Schedule One, Part VI of the FOIA provides that the BBC is a public authority for the purposes of the 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."*

9. 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'.
10. 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.
11. 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)*

12. The Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to the FOIA. His role is to consider whether the information was genuinely held for the derogated purposes or not.

13. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.
14. The Court of Appeal adopted the Information Tribunal's definition of journalism which set out that journalism comprises three elements.
  - "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. The Commissioner adopts a similar three pronged 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. He considers that drama can be best seen as a mixture of art and journalism. This is because it is journalistic in the sense that it provides commentary on the state of the world and artistic because it involves decision making about how to present the material in a congenial way.
16. The information that has been requested in this case can be split into three categories:
  1. The number of staff the BBC employs in certain roles in a given department in Central London (*'category one'*);
  2. How they have been employed in two given years (*'category two'*); and

3. The amount of output per producer/director (*'category three'*).
17. The Commissioner asked the BBC for detailed arguments in this case because he was not clear at that time why the BBC considered that the information is derogated.
18. However, the BBC has provided sufficient evidence to illustrate why each category of information is derogated. The Commissioner considers that the information requested is genuinely held for journalistic and artistic purposes and he will explain why below.
19. For the avoidance of doubt, the Commissioner has considered all of the information before him, but for conciseness he has focussed on explaining why he considers that the information requested falls within the derogation.

### **Categories one and two**

20. As noted above, the first category of information that requires consideration is the number of staff the BBC employs in a given role and department and a breakdown concerning those who have those roles. The second category focuses on the employment status of these individuals. The Commissioner considers that the derogation applies for the same reasons for both categories and will therefore consider them together.
21. The BBC explained that the particular information sought is used by its Managing editor as part of the process in allocating a fixed resource to produce its complement of radio drama output. It explained that the Managing editor decided on what staff were required and this decision reflected his editorial judgment and the ambition of the programmes that he wanted to create. The Commissioner has accepted on a number of occasions (such as in case reference **FS50314106**) that the BBC has a fixed resource in the Licence Fee and resource allocation goes right to the heart of creative decision making. The Commissioner is satisfied that the same rationale connects the information to the derogated purposes.
22. The Commissioner also notes that the request only concerns front line production staff who are directly involved in producing radio drama content and the proximity of the staff to the content favours the BBC's argument that the information is held for derogation purposes.
23. The BBC then provided further information about the nature of the decisions that were made on the basis of this information. It explained that the number of staff in London reflected the decisions that were made about where to produce content, who will produce the content and the nature of the roles required to produce the same. These decisions are made by the Managing Editor in consultation with the Network Controller.

24. The Commissioner considers that the information requested is genuinely used by an editor to exercise judgement about the analysis and continuous review of individual programmes and therefore falls within the second limb of the definitions of journalism and art. The BBC explained that this choice is organisationally important because it imposes responsibility on specific individuals to ensure that the content complies with the general law, its Service Licence, its Editorial Guidelines and Ofcom rulings.
25. The Commissioner also accepts that the information would be genuinely held for the third limb of the definitions of journalism and art, as it would be used in the review of the Managing editor's decisions, particularly in the event that things went wrong. It also may be used in the event that there are challenges in the transfer of given responsibilities away from London in relation to the controversy attached to the BBC's ongoing move to Salford.
26. Furthermore, the information about the resources that the BBC had in each department would also be required when considering the level of professional supervision and guidance that needed to be provided to produce content and who would provide it. The BBC explained that the editorial ambitions of the Managing editor correlated directly to the amount of resource that was required and the supervision that was necessary. In order to comply with its editorial guidelines, the BBC had to supervise some content such as a drama documentary more closely than other content such as an afternoon play. Furthermore, it explained the information about who it used to produce the drama is considered when the Editor of Drama consults with the Controller of Radio 4 about every commission to ensure that each one meets its editorial proposition and the satisfies its editorial guidelines. The information requested becomes a key part of what is necessary to ensure the maintenance and enhancement of standards of its content and for this reason alone, it is caught by the derogation.
27. Overall, the Commissioner considers that the BBC has evidenced that it genuinely holds the first two categories of information for the purposes of art and journalism. He is content that the information is held for the purposes outlined in the second and third paragraphs of the definition. He considers that the information falls within the derogation and outside of the Act.
28. Finally, the Commissioner notes that the BBC argued that in the event that the Commissioner determined that the information was outside the derogation, it considered that section 40(2) [third party personal data] applied to it. The Commissioner wants to note that he has not considered the operation of the exemption because no obligations under section 1(1)(b) arise when the information is outside the Act and thus no exemption is required.

### Category three

29. The BBC denied that it held this information. However, it explained that if it was found to hold this information, it would be caught by the derogation in any event, and would not be within the scope of the Act.
30. The Commissioner considers that it would be possible to work out this information from either the credits (or editorial propositions) of all the content that the BBC broadcast (and retains) and that the need to calculate the averages does not render the information not held.
31. From previous decisions, the Commissioner considers that where components (or building blocks) are held of information, then the composite numbers will also be held providing it does not require a high degree of judgment about how to manipulate that information. This follows the Information Tribunal's judgment in *Johnson v ICO and MOJ* [EA/2006/0085]. In this case, the collation of the information requested would not take a high degree of judgment and the Commissioner considers that the information is held by the BBC.
32. However, the Commissioner must consider whether the components are held for the derogated purposes or not. If they are, then the only conclusion the Commissioner can come to is that the composite number would also be held for the same purposes.
33. The Commissioner considers that the credits of programmes amount to part of the creative output of those programmes.
34. In light of submissions made by the BBC in previous cases, the Commissioner considers that the components are held for the purposes outlined in the second element of journalism within the definition above - the editorial process.
35. The BBC's content is held so that its editors can analyse and review their programmes. Information about the decisions taken to feature certain organisations would be used by the editors of it to ensure that content meets its output objectives. It will continue to be held to assess the success or otherwise of such a selection and to inform the planning process for future programming. The Commissioner therefore considers that there is a relationship between it and the derogated purposes.
36. This view follows a number of previous decisions of the Commissioner. For example in **FS50358104**, the Commissioner considered whether an old edition of Panorama could be provided under the Act. In that case, the Commissioner recognised that copies of previously broadcast programmes are retained so that they can be used for repeat broadcasts, as potential content in other BBC programmes and as a source of research when creating output. He considered that the requested information was retained and used to provide context and

background to the BBC's output and was still held as a resource which may be used for future programmes. He found that the information was held for the second part of the definition of journalism. In the Commissioner's view, his previous decision is analogous to the position of the components of the information requested in this case. It follows that his view is supported by his previous conclusions.

37. Furthermore, the Commissioner also considers that the components would also be held for the third part of the definition as well. This is because the BBC would need at least the components to assess the standards and quality of particular areas of programme making and/or the work of those in its employ.
38. It is not material whether the information is also held for other purposes too, providing that it is held genuinely for the purposes of journalism.
39. To further support his analysis, the Commissioner considers that the status of information should be judged against three criteria that he considers are crucial factors to consider in his analysis:
  - The purpose 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.
40. The information that has been requested relates to the information broadcast by the BBC on radio. It was created to provide recognition to those individuals who contributed to given content and would be kept to enable the BBC to review the success of those programmes against its editorial objectives. It follows that this criterion supports the BBC's contention that the information was held for the purposes of journalism.
41. The second criterion also favours the BBC. The people who produce content influence that content in many ways. There is a real relationship between this information and the content. This relationship continues considering that the editorial decisions that are taken need to be assessed and future planning needs to be undertaken.
42. The final criterion also favours the BBC. The users of this information are the editors responsible for coordinating the BBC's drama output. The BBC has provided the Commissioner with evidence in **FS50327965** that 91% of requests that its archives receive are from production divisions in the BBC. This adds further support that the components would continue to be held in order to produce content. The relationship



between the derogated purposes and the information continues beyond the time that the programme was broadcast.

43. It follows that the Commissioner supports the BBC in its view that this category of information, if held, would be held for two of the derogated purposes – journalism and art. It is not therefore caught by the Act.
44. For all of the reasons above, the Commissioner is therefore satisfied that all the information requested in this case is derogated. As the Commissioner has found that the request is for information held for the purposes of journalism and art, he determines that the BBC was not obliged to comply with Parts I to V of the FOIA for this request and upholds the BBC's position in this regard.

## Right of appeal

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45. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

46. 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.
47. 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**  
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