

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 October 2011

**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 information about the composition of the audience of a particular episode of Question Time and the criteria used to choose it. The BBC explained the information was covered by the derogation and excluded by the Act.
2. The Commissioner's decision is that this information was held by the BBC genuinely for the purposes of journalism and did not fall inside the Act. He therefore upholds the BBC's position and requires no remedial steps to be taken.

### Request and response

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3. On 6 June 2011 the complainant made the following seven part request for information to the BBC [its focus was on how the audience was chosen for BBC Question Time in Wrexham on Thursday 2 June 2011]:
  1. *Breakdown of home addresses of the audience into post codes (first 2 letters and first 2 numbers only) i.e LL11, SY10 or CH11.*
  2. *Total number of people in the audience?*
  3. *Total number of people who identified as Labour, Plaid Cymru, Conservative, Liberal Democrat, Green, UKIP, BNP, Other.*
  4. *Total number of people in the audience who did not identify with a political party.*

5. *Total number of people in the audience who spoke Welsh?*
  6. *The BBC's criteria for selecting the audience for Question Time;*
  7. *If one of the criteria is a knowledge of public affairs in the week before the programme, did a knowledge of Welsh devolved public affairs play and [sic \*an] equal part in selecting the audience.*
4. The BBC responded on 30 June 2011. It 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 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'.
  5. It explained 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 its creative activities. It explained that this information was held for those purposes, that it was not required to provide the requested information under the Act and would not do so. However, it did provide general information about how the audience was chosen and how applicants are chosen. It also explained that it did not claim that in any one programme that the audience was 'representative' and that it aimed to achieve balance across a series of episodes.

## Scope of the case

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6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he challenged the operation of the derogation in this case. He explained that he considered that the information that he asked for was administrative or factual and that the need for transparency and accountability ought to be determinative in this case.

## Reasons for decision

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7. Schedule one, Part VI of the Act provides that the BBC is a public authority for the purposes of the Act 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 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'.
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 Commissioner's analysis will now focus on the derogation.
10. The scope of the derogation has been considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715. The leading judgment 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 Commissioner considers that it follows from this that if the information is genuinely held for any of the three derogated purposes – i.e. journalism, art or literature - it is not subject to the Act. His role is to consider whether the information was genuinely held for the derogated purposes or not.
12. With regard to establishing the purpose for which the information was held, Lord Neuberger of Abbotsbury MR (at paragraph 55) drew a distinction between information which had an effect on the purposes of journalism, art or literature and information that was actually being held for one of those purposes. Based on this judgment the Commissioner considers that for information to be held for a derogated purpose it is not sufficient for the information to simply have an impact on the BBC's journalistic, artistic or literary output. The BBC must be using the information in order to create that output, in performing one of the activities covered by journalism, art or literature.
13. The Court of Appeal adopted the tribunal's definition of journalism which set out that journalism comprises three elements.

*"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."*

14. The information that has been requested in this case can be split into two categories:
  1. information about the composition of the audience for a given programme, which was used in monitoring the audience's profile over a series of programmes (parts 1 to 5 of the original request); and
  2. information about how that audience was selected and the criteria that were used (part 6 and 7 of the original request).
15. The Commissioner will explain for each category why he is satisfied that the information was held for derogated purposes.
16. He has considered all of the information before him, but for conciseness he has focussed on explaining why he considers that the information requested falls within the derogation. He has also considered two previous cases about the production of Question Time and the complaints received about it (**FS50311665** and **FS50319445**) and he has considered the BBC's arguments in those cases where they are also relevant for the information requested in this one.

#### *Category one*

17. In light of submissions made by the BBC in previous cases and mentioned in the refusal notice, the Commissioner considers the second element of journalism within the definition above - the editorial process - as relevant in this case. The audience is a crucial component of an interactive question and answer panel show. Information about the composition of the audience would be used by the editors of it to ensure that the selection and balance of it reflected the output objectives of the programme. It will continue to be held to assess the success or otherwise of such a selection and to inform the planning process for future programming. This is particularly so in relation to Question Time because the editorial objective is to ensure that there is balance over the series of programmes. To enable this balance to be judged, the information is necessary for the editor to use to inform allocation decisions about future programmes. The Commissioner therefore

considers that there is a relationship between it and the derogated purposes.

18. It is necessary to consider whether information was still held genuinely for the purposes of journalism on 6 June 2011 (four days after the programme was broadcast). It is not material whether the information is also held for other purposes too, providing that it is held genuinely for the purposes of journalism.
19. To support his analysis, the Commissioner considers that the status of information should be judged against the following three key criteria:
  - The purpose for which the information was created;
  - The relationship between the information and the programmes content which covers all types of output that the BBC produces; and
  - The users of the information.
20. The information that has been requested relates to the information used for audience selection by the BBC or Mentorn (a third party production company who is contracted by the BBC). It was created to enable the BBC to choose an appropriate audience and was kept to ensure that its audience selection was appropriate in future programming. It follows that this criterion supports the BBC's contention that the information was held for the purposes of journalism.
21. The second criterion also favours the BBC. The audience is a key part of an interactive show where their questions and answers are the foundation of the programme. There is a real relationship between this information and the content. This relationship continues considering that the balance of the audience is assessed on an ongoing basis in order for there to be balance in the series of programmes as a whole.
22. The third criterion also favours the BBC. The users of this information are the editors responsible for coordinating the creative output of the show. For the same reasons as above, the relationship continues beyond the time that the programme was broadcast.
23. It follows that the Commissioner supports the BBC in its view that this category of information is held for one of the derogated purposes – journalism. It is not therefore caught by the Act.

#### *Category two*

24. The second category of information concerns the criteria used by the relevant individuals to choose the audience for the programme. The Commissioner understands that the BBC must carefully consider

situations when there is a live audience in order to ensure that the uncertainty of output is managed. The public anticipates the BBC to have output with participating audiences and this inevitably requires editors to establish audience selection policies and procedures.

25. It follows that the Commissioner is also satisfied that the information used to select the audience on 2 June 2011 was held for the purposes outlined in the second part of the definition of journalism – the editorial process. The information was held for the purposes of journalism because it was used by the editors in 'the selection and prioritisation of matters for broadcast' and continues to be used for the same purpose. It will be used in the decision making process of editors for the production of future programming output and will inform audience allocation decisions in future programmes.
26. The Commissioner also considers that the information would also be used when considering the enhancement of the standards and quality of journalism which fell within the third paragraph of the Tribunal's definition of what 'journalism' means. This is particularly so if the BBC receives editorial complaints about potential bias in audience selection and this adds further weight to the fact that the information was being used for journalistic purposes.
27. It follows that the Commissioner supports the BBC in its view that this category of information is also held for one of the derogated purposes – journalism. It is not therefore caught by the Act
28. The Court of Appeal explained that the limited coverage of the BBC was justified to ensure editorial independence. The BBC has pointed out that information about content is often controversial and the disclosure of this sort of programme information would place the BBC at an unfair disadvantage to its commercial rivals and this further supports the Commissioner's conclusions that the information is held for derogated purposes.
29. The Commissioner has also considered the complainant's comments that the information sought is merely administrative or factual. Unfortunately, this argument cannot be given any weight because it does not relate to the issue that the Commissioner is required to decide which is whether the information requested is held for the derogated purposes or not.
30. Similarly, while the Commissioner appreciates that transparency and accountability are the key principles of the Act, they cannot be taken into account when considering whether or not information is held for a set purpose or not.
31. For all of the reasons above, the Commissioner is therefore satisfied that all of the information requested is derogated. Therefore, the

Reference: FS50401168

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 the Act.

## Right of appeal

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32. 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)

33. 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.
34. 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**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**