

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 February 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 has requested the disclosure of the names of the judges that awarded its Radio Two Folk music awards. The BBC explained the information was covered by the derogation and therefore excluded from the FOIA. The case was referred to the Information Commissioner ('the Commissioner').
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 steps to be taken.

### Request and response

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3. On 25 November 2011, the complainant requested the following information from the BBC:

*"I would like to know who the judges are for the BBC Radio Two Folk Awards."*

4. The BBC responded on 9 December 2011. It stated 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'.
5. 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. However, it did provide general details about how it goes about making the awards and the process through which award proposals pass through.

## Scope of the case

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6. On 23 December 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. She challenged the operation of the derogation and made a number of arguments that have been summarised by the Commissioner:
- The request related to the backstage of an awards ceremony and this was far enough removed from the derogated purposes;
  - The request was about an award ceremony that was disconnected from the programming and would happen whether content has been made or not;
  - She considered her request was for organisational and procedural matters that were regulated by its own editorial guidelines – in particular those guidelines require clear, published rules that were accepted by its lawyers when creating an award;
  - She didn't consider that the information requested satisfied the dictionary definition of art, journalism or literature;
  - She considered that the intention behind FOIA was that this sort of information should be released;
  - She considered that the BBC shouldn't be allowed to be inconsistent as it does release the panels and how they voted for other awards;
  - She considered the credibility of the awards would be enhanced through transparency – in particular, openness would mean that every performer had equal access to this knowledge;
  - She considered transparency would be necessary because the outcome of the awards is the best marketing platform for this genre of music; and
  - She considered that the award was run in partnership with other organisations – Smooth Operations and/or UBC Media and the name of the judges would enable the suitability of the partners to be assessed.

## Reasons for decision

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7. Schedule I, 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."*

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 refers to this as '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.
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 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.
12. 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.

13. The Court of Appeal adopted the 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."*

14. 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. The Commissioner considers that the BBC's radio broadcast coverage, and the decisions about it, can be best considered to be a mixture of art and journalism. Journalism, as the content that is presented amounts to news of current events and art because it must be presented in a way that is congenial to its audience.
15. The information that has been requested in this case relates to the names of the individual judges for the BBC Radio 2 Folk Awards.
16. The Commissioner will now explain why he considers that the information is covered by the derogation. He 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.
17. In light of submissions made by the BBC in previous cases and mentioned in the refusal notice, the Commissioner considers the information requested falls within the second and third elements of the definition of journalism and art noted above.
18. It falls within second element because it is information that is used by the BBC when undertaking the '*exercise of judgement on issues such as: the selection and timing of matters for broadcast or publication.*'

19. The BBC has explained that the decision to create the Folk Awards was made by the BBC's Chief Editorial Policy Advisor who assesses the criteria to appoint the judges during this process. The Folk Awards have been chosen to be featured on the BBC and are part of the content that will be broadcast by it. The decisions to have the award, to broadcast the same and how to undertake the work required to create content (in this case to employ judges anonymously) are all editorial decisions which fall within the second limb of the definition.
20. The information requested would also assist the decision making process, including the viability of coverage, for future productions of the Radio 2 BBC Folk music awards. The Commissioner acknowledges that the information retained in this case is therefore likely to be used to inform future logistical scenarios and editorial decisions taken about the recurrence of the award.
21. 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 in the choice of what programmes to create and when this goes right to the heart of creative decision making. The Commissioner is satisfied that the same rationale connects the information that the complainant has requested to the derogated purpose in this case.
22. It also falls within the third element of the definition because this information relates to the '*enhancement of the standards and quality of creative output*'. In the event that the BBC receives complaints about the Folk Award and/or a lack of transparency and/or a failure to comply with its Editorial guidelines, then the information that the complainant has requested is required to enable the BBC to review this decision and whether it met its Editorial Guidelines – to enable it to review and improve its performance.
23. The information will also allow the work of editors to be critiqued, from within the BBC, against other similar events. The Commissioner acknowledges that the information retained in this case is therefore likely to be used by the BBC to review and improve its performance.
24. This decision notice follows a number of other decisions about whether the events that form the foundation of a series of broadcasts are caught by the derogation. For example, in **FS50401168**, the Commissioner found that the information used to select the audience in Question Time was held for the derogated purposes for similar reasons.
25. Another example can be found in **FS50352659** where the Commissioner found that the information necessary to achieve a set editorial outcome (in that case cover the papal succession) was held for a derogated purpose.

26. In considering whether information is held genuinely for the purposes of journalism and art, the Commissioner has considered the information against the following three factors:
  - a. the purpose for which the information was created;
  - b. the users of the information; and
  - c. the relationship between the information and the programmes content which covers all types of output that the BBC produces.
27. The information requested relates to a component of the BBC Radio Two Folk Award coverage. The information was created in order to facilitate the awarding of the award and associated coverage of it. It follows that this criterion supports the BBC's contention that the information was held for the purposes of journalism and art.
28. The users of this information include the editors responsible for considering whether awards meet its editorial remit and the editor responsibility for its coverage of the award.
29. For the same reasons as above, the relationship continues beyond the time that the programme was broadcast.
30. To support his analysis the Commissioner has considered the fourth factor and been mindful of the purpose of the derogation, which was articulated by Lord Neuberger of Abbotsbury MR at paragraph 45 of his judgment in *Sugar*:

*"The purpose of limiting the extent to which the BBC and other public sector broadcasters were subject to FOIA was 'both to protect freedom of expression and the rights of the media under article 10 of the European Convention on Human Rights, and to ensure that [FOIA] does not place public sector broadcasters at an unfair disadvantage to their commercial rivals.' This is apparent, to my mind, as a matter of common sense, looking at FOIA on its own, but it was also stated in terms to be the policy in a letter from the Department of Constitutional Affairs in 2003, which was admitted in evidence by the Tribunal – hence the quotation marks."*

31. The Commissioner finds in this case that the disclosure of the withheld information would also be likely to impinge the BBC's editorial independence. The BBC pointed out that similar awards run by record companies are also judged anonymously and compelling it to reveal its judges names when they are not public facing individuals would put it an unfair disadvantage to its commercial rivals. The Commissioner

considers that this factor also supports his conclusion that the information is held for derogated purposes.

32. The complainant explained that she considered that the derogation only related to programme production and that this information that is one step removed was not anticipated to be covered by the derogation. The Commissioner considers that the Court of Appeal has determined the nature of the correct test and it is clear that the derogation is not so limited – for example it asserted directly that editorial control over a number of programmes was part of the definition. The Commissioner must apply the law as it is and this argument cannot be given any weight.
33. The complainant considered that her request considered only organisational and procedural matters. While the complainant is right that the information is used to judge these matters, this does not place the information outside the derogated purposes when it is held for some extent for the purposes of art and journalism.
34. The complainant explained that the BBC should not be allowed to be inconsistent in publishing some panels and not others. The Commissioner can only consider whether the information is held for the set purposes. If it is, it is not caught by FOIA and the BBC has discretion to publish the information but cannot be compelled to do so.
35. The complainant made some valid arguments about the merits of transparency for the award. The Commissioner considers transparency to be a key aim of the legislation. However, these arguments simply cannot be considered when the information is not caught by it.
36. For all of the reasons stated above, the Commissioner finds that the BBC genuinely holds the information for the purposes of art and journalism. Therefore, the BBC was not obliged to comply with Parts I to V of the FOIA.

## Right of appeal

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37. 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)

38. 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.
39. 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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