

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 September 2021

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

Address: BBC Broadcasting House
Portland Place
London
W1A 1AA

Decision (including any steps ordered)

1. The complainant has requested information relating to editorial guidelines, copies of complaints, and the recruitment to a post that was then occupied by Professor Richard Sambrook. The BBC explained that the first two parts of the request were covered by the derogation from the FOIA. The BBC also stated that the third part of the request was exempt under section 40(2) of the FOIA but later, at review, said that the information was not held.
2. The Commissioner's decision is that the information at part one and two of the request is held by the BBC for the purposes of 'journalism, art or literature' and does not fall inside the FOIA. She therefore upholds the BBC's position and requires no remedial steps to be taken. She also accepts, on the balance of probability, that the BBC does not hold any information relating to part three of the request.

Request and response

3. The complainant wrote to the BBC on 19 June 2020 and asked for the following:

"I refer to page 50 of the BBC Annual Plan 20/21. Please

provide details and all relevant documents including but not limited to memoranda and minutes relating to the Editorial Guidelines, training and the additional guidance given to those reporting on news and current affairs...including but not limited to the brief and instructions given to those training or providing guidelines for personnel.

Please also provide copies of all complaints to the BBC about date of my last FOI Request March 26th 2020 to date and the BBC responses to the same including, but not limited to complaints about impartiality with regard to handling of the recent controversy involving Dominic Cummings and his trips by vehicle to Durham and Barnard Castle under lockdown, including but not limited to any comments by Emily Maitlis.

Please provide details and all relevant documents including memoranda and minutes relating to the decision to recruit a person to fulfil the role now occupied by Professor Richard Sambrook including but not limited to:

a. advertisements for the role now occupied by Professor Sambrook including proposed job descriptions.

b. details of all responses to those advertisements including the names and positions held of those responding.

c. minutes of the recruitment panel/panels that interviewed Professor Sambrook setting out the reasons why it was decided to offer the appointment to him.

d. all internal memoranda recommending Professor Sambrook's appointment.

e. his letter of appointment and statement of contractual employment terms or equivalent if he was appointed on a self-employed or consultancy basis.

f. all communications between the BBC, its recruitment agency (if used) and Cardiff University relating to the appointment and

g. Professor Sambrook's job description with the BBC."

4. The BBC responded on 20 July 2020 explaining that the first two parts of the request were subject to the derogation from the FOIA. The BBC also explained that it believes that the information requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature'. It

explained that Part VI of Schedule 1 to the 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.

5. The BBC explained that Professor Sambrook was not an employed member of staff and that it was withholding any information it held under section 40(2) – personal data. The letter further explained that the BBC would not offer a review for the first two parts of the request, only the third.
6. On 24 August 2020 the complainant requested a review regarding the third part of the request, although he did not agree that the derogation from the FOIA applied to parts one and two. He also made some further requests as follows:
 - i. If RS did not have employment status his status was presumably that of an independent contractor. A description of his contractual terms of engagement are therefore disclosable as was the subject of question 3e. Section 40(2) should not prevent disclosure on the same basis as if he were an employee.
 - ii. All internal memoranda recommending the appointment of a contractor are disclosable and in particular in so far as they compare the appointment of RS as opposed to another contractor to perform the work the subject of the contract.
 - iii. All communications between the BBC, any recruitment agency and Cardiff University are disclosable in that they set out the contractual terms of the contractor's engagement and the role required from him or any third party.
 - iv. It appears from your response that no public procurement procedure was undertaken prior to appointing RS. This follows as a result of there being no advertisement for the contract. Please confirm whether a procurement exercise was undertaken and supply copies of all relevant documents?

- v. Please therefore now respond to Question 3 in its entirety but on the basis that RS was appointed as an independent contractor and not as an employee.
- vi. Please confirm whether or not RS was contracted in a personal capacity or through a corporate structure.

The BBC pointed out that the complainant had made further requests but said that they would treat it as part of the internal review.

- 7. The BBC conducted a review on 30 September 2020, saying that the complainant had made new requests but that it intended to treat the new questions as part of the review. The review provided some context and explanation but stated that it did not hold information falling within the scope of the third part of the request.

Scope of the case

- 8. The Commissioner received a complaint about the way the complainant's request for information had been handled on 24 December 2020 (the letter was dated 11 December 2020). In particular, the complainant challenged the operation of the derogation in this case in relation to parts one and two of his request. The complainant also questioned the BBC's assertion that it did not hold information regarding part three of his request.

Reasons for decision

Derogation from the FOIA

- 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 in *Sugar (Deceased) v British Broadcasting Corporation and another* [2012] UKSC 4¹ 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.

¹ [Microsoft Word - Sugar v BBC.doc \(supremecourt.uk\)](#)

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 relates to editorial training and editorial decision-making.

20. 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.
21. 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.
22. The complainant suggests that parts one and two of the request relate to the "machinery" and "methodology" used by the BBC in ensuring its compliance with the BBC Charter and Communications Act 2003. The complainant argues that the FOI request does not relate to the journalistic content of the BBC programmes or editorial content and that his request has been refused on the grounds of the BBC's interpretation of Part VI of Schedule 1 of the FOIA. The complainant contends that this does not exclude the provision of information relating to constitutional, governance or compliance issues such as those contained in its editorial guidelines and complaints about impartiality as opposed to matters of journalistic content. In the complainant's view *"the BBC applied an impermissibly generous ambit to the term 'journalism'"* and went beyond the limits provided by Sugar.
23. The complainant quotes from *Sugar v BBC [2009] UKHL 9, [2009] 1 WLR 430* to support their view:

"84. I respectfully agree with the measured comments of Lord Neuberger MR² (para 55):

In my view, whatever meaning is given to 'journalism' I would not be sympathetic to the notion that information about, for instance, advertising revenue, property ownership or outgoings,

² [Microsoft Word - Sugar v BBC.doc \(supremecourt.uk\)](#)

financial debt, and the like would normally be 'held for purposes ... of journalism'. No doubt there can be said to be a link between such information and journalism: the more that is spent on wages, rent or interest payments, the less there is for programmes. However, on that basis, literally every piece of information held by the BBC could be said to be held for the purposes of journalism. In my view, save on particular facts, such information, although it may well affect journalism-related issues and decisions, would not normally be 'held for purposes ... of journalism'. The question whether information is held for the purposes of journalism should thus be considered in a relatively narrow rather than a relatively wide way."

24. The complainant's view is that the request concerned the content of the BBC's annual report and that the BBC had failed to consider the issue of the disclosure of this performance assessment material in the "narrow" way envisioned by Lord Neuberger. The complainant argues that the requested information falls within the scope of the FOIA. If not, the BBC would largely be "immune" from the FOIA "which cannot have been the intention of the legislature".
25. The BBC has explained that it holds information relating to parts one and two of the request. The information requested at part one relates directly to the production and implementation of the 2019 Editorial Guidelines across the BBC including through training. This information is held by the BBC Academy who administers such training as well as the experienced senior advisers in Editorial Policy and Standards who run face-to-face training. The BBC's view is that the information is held for training and falls outside the scope of the FOIA.
26. The information relevant to part two of the request is held by the BBC's Executive Complaints Unit ("the ECU") who determine the outcome of editorial complaints under the BBC's Complaints Framework, as well as the BBC's Audience Services Team who triage complaints received by the public.
27. The BBC argues that there is a clearly established line of authority in previous ICO decisions that affirm this approach that information held for editorial complaints and investigation purposes fall outside the scope of the FOIA and provides as examples [FS50593574](#), [FS50563849](#).
28. The BBC explains that it publishes a significant amount of information about its editorial complaints process including complaints that engage impartiality issues. Broadcasting regulator Ofcom also publishes reviews of BBC content including

its compliance with impartiality standards. The BBC contends that it must have a safe space to review editorial complaints and consider its response and decide whether, and in what form, to publish findings.

29. When considering the purposes for which the information was held, the BBC has referred to the Supreme Court *Sugar v BBC* which it says gave a wide meaning to the 'purposes of journalism' or 'output' including –

*"...first, the collecting, writing and verifying of material for publication; second, the editing of the material, including its selection and arrangement, the provision of context for it and third, the maintenance and enhancement of the standards of accuracy, balance and completeness, and the supervision and training of journalists."*³

The BBC states that the Supreme Court thereby accepted the Tribunal's tripartite definition of journalism. Both parts one and two of the request are information held under the third limb of the tripartite definition as it engages:

"...the maintenance and enhancement of the standards of the output by reviews of its quality, in terms in particular of accuracy, balance and completeness, and the supervision and training of journalists."

30. With respect to the information requested in part one, it is internal BBC correspondence and training material on journalistic rules within the BBC for producing content. The role of Editorial Policy staff who hold this information extends to reviews of editorial rules to ensure the standards are consistent with changes in journalistic practices, the law and community standards, as well as training BBC staff in how to implement principle-based rules.
31. Regarding part two of the request, BBC complaint teams use the information to understand how audiences react to BBC content; the extent to which output may infringe editorial standards; and to remedy any breaches of those standards. When considering the connection between the information itself and its output on news and current affairs and/or its journalistic activities relating to such output, the BBC has explained that disclosure of the

³ <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>

information requested at parts one and two of the request would identify internal BBC discussions about how senior, experienced staff seek to administer editorial standards across the BBC in a way that is specific to the needs of content-makers and journalists in the BBC. It argues that disclosure would undermine the important value of editorial independence which is central to the impartiality of the BBC, exposing editorial decision-making to unfair external scrutiny.

32. Overall, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism. She is content that the information is held for the purposes outlined in paragraphs 31-33 above.
33. 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 at parts one and two 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.

Section 1 – general right of access to information held by public authorities

34. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled- (a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him."

35. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held (and, if so, whether all of the information held has been provided).
36. The Commissioner asked the BBC a number of questions as to what searches it had carried out to establish whether it held the information requested at part three.

The complainant's view

37. The complainant points out that the BBC's internal review contradicts its earlier refusal notice that it did hold information but would not disclose it. It also contradicts what was said later in its review that Professor Sambrook was appointed to undertake an independent review for no payment and consequently he was not an employee so there was no material to disclose.
38. These assertions, the complainant argues, did not answer the request posed and that the BBC's interpretation has been confined solely to documents which would have related to Professor Sambrook's appointment to a paid role. The request is broad enough to justify the disclosure of documents relating to the appointment. The process of his appointment to undertake the independent review clearly generated documents, not least the "Terms of Reference" specifically referred to by the BBC and the arrangement fees to be paid for Professor Sambrook's researchers at Cardiff University must have generated some paperwork

The BBC's view

39. The BBC said that the request had misunderstood the circumstances of the appointment, assuming a public recruitment exercise was undertaken.
40. It also stated that it had provided a thorough response in the internal review. The reviewer had liaised with senior members of the BBC's Editorial & Standards team and BBC News and Current Affairs. The BBC provided an explanation of the circumstances that gave rise to Professor Sambrook's appointment:

"The BBC asked Richard Sambrook, Professor of Journalism at Cardiff University, to undertake an independent review of social media used by staff and freelance contributors in BBC News and Current Affairs on both their official BBC and personal media accounts. In particular, Professor Sambrook was asked to assess current practice and adherence to BBC editorial and and social media guidelines; to assess the reputational risks and benefits to the BBC; to review the approach taken by relevant industry comparators; and to suggest ways in which the BBC might improve the use of social media by the BBC and its employees, both staff and freelance.

Professor Sambrook undertook the appointment as an independent expert.

Professor Sambrook has significant experience in editorial analysis and journalism, having served as, amongst other roles, Director of BBC News. He has a particularly unique profile and experience for this type of work. Given this, a decision was made to appoint him directly and so the position was not advertised. Professor Sambrook elected to undertake the appointment for no fee but worked with researchers at Cardiff University who were paid a small fee by the BBC for their expertise in assisting Professor Sambrook.

Professor Sambrook was engaged under Terms of Reference rather than a letter of appointment or by reference to a job description.

The BBC does not hold any records that fall within the scope of your request about this decision-making process."

41. After the Commissioner began her investigation the BBC again looked at whether this information was held. For a second time senior representatives were contacted who confirmed that searches need not be conducted as the request had misunderstood the way in which Professor Sambrook was appointed. In the interests of completeness email searches of a senior news staff member involved in Professor Sambrook's appointment was completed by reference to the Professor's name and no relevant information was produced.
42. The BBC explained to the Commissioner that it has a Records Management Policy and Corporate Retention Schedule which identify minimum retention periods for HR documents such as terms of engagements, such records were not created here as explained in its internal review, and so do not apply.

The Commissioner's view

43. The Commissioner went back to the BBC after she received its response. She questioned whether the BBC had undertaken a thorough search and suggested that it do so again.
44. The BBC declined to do so, explaining that the reason it had not undertaken searches, other than the one outlined in paragraph 43, is because the recruitment was conducted verbally between senior staff members and Professor Sambrook.

45. The Commissioner also queried whether the "*Terms of Reference*" might fall within the scope of the request but the BBC's view was that these "*terms*" outlined the scope of the social media report. In other words, as the Commissioner understands it, these were not an appointee's "terms of engagement" but the "terms of reference" or instructions that needed to be adhered to. The BBC's view is that the scope of the request is "the decision to recruit". Therefore the "*Terms of reference*" do not fall within scope. The Commissioner accepts this view.
46. She also accepts that, on the balance of probability, no other information is held, though this may be difficult to understand for individuals outside the BBC. However, whether a public authority should hold information is not part of the Commissioner's remit. She does consider that it would have been more helpful if the BBC had explained at a much earlier point to the complainant or the Commissioner that the appointment had been made verbally. It was explained at internal review that the Professor had been "*asked...to undertake an independent review*" but this does not make it clear that the entire recruitment was conducted verbally.

Right of appeal

47. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

48. 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.
49. 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

Janine Gregory
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