

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 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 financial support for an external organisation, Comic Relief. 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 24 March 2019, the complainant wrote to the BBC and requested information in the following terms:

'I would like to request the following information under The Freedom of Information Act and The Environmental Information Regulations.

I believe the derogation does not apply in this instance because I am trying to find out the extent of the BBC's financial support for an outside organisation – in this case Comic Relief.

Comic Relief is not an off shoot of the BBC. On the contrary it is an independent charity with its only [sic] Chief Executive and board of trustees. License fee payers have the right to know how The BBC is using public funds to support the work of this organisation.

I believe the case for disclosure is heightened by the controversy surrounding many of the charity's activities. You will be aware that the Labour MP David Lammy has criticised the way charity portrays Africa. Others members of parliament have criticised what they fear is a new anti Conservative Government bias creeping into the charity's work.

1...Does the BBC hold written documentation which details the extent of its financial support for Comic Relief. This documentation will detail the amount spent on individual Red Nose Day Appeals, for instance the Red Nose Day appeal broadcast on Friday 15 March 2019 as well as the specially themed Comic Relief programmes and events broadcast in the run up to that appeal.

2...If the answer to the above question is yes can you please detail how much The BBC has spent and or is expected to spend on the following three Comic Relief Appeals. (2019, 2017, 2015.). Please include the costs associated with the appeal night itself and the cost of those specific Comic Relief branded/themed programmes and events broadcast in the run up to the appeal. Eg The 2019 figures will include the amount spent by The BBC in planning, arranging, casting and broadcasting the celebrity climb of Mount Kilimanjaro.

3...Has Comic Relief itself ever made a financial contribution to the BBC to cover the cost of the BBC's Red Nose broadcasts and other Red Nose events organised and broadcast by the BBC. If the answer is yes can you please provide details as they relate to the Red Nose Day appeals 2015, 2017, 2019.

4...Since January 1 2018 have any of the following Comic Relief employees and representatives written to Charlotte Moore, the current Director of Content about the extent of the BBC's financial support for Comic Relief, its Red Nose Day appeals and related events.

a...Liz Warner, the Chief Executive of Comic Relief.

b...Richard Curtis, co-founder and trustee.

c...Sir Lenny Henry, co-founder of the charity.

d...Tim Davie, the current chair of the charity who is also a BBC employee.

If the answer is yes can you please provide copies of this correspondence and communication including emails.

5...Since January 1 2018 has Charlotte Moore written to any of the Comic Relief employees and representatives mentioned in the previous question about the extent of the BBC's financial support for Comic Relief and its Red Nose Day appeals and related events.

If the answer is yes can you please provide copies of this correspondence and communication including emails.'

4. On 16 April 2019 the BBC confirmed 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 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. It also explained the following about the charity:

'The charity Comic Relief is not a BBC entity and is not covered by the Freedom of Information Act. More information about the registered charity is available at the following link: <https://www.comicrelief.com/>

There is information on the Comic Relief website which explains their 'Operating Income and Expenditure Statement' which explains how Comic Relief is run, which is available at the following link: <https://www.comicrelief.com/about-comic-relief/finances>

Comic Relief have also provided the following information:

"The Kilimanjaro challenge was funded from Comic Relief's operational budget, which does not include public donations. The costs were covered in cash, or in kind, by support from corporate sponsors and donors, by generous private donations and by Government (including Gift Aid) as well as from investment income and interest. Many items of technical kit and clothing were donated by suppliers. No money donated directly by the public was used to fund the project."

7. On 16 April 2019 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 as the BBC's working relationship with Comic Relief is unique.
8. In response to the Commissioner's letter of 7 May 2019, the complainant argued that

'The BBC's commitment to the bi-annual Comic Relief appeal isn't limited to a single programme ... I am seeking information about the total amount spent on each of the last three Red Nose Day appeals. I believe the derogation should not be used to conceal information about

the use of public funds particularly when the request specifically does NOT include the cost of individual programmes or payments to any individual presenters.

Having said that The ICO itself has previously ruled that some information relating to the costs of individual BBC programmes should be disclosed. Could I also refer you to Decision Notice FS50102474 issued on 11 December 2006. The request was about the costs relating to the annual Children In Need Appeal. On that occasion The Commissioner ruled that costs and payments should be disclosed. ...

My original request for information was made under both The Freedom of Information Act and The Environmental Information Regulations (EIRs.). I am not sure to what extent the aforementioned court case covers The BBC's obligations under the Environmental Information Regulations. Clearly some of the relevant information held is likely to be environmental (for instance the causes of famine?) or is likely to have implications for the environment? eg the methods of transport (including air travel) used to fly BBC/Comic Relief staff overseas.

I reiterate that the primary function of The BBC's Comic Relief programming is to raise money for a third party organisation. In its annual report Comic Relief acknowledges that The BBC's support is a valuable donation to the organisation, albeit one that it claims it can't quantify. I mention this only to reinforce my point that The BBC is devoting licence fee funds to support a third party organisation which is independent from The BBC and which contrary to what some people believe is not an off shot of BBC Light Entertainment. I would argue that Comic Relief's admission that it can't quantify the level of the support only increases the obligation on The BBC to declare a figure. How else can the public judge whether it is right to devote so much of the licence fee to the organisation.'

9. On 22 July 2019 the Commissioner invited the BBC to provide its more detailed arguments about why it believed that the information requested falls within the derogation.

Background

10. The BBC provided a background to the requested information to clarify that the BBC does not provide any financial support to the independent charity, Comic Relief.
11. A key assumption in the complainant's overall request is that the BBC provides financial support for Comic Relief, which it does not, and therefore the information the complainant has sought in his 5 - part request is not held by the BBC.

12. The BBC referred to its Editorial Guidelines (<https://www.bbc.com/editorialguidelines/guidance/charitable-appeals>) to explain that it has a long-standing broadcast partnership with Comic Relief and other similar fundraising initiatives such as BBC Children in Need and Sport Relief.
13. For Comic Relief, the BBC schedules a season of programming across a range of channels and platforms within a specific time period, usually from mid-January until March culminating in Red Nose Day.
14. The BBC's coverage and programming in relation to Comic Relief is no different from any other BBC programming or commissioning and any costs are subsumed as part of the BBC's own programmes and production budgets.
15. The BBC concluded that *'to the extent that information has been requested in relation to programmes and production costs associated with Comic Relief appeals, we submit that this information is held for derogated journalistic purposes... In addition, given that the programming is across multiple platforms at a network, regional and local level, we further submit that even if the information was not held for the purposes of journalism, this broad request would likely exceed the appropriate cost limit under the FOI Act.'*

Scope of the case

16. The Commissioner notes that the complainant argues that some of the information requested could be covered by the Environmental Information Regulations (EIR). Regulation 2(2)(b)(i) provides that any public authority which is only a public authority under the FOIA in respect of certain information is not automatically a public authority for the purposes of the EIR. The Commissioner refers to her guidance (<https://ico.org.uk/media/for-organisations/documents/1623665/public-authorities-under-eir.pdf>) - *'under Schedule 1 the BBC is only listed as a public authority in respect of information held for purposes other than journalism, art or literature. Therefore it is not a public authority under the EIR under this heading.'*
17. Therefore the Commissioner considers the scope of the case is to determine if the requested information is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

Reasons for decision

18. 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."

19. 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'.

20. 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.

21. 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)

22. 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.
23. 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.

24. 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.

25. 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'.

26. 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 associated with Comic Relief appeals.

27. The complainant's request for programming and production costs associated with the Comic Relief fundraising appeals is well within the expected remit for the purposes of creating content and producing output.

28. The BBC have explained that its coverage of Comic Relief culminates in an evening of comedy and entertainment, scheduled largely on BBC

- One. During the specified campaign period, (mid-January-March) the BBC broadcasts specially commissioned programmes or special strands within existing programmes that raise awareness of the Comic Relief appeals across the whole range of BBC outlets. For example in recent years the independent company, Love Productions, was commissioned by BBC Content to make a special series of The Great British Bake Off.
29. The costs associated with charity appeal broadcasts are subsumed as part of programme budgets and therefore this information is held by the various individual programme areas and channels, both across the BBC network and at a regional and local level. In addition, the BBC's Commercial, Rights and Business Affairs team in BBC Content holds details of the agreed commissioning budget for BBC Studios to co-produce a range of programming for the BBC during the period from January-March.
30. The BBC considered that the requested information falls within the second limb of the Information Tribunal's definition of journalism. (editorial - see paragraph 25 above) *'Information about programme costs and budgets is used by commissioners, controllers and other business leads to inform decisions about how they commission content, and the editorial and creative remit and direction of channels and programmes. In particular, information about the costs associated with one programme influences decisions that are made about the broader allocation of resources across other content.'*
31. The Commissioner has previously accepted that any decision taken on costs has a direct impact on the creative scope for the programme and for other programmes because more money spent on one area or one programme means less available for another. The Commissioner recognises that the decision to broadcast fundraising appeals (in this case Comic Relief) relates to editorial decisions about the content that the BBC wants to offer its customers and this in turn relates to the overall editorial decision making process and resource allocation. It is therefore intimately linked to the corporation's output and it is clear that the Commissioner has no jurisdiction in this matter.
32. The Commissioner has accepted on a number of occasions (such as in case reference [FS50314106](#)) 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 applies in this case.
33. The Commissioner notes that the complainant referred to a decision notice (FS50102474) from 2006 which is before the Supreme Court ruling of 2012 and is now inconsistent with the well-established precedent that production and programme budgetary information is derogated.

34. 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 journalistic purposes. The conclusion reached by the Commissioner is also consistent with previous decision notices.
35. In conclusion, and for all of the reasons above, 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.

Right of appeal

36. 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

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

37. 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.
38. 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

Pamela Clements
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