

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2019

Public Authority: The British Broadcasting Corporation ('the BBC')

Address: Broadcast Centre
White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant requested information about retainer payments made by the BBC to its highest paid staff. 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 did not fall inside FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. On 14 November 2018, the complainant wrote to the BBC and requested information in the following terms:

"It might be helpful if I point out that my request has been sparked by recent revelations that some of the BBC's highest paid staff are in receipt of a so called retainer. This is a payment made to them – normally but not exclusively on an annual basis – which is above and beyond any monies they receive for individual programmes.

In the summer it emerged that a number of staff including Graham Norton and Mary Berry were in receipt of such payments.

Please note that the reference to staff in the questions will include but not be limited to talent working in news and current affairs, documentary film making, light entertainment, drama, comedy programming, BBC radio and sport.

1. In the interests of clarity can you please identify all those staff who have received a retainer payment either this year or during the most recent financial year. In the interests of clarity can you specify when their most recent retainer payment was awarded.

2. In the case of each aforementioned individual can you please state the value of the retainer for this year or the most recent financial year. In the case of each individual can you please state for how long they have been in receipt of a retainer. In the case of each individual can you please state how much they received in each individual year for which they received the payment.

3. Can you please identify any other staff – aside from those above – who received a so called retainer payment in any and or all of the previous seven financial years.

4. In the case of each member of staff identified in relation to question three can you please state the total amount they have been paid in retainer payments. In the case of each member of staff can you please provide a breakdown of payments by the relevant financial year?

5. Can you please identify any other staff who have received retainer payments this year and or during any or all previous seven financial years but for whatever reason they have not been identified in relation to questions one to four. This may be because their retainer payment is a one off payment which covers several financial years. In the case of each individual can you state when they received their most recent retainer payment. In the case of each individual can you please state how much they have received in each of the previous seven financial years or how much they have received over the course of the previous seven financial years."

4. On 10 December 2018 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. 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 Act 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.

6. On 12 December 2018 the complainant contacted the Commissioner to complain about the way the request for information had been handled. In particular, he challenged the operation of the derogation in this case. He argued that "my request was inspired by the BBC's release of a list detailing those stars and personalities who are currently being paid £150,000 or more out of licence fee payer funds. The BBC which is now legally obliged to produce a list of this kind published the first such declaration last year and published the most recent one in July of this year. When the second and most recent list was published it became clear that a number of personalities including Mary Berry and Graham Norton were in receipt of a retainer which didn't relate to a particular programme as such but was a key component of the licence fee component of their salaries. The BBC did not specify the value of the retainer but it's quite possible the retainer on its own could be worth £150,000. In the light of the Government's insistence that the BBC disclose the salaries of those earning £150,000 or more I do not believe that derogation should be used to conceal information about salaries at this level".
7. On 4 January 2019 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.

Scope of the case

8. The scope of this notice is to determine whether the requested information - retainer payments made by the BBC to its highest paid staff - is excluded from FOIA because it would be held for the purposes of "journalism, art or literature".

Reasons for decision

9. 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."

10. This means that the BBC has no obligation to comply with parts I to V of the Act where information is held for "*purposes of journalism, art or literature*". The Commissioner calls this situation "the derogation".
11. 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 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)
12. 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.
13. 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.
14. 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.
15. 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."

16. 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".
17. 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.
18. 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.
19. In this case, the information requested concerns retainer payments made by BBC to its highest paid staff. The Commissioner has considered the arguments from the complainant and from the BBC, but for conciseness she has focussed on explaining her own view as to why the information requested falls within the derogation.
20. The Complainant argued that the information requested should be released as the BBC is legally obliged to produce a list of stars and personalities who are currently paid £150,000 or more and the value of the retainer could be worth £150,000 on its own.
21. The BBC has explained that *"information about all payments made to talent, including retainer payments if any were made, is held within the BBC's Commercial, Rights and Business Affairs division at a programme*

level. This team is structured into five programme areas: Radio, Entertainment, Scripted, Sports and Factual programmes”.

22. All retainer payment information allows the BBC to make budgetary decisions about the allocation of resources for output and other talent. Disclosure of the requested information would reveal information that is held directly in connection with the BBC's output as commissioners, channel controllers and business leads use this information to inform decisions about how they commission content, and the editorial and creative remit and direction of channels and programmes. In this way, the information requested is held directly and significantly for the purposes of journalism, and in particular, for the purposes of informing creative and editorial decision-making processes.
23. The Commissioner accepts the BBC submissions that information about retainer payments is intrinsically linked to the BBC's output, and this information can be used in decision making about future programming. Information about all payments made to talent is used by controllers, commissioners and business leads in planning for the creative remit and editorial direction of the BBC's channels and content.
24. In light of submissions made by the BBC in this and previous cases (FS50554121¹) the Commissioner considers that the decisions concerning retainer payments made by BBC to its highest paid staff fall under the second element explained above, editorial judgement. The information requested therefore falls squarely within the definition of journalism and the Commissioner is satisfied that the requested information is derogated.
25. 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 the purposes of journalism, art or literature.
26. In conclusion, and for all of the reasons above, the Commissioner finds that the information falls within the derogation and that the BBC is not obliged to comply with Parts I to V of the FOIA in respect of the complainant's request.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043243/fs_50554121.pdf

Right of appeal

27. 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

28. 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.
29. 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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