

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 May 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 requested copies of minutes and emails about the proposed Election TV debates. 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 was excluded from 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 28 January 2015, the complainant wrote to the BBC and requested information in the following terms:

*'A copy of any minutes of meetings when it was discussed/decided that Plaid Cymru and the SNP should participate in the proposed Election TV debates*

*A copy of the submission/s (emails or any correspondence) to senior executive and/or DG seeking approval of the final list of invitations for the TV Debates*

*A copy of any emails, letters, submissions, briefings, minutes when the inclusion/exclusion of the political parties in Northern Ireland*

*was discussed.'*

4. On 4 February 2015 the BBC responded and 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'.
5. On 10 February 2015 the complainant complained to the ICO about this response. He argued that '*this* request is unique and would fall within parliament's intention with regards the BBC's obligation to FoI given the very specific unique editorial process which must be followed by the BBC at general election time.'
6. The Commissioner invited the complainant to withdraw his case on 18 February 2015 (citing the decision notice [FS50463644](#)) as it was his opinion that the requested information was held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.
7. However, the complainant declined to withdraw his case and wrote to the Commissioner on 18 February 2015 to dispute the derogation. He argued that his request concerning the proposed election debates was different:

*'the BBC does not have complete journalistic independence in the coverage and preparation for general elections – how the BBC covers elections is quite strictly defined – in fact they are not allowed full journalistic independence.*

*If we can not enquire as to the BBC decision making process around general elections then we, the general public, would never know if they followed the process correctly. Parliament's intention on FoI was that the public would be entitled to be aware of how government and public authorities carry out their decision making functions – parliament would of course not have intended this to be the case for the BBC with regards their day-to-day journalistic operations – which is why the BBC is rightly exempt. However if parliament has taken the time to ensure that BBC MUST follow certain strict guidelines with regards their coverage of general elections then it flows that parliament would want the public to have the ability to know that this has been adhered to – in the same way that they enable this to happen for every other public authority – namely the Freedom of Information Act.*

*The BBC itself states that they are required by law to adopt a code of practice to cover elections – if the public is not enabled to learn if this was followed then we are being failed. Again, I would argue that the Supreme Court decision is not binding on this example – it*

*is entirely new and separate and requires new consideration. I have enclosed the BBC's own guidelines on this below for your information:*

### **Reporting UK Election and Referendum Campaigns**

#### **10.4.19**

*The BBC is required by law to adopt a code of practice at each election to govern the participation of candidates in each constituency or electoral area. In doing so, the BBC is required to "have regard to any views expressed by the Electoral Commission".*

*Election and referendum guidelines for TV, radio and online coverage, including message boards, will be drawn up by Chief Adviser Politics, agreed by the BBC Trust and published before each campaign.*

*Finally, I would argue that the Supreme Court's point with regards "the selection, prioritisation and timing of matters for broadcast or publication" highlights my point – this rule is again not applicable here. It is unlikely that the Supreme Court considered the very rare period of general elections when reaching their decision on the broader editorial and journalistic independence of the BBC – which I fully support and believe must be upheld. However the BBC is not entirely independent when it comes to these decisions during general elections as they must fully comply with electoral commission and OFCOM rules.'*

8. On 20 February 2015 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.

## **Background**

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9. The BBC provided a background to the requested information.

### The leaders' debates

10. On 13 October 2014 the BBC, ITV, Channel 4 and Sky announced their joint plans to broadcast a series of multi-platform party leader debates in the run up to the 2015 General Election. The proposed debates follow the success of the debates which were broadcast prior to the 2010 General Election, the first in British political history, and watched by 22 million people. The BBC is under no obligation to broadcast debates, and the proposals were merely one aspect (albeit a high-profile aspect) of

the BBC's editorial ambitions for its election programming. The broadcasters wrote to the leaders of the Conservatives, Labour, Liberal Democrats and UKIP inviting them to take part.

11. On 23 January 2015 the broadcasters published new proposals to expand the debates. In a joint statement explaining the reasons for the change to the original proposals, the broadcasters announced:

*BBC, ITV, Sky and Channel 4 remain committed to holding election debates in the General Election campaign. Following meetings with the Conservative, Labour, Liberal Democrat and UKIP representatives, it has not been possible to come to an agreement on the original proposal put forward by the broadcasters in October 2014.*

*Since October the broadcasters have together and individually had a number of meetings and conversations with the parties invited to take part, the Conservatives, Labour, Liberal Democrats and UKIP, and also discussions and correspondence with the SNP, Plaid Cymru and the Green Party. All these discussions have been constructive and useful in informing our thinking about the debates.*

*Over the three months since the original proposal was put forward, the broadcasters have also continued to monitor the electoral landscape, as we promised to do, taking into account the polling evidence, and the expressions of public support for the debates to go ahead and for a wider range of parties to be included in the debates.*

*In view of these factors, the broadcasters are now inviting party leaders to take part in the following debates within the official election campaign and approximately two weeks apart.*

*Two debates between the leaders of the following parties: Conservative, Labour, Liberal Democrat, UKIP, Green, SNP and Plaid Cymru. One of these debates to be produced by ITV, and one by the BBC.*

*One debate between the leaders of the Conservative party and the Labour party produced by Sky and Channel 4.*

*The proposed dates for the debates are 2, 16 and 30 April. The order of the debates is to be discussed with the parties.*

*The party leaders will be formally invited to take part in these debates. In the event that any of the invited party leaders decline to participate, debates will take place with the party leaders who accept the invitation.*

12. On 28 January 2015 the BBC received the request from the complainant.

13. Following two more months of negotiations over the composition, format, and timing of the debates, the broadcasters announced the final proposals which have been agreed with the political parties:

*BBC, ITV, Sky, Channel 4 election debates announcement, 21 March 2015, <http://www.bbc.co.uk/mediacentre/statements/TVdebates210315>*

The BBC's duty of due impartiality

14. The BBC is required by its 2006 Charter and Agreement to ensure that matters of political controversy are covered with due accuracy and impartiality.
15. 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. (Both Guidelines can be accessed here: <http://www.bbc.co.uk/editorialguidelines/>)
16. The Election Guidelines help to define how the BBC will comply with its duty of due impartiality during the period leading up to and including the general election. For example, with respect to the selection of party leaders invited to participate in the proposed debates, section 3.1 is particularly relevant:

*'To achieve due impartiality, each bulletin, programme or programme strand, as well as online and interactive services, for each election, must ensure that the parties are covered proportionately over an appropriate period, normally across a week.*

*Determining appropriate levels of coverage should take into account levels of past and current electoral support.*

*Electoral support in the previous equivalent election is the starting point for making those judgements. However, other factors should be taken into account where appropriate, including evidence of variation in levels of support in more recent elections, changed political circumstances (e.g. new parties or party splits) as well as other evidence of current support. The number of candidates a party is standing may also be a factor.'*

Complaint from the Democratic Unionist Party

17. On 23 January 2015, the Democratic Unionist Party (DUP) submitted a complaint to the BBC Executive concerning the omission of the DUP from the proposed UK leaders' debate, to which the BBC responded. On 20 February 2015 the DUP submitted an appeal to the BBC Trust. The DUP

appealed on the grounds that the exclusion of the party from the debate would breach the BBC's duty of impartiality.

18. The Trust did not uphold the DUP's appeal, and in its findings said that the Corporation was "reasonably entitled" to take the view that the SNP and Plaid Cymru are not comparable with the DUP, on the basis that "the SNP and Plaid Cymru compete directly for votes with the larger parties of Great Britain, whereas the DUP and the other NI parties do not".

### **Scope of the case**

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19. The Commissioner considers the scope of the case is to determine if the requested information, for the copies of minutes and emails about the proposed Election TV debates, is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

### **Reasons for decision**

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20. 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."

21. 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'.
22. 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)*

23. 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.
24. 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.
25. 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.
26. 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’.

27. 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.

28. The information that has been requested in this case is for copies of minutes and emails about the proposed Election TV debates.

29. The BBC have argued that

*'The requested information in this case directly relates to the selection of political leaders to appear in the proposed debates to be broadcast by the BBC in the run up to the 2015 General Election. The decision about which political leaders are invited to participate is an exercise by the BBC of its editorial discretion, in accordance with its obligations of due impartiality, to decide what programmes to broadcast and the format they should take. In relation to such a high profile and important area of programming, this is ultimately an editorial decision to be made by the BBC Director-General in his role as Editor-in-Chief. Accordingly, we submit that the requested information is inextricably linked to the creation of the BBC's output and falls squarely within the scope of the derogation.'*

30. The Commissioner has already referred the complainant to the decision notice [FS50463644](#) which considered the request for correspondence between the BBC and the Department of Health. The Commissioner upheld the BBC as he was satisfied that the requested information fell under the definition of journalism and was therefore derogated.

31. The decision notice for the case reference [FS50299957](#) considered the request for information relating to the prospective televised debates in the lead up to the 2010 General Election. The request was for "all briefing notes, memos, internal documents produced in relation to the prospect of debates between political leaders in the run up to a General Election, establishment of, agreement to and announcement of the proposed debates".

32. 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:

*'The Commissioner recognises that decisions regarding the televised debates do potentially involve matters of policy and democracy.'*



*However he does not accept that information regarding the BBC's decision to broadcast is not related to the programme...decisions about potential programme content and format are themselves editorial.*

*...editorial guidance to programme makers on how to cover issues, comments from stakeholders, discussions between programme makers and broadcast plans is all material held to a significant extent for the specified purposes as it is used to shape the content and delivery of the BBC's output.*

*...He does not consider that any involvement of three political parties in decisions regarding BBC content undermines the BBC's position that the material is held to a significant extent for the purposes of journalism, art or literature. Information regarding input from those political parties will have been used by the BBC when making decisions regarding programme content.'*

33. The Commissioner concluded in 2010 that *'there is a relationship between the requested information and the BBC's creative output, the information requested relates to editorial decisions about future broadcast content and is therefore held by the BBC to a significant extent for the purposes of journalism, art or literature'*.
34. The BBC have responded to the complainant's argument that the BBC does not have complete journalistic independence in its coverage of elections (primarily because it has to adopt a code of practice), and therefore parliament must have intended FOIA to apply to the BBC.
35. The BBC stated that it is correct that the *'BBC is legally required to adopt a code of practice with respect to "the participation of candidates at a parliamentary or local government election in items about the constituency or electoral area in question which are included in relevant services during the election period" (and this is incorporated within section 4 of the Election Guidelines). However, this obligation does not bite in relation to the requested information and does not have any relevance in terms of how the Freedom of Information Act applies to the BBC. Schedule 1 provides that the Act applies to the BBC in respect of "information held for purposes other than those of journalism, art or literature". The Act does not say anything about how general elections have an effect on how the Act applies to the BBC or any other public authorities.*
36. In response to the complainant's argument that *'the Supreme Court decision in Sugar is not relevant in this case because it is unlikely that the Supreme Court considered the special circumstances surrounding general elections'*, the BBC maintain that the Supreme Court's decision in *Sugar* is highly relevant.

37. The Supreme Court identified that

*'It is that public service broadcasters, no less than the commercial media, should be free to gather, edit and publish news and comment on current affairs without the inhibition of an obligation to make public disclosure of or about their work in progress (para78).....Information held for any such purposes of journalism, art or literature was absolutely exempt from disclosure.(para 111)'*

38. The BBC argued that *'there is no area of broadcasting where the BBC's commitment to due impartiality is more closely scrutinised than in reporting election campaigns. Accordingly, the need for a space to make major editorial decisions independently and free from unwarranted interference is particularly important when the requested information concerns the BBC's internal deliberations about which political party leaders should be invited to participate in the debates.'*

39. 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 FS50463644 and FS50299957.

40. In conclusion, and for all of the reasons above, 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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41. 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>

42. 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.
43. 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 .....**

**Steve Wood**  
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