

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 February 2020

**Public Authority:** British Broadcasting Corporation ("the BBC")

**Address:** Broadcast Centre

White City

Wood Lane

London

W12 7TP

### Decision (including any steps ordered)

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1. The complainant requested the cost of local evening programming on BBC local radio in England and the cost of Virtual Local Radio (ViLoR), a new technology for local radio. The BBC explained the information was covered by the derogation relating to information held for the purposes of journalism, art or literature and hence was excluded from the FOIA.
2. The Commissioner's decision is that this information was held by the BBC for the purposes of journalism, art or literature and so was not covered by the FOIA. She 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 16 October 2019 and asked for:

*"May I request the following data in two separate areas:*

*Cost of local evening programming on BBC local radio in England.*

*The BBC took the decision in 2017 to deliver local weekday evening programming on its local stations in England. This was a policy*

*change, replacing a networked programme.*

*May I request therefore, the total ongoing annual cost for a year of the new approach across all stations.*

*This single figure encompassing all stations should include but not be limited to:*

*a) All presenter costs*

*b) All recruitment costs and activity*

*c) All producer/BJ/BA/support costs*

*d) All or any additional network or technical costs*

*e) All or any print design, digital production or promotion*

*f) All incremental SBJ or other management and support costs - including the SBJ communities posts introduced as part of this programme initiative.*

*(Where staff members are concerned, the figure should include salary + all costs of their employment)*

*It should not include sport etc., which was already in place beforehand and will have been aired some weekday evenings.*

*Cost of VILOR local radio playout system*

*May I request the cost of the implementation of the VILOR playout project.*

*This single figure should include but not be limited to:*

*a) Capital costs - including but not limited to: costs of software and hardware, studio infrastructure/build and other capital investment in the project.*

*b) All installation costs - including, but not limited to:*

*All or any third party costs not covered in (a) above.*

*All or any BBC costs attributable to the staffing and implementation of system design/liaison with manufacturers etc.*

*All or any BBC costs involved introducing the system which are not included in (a) above*

*Any maintenance or 'fire-fighting' since installation.*

*Any expenses payable.*

*c) All training costs - including but not limited to:*

*Staff costs relating to those staff training others on the system through its entire installation whether incurred directly or by the effective funding of attachments for this purpose.*

*All expenses payable.*

*All or any training materials.*

*d) All or any additional ongoing costs which fall due across the equivalent period of amortisation/depreciation. This should exclude any infrastructure/staffing/central costs/lines/routine maintenance arrangements which were already in place."*

4. The BBC responded on 25 October 2019. It stated that:

*"The information you have requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature'. The BBC is therefore not obliged to provide this information to you and will not be doing so on this occasion. Part VI of Schedule 1 to FOIA provides that information held by the BBC and the other public service broadcasters is only covered by FOIA if it is held for 'purposes other than those of journalism, art or literature'. The BBC is 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."*

5. 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 on 25 October 2019 to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case.

## **Reasons for decision**

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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 parts I to V of the Act where information is held for the purposes of journalism, art or literature. The Commissioner calls this situation "the derogation". In this case the BBC is arguing that the requested information was held for the purpose of journalism.
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 following analysis focusses on the derogation.
10. 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)*
11. 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.
12. 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.
13. 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.
14. 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."*

15. 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".
16. 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.
17. The Commissioner adopts a similar 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.
18. The information that has been requested in this case is held for the purposes of "journalism, art or literature".
19. In light of the present submissions of the BBC the Commissioner recognises the relationship between the two parts of the request – cost of local radio and the cost of the ViLoR local radio playout system – and the BBC's journalistic output.
20. The BBC's core purpose is that of public service broadcasting. A key function within this is the duty to impart information and ideas on matters of public interest and to provide services which inform, educate

and entertain. Maintaining its editorial independence is a crucial factor in enabling the BBC to fulfil this function.

21. In determining whether the disputed information is held for the purpose of journalism, art or literature, the test is whether there is sufficiently direct link between the requested information and the derogated purpose.
22. The Commissioner has considered all of the information before her, but for conciseness she has focussed on explaining why she has decided that the information requested falls within the derogation.
23. In determining whether the information is held for the purposes of journalism, the Commissioner has considered the following factors:
  - The purpose(s) for which the information was held at the time of the request;
  - The relationship between the purposes for which the information was held and the BBC's output on news and current affairs, including sport, and/or its journalistic activities relating to such output.

### **Cost of local evening programming on BBC local radio in England**

24. When considering the purposes for which the information was held, the BBC has explained the allocation of costs in local radio is driven by a number of inter-connected factors including editorial, strategic and regulatory issues. The BBC manages its costs according to the decisions that relate to the Local Radio service licence as a whole rather than by station; staffing levels and hours of local and shared broadcasting. The allocation of funds within the Local Radio service licence reflects the editorial judgements of relevant decision-makers.
25. The Commissioner is satisfied that the information requested is held for the purpose outlined in the second element of the definition at paragraph 14 above, namely the editorial exercise of judgement on issues such as selection of technology and budgetary decisions.
26. The Commissioner accepts that the editor's allocation of the budget is according to their editorial decisions and priorities and that it has a direct editorial effect.
27. The Commissioner is satisfied that the cost of local programming on BBC local radio affects decisions which impact on the content and production of those programmes.

28. In summary, the Commissioner agrees that there is a direct link between the requested information and editorial decision making.
29. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated and that the BBC was not obliged to comply with Parts I to V of FOIA.

**Cost of ViLoR local radio playout system**

30. The BBC explained that ViLoR introduced a new approach to making radio. ViLoR is technology that the BBC has implemented across its local radio stations.
31. The Commissioner is satisfied that the information requested, cost of ViLoR, involves judgement about how the BBC chooses to reach its audience and is related to editorial decision making.
32. The BBC states "*ViLoR enables the BBC Local Radio the opportunity to move to the same production platform as the rest of BBC Radio, greatly simplifying the sharing of media which offers editorial staff the chance to better collaborate to improve journalistic output*".
33. The Commissioner believes decisions relating to the costs of programming, and technological means employed to best communicate to its audiences, impact how the BBC produces output for broadcast.
34. The Commissioner has accepted on a number of occasions (such as in case reference FS50547905<sup>1</sup>) 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 in question here to the derogated purposes.
35. Overall, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism. She considers that the information falls within the derogation.
36. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, 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.

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notice/2014/1042108/fs\\_50547905.pdf](https://ico.org.uk/media/action-weve-taken/decision-notice/2014/1042108/fs_50547905.pdf)

## 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: 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)

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 .....**

**Ben Tomes  
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