

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 October 2013

**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 all documents held by the BBC relating to Test Match Sofa. The BBC refused the request for information and explained the information was covered by the derogation and excluded from FOIA. It further said that if the information was not covered by derogation, it would be exempt under section 43(2) (commercial interests), section 40(2) (third party personal data) and section 42 (legal professional privilege).
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. He therefore upholds the BBC's position that the information requested is derogated 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 28 May 2013 and asked for information of the following description:  
  
*"We request disclosure under the Freedom of Information Act 2000 of all documents held by the BBC relating to Test Match Sofa, in all locations where the requested information may be found including private emails accounts, text messages on mobile phones or in any other media."*

4. The BBC responded on 21 June 2013. It stated that it believes that the information requested is excluded from the FOIA because it is held for the purposes of 'journalism, art 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 FOIA 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. The BBC also explained that if the information fell within the scope of FOIA, the information would be exempt under section 43(2), section 40(2) and section 42.

### **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, the complainant is challenging the BBC's refusal to provide the requested information.
8. The Commissioner will consider the derogation first. If the information is found to be covered by the FOIA, the Commissioner will then consider the exemptions.

### **Reasons for decision**

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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 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'.
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 Commissioner's analysis will now focus on the derogation.

12. 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)

13. 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.
14. 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.
15. 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.
16. 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'.

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. The information that has been requested in this case concerns documents held by the BBC relating to Test Match Sofa. The complainant's main argument is that the information requested does not have any genuine relationship with the BBC's output. However, the Commissioner respectfully disagrees with this.
20. When considering the purposes for which the information was held, the BBC has explained that any relevant information held in respect of Test Match Sofa would be held in order to support and inform the production and delivery of the BBC's own output. For example, the BBC explained that information about competing services would be used by the BBC's rights team to inform the process of valuation and contract negotiation for the BBC's broadcasting rights. Further to this, the information would be used by the Test Match Special production team to inform the editorial strategy for their output. From this, the Commissioner accepts there is a direct link between the requested information and the BBC's editorial making decisions. It is important here to note that Test Match Sofa is an online broadcaster which broadcasts during

international cricket Test Matches. Test Match Special is a BBC programme broadcast live from the ground where the cricket match is being played.

21. The Commissioner acknowledges the view that the BBC's programme editorial strategy will evolve over time as new competing services will emerge. The BBC's view is that there is a direct relationship between the scope of the BBC's broadcasting rights contract and the shape of the subsequent programme offering. Therefore the use of such information that has been requested in this case is integral to the BBC's journalistic purpose and therefore has a direct relationship with their output.
22. In the case FS50319445<sup>1</sup>, the complainant made a request for the contract and other documentation relating to the BBC and a production company. The Commissioner noted that the information relating to the relationship between the BBC and the other body would be likely to be used by BBC staff responsible for making editorial decisions, including the selection, prioritisation and timing of matters for broadcast and the analysis and review of individual programmes. Although the circumstances of the case in FS50319445 plainly differs from the one presented here, the Commissioner considers the findings can be extended in that the requested information would likely be used by those producing the Test Match Special programme when making editorial decisions about its content. It would also likely be used by BBC staff responsible for making editorial decisions in respect of Test Match Special that would cover the selection, prioritisation and timing of matter for broadcast and the analysis and review of individual programmes.
23. Similarly the requested information constitutes operational information which would be held and used in support of the delivery of the BBC's own output, in this instance that of BBC Sport. The Commissioner in the case FS50363389<sup>2</sup> has previously accepted that information held at this level within the BBC was indicative of the use of information in support of programme-making.
24. The Commissioner also accepts the BBC's view that Test Match Sofa is an external service competing with the BBC's own output

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<sup>1</sup> [http://www.ico.org.uk/~/media/documents/decisionnotices/2010/fs\\_50319445.ashx](http://www.ico.org.uk/~/media/documents/decisionnotices/2010/fs_50319445.ashx)

<sup>2</sup> [http://www.ico.org.uk/~/media/documents/decisionnotices/2011/fs\\_50363389.ashx](http://www.ico.org.uk/~/media/documents/decisionnotices/2011/fs_50363389.ashx)

for an audience. Leading on from this finding the Commissioner would refer to the Supreme Court in *Sugar* where it was confirmed that a reason for the inclusion of the derogation was to ensure that the public service broadcasters should not be placed at a disadvantage in relation to their commercial rivals. Specifically noting that the protection afforded by the derogation addressed the anomaly that the BBC, as a public service broadcaster, was made subject to the Act while their commercial broadcaster with whom the BBC is in competition remain outside of the Act.

25. The Commissioner has also 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."*

26. The Commissioner finds in this case that the disclosure of documents held by the BBC relating to Test Match Sofa would be likely to impinge on the BBC's editorial independence. This is because the disclosure of these documents would place the BBC at an unfair disadvantage to its commercial rivals and this supports the Commissioner's conclusions that the information is held for derogated purposes too.
27. Overall, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism. He is content that the information is held for the purposes outlined in the second and third points of the definition, namely editorial purposes and for the maintenance and enhancement of the standards and quality of journalism, which means that the information falls within the derogation.
28. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. As the Commissioner is satisfied the information requested is derogated, the exemptions cited by the BBC will not be considered. The Commissioner has found that the request is for information held

Reference: FS50506230

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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29. 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)

30. 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.
31. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**