

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 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)

1. The complainant has requested information on the use of payment arrangements to personal service companies by BBC Look North. The BBC explained that 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. He therefore upholds the BBC's position.
3. Section 10 of the FOIA provides that a public authority should respond to a request for information within 20 working days. The Commissioner has found a breach in this case because the public authority did not respond within 20 working days to the second question in the request. The Commissioner requires no steps to be taken.

Request and response

4. The complainant wrote to the BBC on 19 April 2013 and asked for:

'Generally, how many payment arrangements to personal service companies has BBC Look North been engaged with in the last five years?

How many of those arrangements has BBC Look North either ended or is in the process of ending as a result of the Deloitte review?'

5. The BBC responded to the first question on 17 May 2013 and after the intervention of the Commissioner, the BBC answered the second question on 25 July 2013. In answer to both questions, the BBC 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.'
6. 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.

Scope of the case

7. The complainant contacted the Commissioner on 20 May 2013 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 argued that the number of payment arrangements with personal companies does not have a direct link with journalistic output. He also argued that 'the budgetary effect is the same' if the figure paid is to a personal service company or by another method of payment.

Reasons for decision

8. 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."

9. 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'.
10. 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.

11. 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." 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'."
16. 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.
 17. The information that has been requested in this case is the number of payment arrangements to personal service companies by the programme BBC Look North and the number of such payments that have ended as a result of the Deloitte review.
 18. The Commissioner wrote to the BBC on 11 July 2013 advising that the second question had not been answered. The BBC contacted the complainant on 25 July with a response to his second question. The Commissioner also asked for detailed arguments which were provided on 14 October 2013.
 19. The BBC has explained that there are a variety of payment structures to help manage the high level of flexibility required to meet 'production and broadcasting demands' with many individuals working on a freelance/self-employed basis.
 20. The BBC uses freelancers 'to provide creative flexibility in a way that allows the BBC to manage creative and editorial renewal with ease; to provide value for money so that freelance workers are only engaged and paid for the time they are needed for a programme; and to secure the best talent in a competitive market place where talent have a broad portfolio of work across the industry and will only offer their services as freelancers'.

21. Freelancers include individuals engaged in both on-air and off-air roles in production and are not employees – 'they are responsible to HMRC for their own tax and NI payments'. Some individuals are contracted via Service Company contracts and 'the service company is responsible for paying tax and NI for the worker, if appropriate'.
22. On 7 November 2012, the BBC announced changes to its freelance contracting arrangements as a result of a review conducted by Deloitte LLP and the BBC's own internal audit department covering all on-air and off-air individuals contracted. Changes to off-air freelancers will take effect from October 2013 and the criteria for on-air presenters is being finalised with HMRC.
23. In light of this submission from the BBC, the Commissioner understands that the type of payment arrangements is directly linked to the flexibility required to meet production and broadcasting demands for BBC output.
24. The Commissioner has considered all of the information before him, but for conciseness he has focussed on explaining why he has decided that the information requested falls within the derogation.
25. 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.
26. When considering the purposes for which the information was held, the BBC explained that all off-air freelancers in production roles are engaged using a two-stage process: negotiation and then issuing a contract. The initial contact for the negotiation is 'closely related to the production itself...one of the scheduling team working to the direction of the producers of a programme'. Once it has been agreed that the freelancer is available and the details of activity, time and fee are agreed, the second stage starts – the details are entered on to the BBC system and a contract is issued.
27. The BBC quoted decision notice case reference [FS50253117](#) as relevant to this case. It argued that information about modes of payment and contract end dates are details necessary to determine the availability of individuals to work on particular programmes. Also,

any relevant contract and payment information would itself only be held as the result of earlier editorial decisions 'to employ those individuals to work on BBC output.' (see paragraph 18)

28. In other decision notices [FS50356183](#) and [FS50275712](#) the principle of holding operational information (conditions of employment) for future planning of programmes may not have been the sole purpose for holding the information but the refusal of the BBC to provide the information was upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation.
29. The complainant argued that the number of payment arrangements with personal companies does not have a direct link with journalistic output and that 'the budgetary effect is the same' whether the figure paid is to a personal service company or by another method of payment. However, the BBC has provided arguments to show that the type of payment arrangements is directly linked to the flexibility required to meet the production and broadcasting demands for the Look North programme.
30. For all of the reasons above, the Commissioner is therefore satisfied that the information requested is derogated. Therefore, the Commissioner has found that the requests are for information held for the purposes of journalism and that the BBC was not obliged to comply with Parts I to V of FOIA.
31. Section 10 of the FOIA provides that a public authority should respond to a request for information within 20 working days. The Commissioner has found a breach as the BBC did not respond within 20 working days to the second question in the request.

Right of appeal

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

Website: 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
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