

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 October 2016

Public Authority: British Broadcasting Corporation
Address: Room BC2 A4
Broadcast Centre White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information relating to travel and accommodation expenses of the Director of News and Current Affairs. The BBC responded to some parts of the request but said that parts 2-6 and 8 of the request were covered by the derogation and excluded from FOIA.
2. The Commissioner's decision is that parts 2-6 and 8 of the request is held by the BBC for the purposes of 'journalism, art or literature' and does not fall within the scope of FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 27 April 2016 the complainant sent the following information request to the BBC:

"Please note that I am only interested in information which relates to the period 1 January 2014 to the present day [22 January 2015].

1...During the aforementioned period can you please provide a full list of occasions when James Harding the Director of News and Current Affairs has travelled overseas as a representative and or employee of the BBC. Please include all trips which involved a cost to the BBC. In

the case of each individual trip can you please provide a full itinerary which includes the dates of travel, the duration of the stay and all the specific destinations and organisations visited. Please do provide a reason for each visit?

2...In the case of each trip can you please provide a breakdown of all domestic and overseas transportation costs met by the BBC either at the time or in the form of a expense claim and or on a corporate credit/procurement card. These costs will include but will not be limited to the costs of external and internal helicopter/plane flights, train jounries, taxis and car hire. (sic)

3...In the case of each trip can you please provide details of the class and type of each railway ticket and or each plane ticket purchased by the BBC. These could have been purchased at the time or in the form of an expense claim. They could have also been purchased on a corporate credit or procurement card.

4...In the case of each trip can you please provide a full breakdown of all accommodation costs. These could have been met at the time of the book and or paid for in the form of an expense claim. They could have been purchased on a corporate credit or procurement card.

5...In the case of each trip can you please identify all accommodation used by Mr Harding. Can you please provide the names of all hotels, bed and breakfast establishments as well as those firms which specialise in the provision of villa, apartment and chalet accommodation.

6...In the case of each trip can you please provide a list of all other BBC employees and or representatives who accompanied Mr Harding on the trip?

7...In the case of each trip can you please state whether the BBC contributed to the travel and accommodation costs of any member of Mr Harding's family who may have accompanied him on the trip. Can you please provide details for each individual trip including a full list of the costs met by the BBC,

8...In the case of each of the aforementioned trips can you please provide the overall cost to the BBC. This will include BBC expenditure on Mr Harding as well as anyone else who accompanied him on the trip."

4. On 26 May 2016, the BBC responded to the request. The BBC provided information in response to parts 1 and 7 of the request but explained

that it did not believe that parts 2-6 and 8 of the request were caught by FOIA because this information was held for the purposes of 'art, journalism or literature'.

Scope of the case

5. The complainant contacted the Commissioner on 31 May 2016 to complain about the way his request for information had been handled.
6. The Commissioner considers the scope of the case is to determine whether parts 2-6 and 8 of the request are excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

Reasons for decision

7. 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."

8. 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 'the derogation'.
9. 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)

10. 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.
11. 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.
12. 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.
13. 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'.

14. 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.

15. The information requested in this case relates to travel and accommodation expenses.
16. The BBC explained that the Director of News and Current Affairs at the BBC, Mr James Harding, while serving on the BBC's Executive Board, is primarily a journalist and the senior editor for the BBC's news and current affairs output, which includes responsibility for daily bulletins on the BBC's main TV channels and radio stations, as well as flagship programmes like Today, Newsnight, Question Time and Panorama. It also includes regional TV and radio news programmes in England, the BBC News website, the BBC News Channel, BBC Parliament and BBC Radio 5 live, as well as the World Service Group, which includes the BBC World Service, BBC World News (available in 200 countries and territories worldwide), and the BBC's international facing online news services in English (bbc.com/news), delivering news and analysis in English and 27 other languages to a global audience of 256 million people each week.
17. It went on that the Director provides leadership and editorial direction, setting immediate priorities (for example, in the daily editors' meeting), commissioning output, as well as identifying and developing broader strategies and themes for the distribution and content of BBC News Group's global output, consistent with the promotion of the BBC's public purpose of bringing the UK to the world and the world to the UK. For example, in January 2015, Mr Harding launched the 'Future of News' report¹, which laid the groundwork for, and made preliminary recommendations as to, the development of the principles and priorities of public service journalism in the internet age to address changing audience needs having regard to the impact of developments in technology, society and journalism relating to news and data gathering, form and content and distribution.
18. In addition, between November and December 2015, Mr Harding co-presented 'On Background', a six part series broadcast on the BBC World Service which aimed to add light to the heat of the week's news, including major interviews, discussion and viewpoints from a range of

¹ http://newsimg.bbc.co.uk/1/shared/bsp/hi/pdfs/29_01_15future_of_news.pdf

perspectives, data briefings, 'lost stories', and opening a door on the editorial thought-processes of BBC News, drawing on the expertise of BBC journalists around the world, as well as significant political players and engaging and informed commentators relevant to the stories covered.

19. It went on that as part of the role, it is important for the Director to establish and develop relationships which secure the BBC's access to institutions and individuals for the purposes of its global output, not merely in the UK but also overseas, and to understand the ideas and priorities of international thought leaders to inform the BBC's own editorial strategy and content across its diverse news services. Such information directly relates to what the BBC should publish, when it should publish it and the means by which it should do so.
20. While it would not be appropriate to identify the specific individuals met or the content of discussion, because the success of such visits is dependent on a relationship of trust (although some individuals are identified in the Future of News report), we can confirm that each of the identified overseas trips was undertaken in the anticipation that they would, and they did in fact, inform the BBC's editorial direction and some even led directly to output being commissioned and published by the BBC. For the avoidance of doubt, the visits were not, for example, for the purposes of attending meetings of the Executive Board, connected with managing personnel issues, or other matters not relating directly to the BBC's special purposes. The disputed information is primarily held by and on behalf of the Director of News and Current Affairs, although some of the constituent information may also be held elsewhere in the BBC, for example for financial management and compliance purposes. These are not unique events, and therefore such information informs subsequent editorial decisions.
21. The BBC maintained that the disputed information was held at the time of the request for the purposes of journalism, art or literature. The BBC's records relating to the relevant trips (albeit, in themselves not 'journalistic' in the sense that they were not intended for publication) did at the time of the request, and indeed continue, to closely support the BBC's creative activities in relation to journalism.
22. It said each of the visits had an editorial/journalistic purpose, and some led directly to specific items of content being commissioned and broadcast, although all informed the BBC's editorial strategy. Decisions relating to whether to undertake a visit, who to meet with, the appropriate budget to be allocated for such a visit, having regard to what might be achieved and the value placed on that benefit, and who would be the appropriate attendees, are all the result of, and are

closely associated, with editorial decision making and influence the BBC's output.

23. It argued that the disputed information falls within the first and second limbs of the definition of journalism as articulated by the Information Tribunal, as it concerns newsgathering and the exercise of editorial judgement on issues such as the selection and prioritisation of matters for broadcast.

24. It referred to the fact that the courts and the Information Commissioner have repeatedly accepted, resource allocation goes to the heart of creative decision making. In the case of *BBC v Information Commissioner*², applying the test which was subsequently approved by the Supreme Court in *Sugar v BBC*, the High Court held that information relating to the production costs of certain output was held for the purposes of journalism, art or literature. That case related to a number of requests for information, including:

- i. how much the BBC paid for the rights and to cover the recent winter Olympics in Turin Italy;
- ii. the budget for a series of 'Top Gear' on BBC2;
- iii. how much the BBC paid a specified independent production company in the previous year and what programmes this related to; and,
- iv. total annual staff costs (performers, writers and production staff) of the 'EastEnders' programme.

25. In reaching his conclusion, Mr Justice Irwin noted that:

"Since the information here is overwhelmingly financial, it is not really arguable that the information itself is journalistic, artistic or literary. The question is whether this financial information is held (for present purposes, predominantly) for the stipulated purposes. It seems to me difficult to say that information held for 'operational' purposes is not held for the purposes of 'journalism, art or literature'. It has not been contended that journalism, art and literature are not the product of the operations of the BBC. This does not mean that everything the BBC does is done for the purpose of journalism, art or literature. As Davis J said, that would be far too broad a reading. The cost of cleaning the BBC boardroom is only remotely linked to the

² *BBC v Information Commissioner* [2009] EWHC 2348 (Admin)

product of the BBC, whereas the operating cost of creating an episode of a programme is much more closely linked to the designated purposes. Yet those costs could aptly be termed 'operational'."

26. It also noted that the Information Commissioner has previously upheld the BBC's reliance on the derogation in respect of information held for the purposes of journalism, art or literature in connection with very similar information. For example:
- i. in Decision Notice FS5061690513, the Information Commissioner upheld the BBC's reliance on the derogation in respect of information about an overseas trip by the then Director of Television. Incidentally, the fact of that visit had also been published as part of the BBC's regular salaries and expenses data;³
 - ii. In Decision Notice FS5057013814, the Information Commissioner upheld the BBC's reliance on the derogation in respect of information, including financial information, about a promotional and networking forum to support the BBC's content;⁴
 - iii. In Decision Notice FS5035729015, the Information Commissioner upheld the BBC's reliance on the derogation in respect of information about the "pre-emptive" costs of the BBC's output, in that case relating to the papal succession;⁵
 - iv. In Decision Notice FS5025805616, the Information Commissioner upheld the BBC's reliance on the derogation in respect of information relating to the expenses of a named news presenter; and;⁶
 - v. In Decision Notice FS5019340317, the Information Commissioner upheld the BBC's reliance on the derogation in respect of information including the cost associated with output that was not ultimately commissioned.⁷

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624007/fs50616905.pdf>

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043660/fs_50570138.pdf

⁵ https://ico.org.uk/media/action-weve-taken/decision-notices/2011/605570/FS_50357290.pdf

⁶ https://ico.org.uk/media/action-weve-taken/decision-notices/2009/499534/FS_50258056.pdf

⁷ https://ico.org.uk/media/action-weve-taken/decision-notices/2009/494928/FS_50193403.pdf

27. It said that the BBC voluntarily and pro-actively publishes a range of information which is held for the purposes of journalism, art or literature and would therefore not be disclosable pursuant to a request under FOIA, from the BBC's programmes themselves, to certain information about editorial complaints, to the expenses of the most senior staff. While some of the disputed information has already been published by the BBC and is accessible to the complainant that does not mean that the BBC is obliged to disclose it under FOIA. The fact that information may be in the public domain is not a relevant factor to determining the purpose for which it is held, and whether it falls within the scope of FOIA. It argued that the fact that certain limited information may be in the public domain certainly does not create an entitlement to other unpublished information, regardless of the purpose for which it may be held.
28. It concluded that the relevant question remains whether at the time of the request there was a sufficiently direct link between the BBC's holding of the disputed information and the achievement of its journalistic purposes, having regard to the proximity between the subject matter of the request and the BBC's journalistic activities and output. It confirmed that the disputed information serves to closely support the BBC's creative output and falls squarely within the derogation.
29. Based upon the arguments submitted by the BBC, the Commissioner considers that the visits relevant to the request had an editorial/journalistic purpose and whilst some led directly to specific items of content being commissioned and broadcast, all informed the BBC's editorial strategy. The withheld information is therefore directly linked to the exercise of editorial judgement and some ultimately to commissioned output.
30. 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, art or literature' and is therefore derogated. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes.
31. The Commissioner has therefore 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

32. 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

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

33. 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.
34. 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

Gemma Garvey
Senior Case Officer

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