

Freedom of Information
Internal Review decision

Internal Reviewer	Lawyer – Legal Workplace and Information Rights
Reference	IR2017038/ RFI20170560
Date	26 June 2017

Requested information

On 14 April 2017 Mr Janik made a request through the website whatdotheyknow.com for information under the Freedom of Information Act 2000 (“the FOIA”):

- (1) Please supply a summary of information held by the BBC on the subject of a reduced license fee for those on long-term or permanent means-tested state provided benefits. Examples of such persons would include elderly in receipt of guaranteed pension credit and disabled persons.*
- (2) Does the BBC oppose or support the principle of reduced TV Licence fees for those in receipt of means-tested state benefits?*
- (3) Does the BBC accept those on means-tested state-provided benefits are poor and not in receipt of excessive, by decency standards, and disproportionately high payments of license payers money ?*
- (4) With which government department and parliamentary select committee could this idea be pursued?*
- (5) Why is BBC London News weekday late evening repeat (series) recording function usually omitted from the programme guide provided by the company partially owned by the BBC? It is always present for the early evening bulletin, so too for the 22:00 BBC 1 news.*

The BBC responded on 23 May 2017:

Question 1

A number of television licence concessions exist. Blind (severally sight impaired) people are eligible for half price licences and all people over the age of 75 are eligible for free licences. The recent BBC Charter Review settlement established that Government will transfer responsibility for the cost of the over 75s concession and the policy determining eligibility. The policy transfer has subsequently been put

into statute by the Digital Economy Act 2017 and will take effect from 1 June 2020. As it has confirmed publicly, the BBC has commissioned Frontier Economics to look at options around the existing TV licence concession available to over 75s - but it is not yet in receipt of the final deliverable from Frontier Economics' work.

Questions 2 – 4

Please be advised that the Freedom of Information Act gives a general right of access to all types of recorded information held by public authorities. As this is not a request for recorded information, and we are not required to create new information to respond to a request, or give a judgement or opinion that is not already recorded, we cannot provide the information in your request.

Question 5

The information you have requested is excluded from the Act because it is held for the purposes of 'journalism, art or literature.' The BBC is therefore not obliged to provide this information to you and will not be doing so on this occasion. 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'. The BBC is 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.

The limited application of the Act to public service broadcasters was to protect freedom of expression and the rights of the media under Article 10 European Convention on Human Rights ("ECHR"). The BBC, as a media organisation, is under a duty to impart information and ideas on all matters of public interest and the importance of this function has been recognised by the European Court of Human Rights. Maintaining our editorial independence is a crucial factor in enabling the media to fulfil this function.

That said, the BBC makes a huge range of information available about our programmes and content on bbc.co.uk. We also proactively publish information covered by the Act on our publication scheme and regularly handle requests for information under the Act.

Mr Janick requested an internal review of the BBC's Decision on 23 May 2017:

Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request an internal review of British Broadcasting Corporation's handling of my FOI request 'BBC TV Licensing: Reduced charges for means-tested benefit recipients'.

My (5) was not a request for "journalism, art or literature." It was about the activities of a private company owned, 50% ?, by the BBC which the BBC uses to technically alter, without the knowledge and without the prior consent of persons using a digital television or digital television recording device, the contents of the computer memory on those devices.

I asked "Why is BBC London News weekday late evening repeat (series) recording function usually omitted from the programme guide provided by the company partially owned by the BBC? It is always present for the early evening bulletin, so too for the 22:00 BBC 1 news."

The BBC has a duty under the Act to assist (section 16) which the BBC overlooked.

The substance of my (5) was the technical delivery of a pre-paid service (meaning the compulsory TV tax of which the BBC wastes tens of millions every year on frivolities - all in secret from the public).

The BBC's weak, lamentable and inadequate excuse of "journalism, art or literature." does not effect the technical delivery of its service on terrestrial digital television. That technical delivery is entirely independent of "journalism" or "art" or even "literature" unless the BBC is claiming, on very dubious grounds, that the technical manual relating to the technical delivery of that technical service is indeed a Work of Art compatible with outstanding literature or honestly classed as "literature" worthy of studying in schools or even in universities.

The BBC failed to apply the Act section 16 to my (2) and (3).

My (2) was "Does the BBC oppose or support the principle of reduced TV Licence fees for those in receipt of means-tested state benefits?"

My (3) was "Does the BBC accept those on means-tested state-provided benefits are poor and not in receipt of excessive, by decency standards, and disproportionately high payments of license payers money ?"

In the context of the BBC's answer to my (1), it would have been useful, helpful and pursuant to section 16 to indicate whether my (2) and (3) were included in the remit (currently kept secret by the BBC) of Frontier Economics' review. May I therefore invite the BBC to have another go and state either the full remit of the Frontier Economics review or whether or not such my (2) and (3) concerns are included or excluded from that review?

(10) A full history of my FOI request and all correspondence is available on the Internet at this address:

https://www.whatdotheyknow.com/request/bbc_tv_licensing_reduced_charges

Issues on review

The scope of this internal review is limited to considering:

- i) In relation to requests 1-3, whether the BBC correctly decided to withhold the requested information under section 22 of the FOIA;
- ii) In relation to requests 1-3, whether the BBC correctly acted in accordance with its duty under section 16 to provide reasonable advice and assistance to Mr Janik; and

- iii) In relation to requests 5, whether the BBC correctly applied the derogation in finding that the requested information fell outside the scope of the FOIA.

The information requested in request 4 was not the subject of the applicant's request for an internal review.

Decision

I confirm the BBC's following decisions:

- i) The BBC decides not to disclose information requested in requests 1-3 under section 22 of the FOIA as it is intended for future publication;
- ii) The BBC acted in accordance with its duty under section 16 to provide the applicant with reasonable advice and assistance in respect of requests 1-3; and
- iii) The BBC decides not to disclose information requested in request 5 as it is held for purposes related to 'journalism, art or literature' and is therefore out of the scope of the FOIA.

Question 1

The BBC intends to publish the Frontier Economics report (the "report"). At this stage, the BBC aims to publish the Review in August 2017.

The BBC proactively published information about this report. On 25 January 2016 the BBC published a story about the report on its website:

<http://www.bbc.co.uk/news/uk-35397783>

Section 22(1) provides that information is exempt information if:

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*
- (b) the information was already held with a view to such publication at the time when the request for information was made, and*
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).*

ICO Guidance provides that for the exemption to apply, the public authority must have a 'settled expectation' that the information will be published at some future

date.¹ Further, the intention to publish the requested information must pre-date the request. The Guidance explains that there need not be a 'fixed publication date' to be in place in order to apply the exemption.²

Given that the BBC intends to publish the requested information at a future date, it is reasonable for the BBC to decide that the information is subject to section 22 of the FOIA. This is sensible given that the report will be finalised in the coming months so any early publication could undermine the integrity of the report.

Public Interest

Section 22 is a qualified exemption. This means that the BBC must consider whether the public interest in maintaining the exemption is greater than the public interest in disclosing the information.³

Public interest arguments in favour of disclosure

There is a public interest in the BBC promoting accountability and transparency in its work. This is underscored by the fact that the BBC is publicly funded through the licence fee.

Public interest arguments in favour of maintaining the exemption

There is public interest in maintaining the exemption where rushing publication of a report intended for future publication could rush the conclusion of a report and in turn undermine the rigor of the report. Further, it may not provide the authors of the report with a fair opportunity to plan for, and manage, the release of the report. ICO Guidance provides public authorities with the scope to consider whether 'it is the right decision to manage the availability of the information by planning and controlling its publication'.⁴ Given the importance of the subject matter of the report, the BBC decides there is a strong public interest in allowing the authors of the report to complete the report in a way that does not risk the integrity of the report's findings.

¹ <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>, para 5.

² Ibid, para 12.

³ Ibid, para 28.

⁴ Ibid, para 25.

Balance of public interest arguments

On balance, it is in the public interest to maintain the exemption as publishing information that is intended for future publication before it has been finalised may risk jeopardising the integrity of the report.

Questions 2 -3

In the original response to this request, the BBC stated that it did not hold the information requested in questions 2-3.

The Frontier draft report looks at a range of options for reform of 'free' licence fees for those aged over 75s only. As the report has not yet been completed, the BBC has not decided what reform option to pursue. Without prejudicing the outcome of the report, to the extent that the Applicant's questions may be addressed by that report, this information may also be subject to section 22 of the FOIA.

Section 16

Section 16 of the FOIA requires public authorities to 'provide advice and assistance, so as it would be reasonable to expect the authority to so do, to persons who propose to make, or have made, requests for information to it'.

In its original response to the applicant, the BBC replied that the requested information was not held as it had not been recorded. The information requested in questions 2-3 pertains to policy positions that may be formulated as a result of the findings of the report. In the circumstances at the time the BBC's response was written, it was reasonable for the BBC to conclude that it did not hold the information as the report had not been concluded. The response was therefore reasonable in those circumstances.

To further assist the applicant, the BBC also points to previously published information about the policy of funding the licence fees of over 75 year olds:

<http://www.bbc.co.uk/news/uk-politics-33414693>

The TVL website also contains information about payment of a licence fee for over 65s:

http://www.tvlicensing.co.uk/check-if-you-need-one/for-your-home/aged-74-and-over-aud3?WT.mc_id=r009&x=0

Question 5

The information requested in question 5 is held by the BBC for purposes directly related to 'journalism, art or literature'.

The test to be applied

Part VI of Schedule 1 of FOIA provides that information held by the BBC and other public service broadcasters is only covered by the FOIA if it is held for 'purposes other than those of journalism, art or literature'.⁵

One of the main policy drivers behind the limited application of the FOIA to public sector broadcasters was to protect freedom of expression and the rights of the media under Article 10 of the European Convention of Human Rights. Article 10 states that:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

The BBC's core purpose is that of public service broadcasting; a key function within this is the duty to impart information and ideas on all matters of public interest and to provide services which inform, educate and entertain. Maintaining our editorial independence is a crucial factor in enabling the BBC to fulfil this function.

The ICO recognised the importance of Schedule 1 of the FOIA in protecting the independence of the media, stating that:

*"It is the Commissioner's view that the ultimate purpose of the derogation is to protect journalistic, artistic and literary integrity by carving out a creative and journalistic space for programme makers to produce programmes free from the interference and scrutiny of the public. This position is consistent with the Human Rights Act 1998, as it could be argued that the invasion of this space is a restriction on the programme maker's ability to exercise free speech".*⁶

In determining whether the disputed information is held for the purposes of journalism, art or literature, the appropriate test to be applied by the Information Commissioner is whether there is '*any sufficiently direct link between the BBC's holding of the information and the achievement of its journalistic purposes*'⁷ having regard to the '*the proximity between the subject-matter of the request and the BBC's journalistic activities and end-product*'.⁸

In applying this test, the Information Commissioner should have particular regard to:

⁵ Schedule 1, Freedom of Information Act 2000.

⁶ Sugar v The Information Commissioner (EA/2005/0032), access at: <http://www.informationtribunal.gov.uk/DBFiles/Decision/i186/sugar%20derogation.pdf>

⁷ Sugar v BBC [2012] 1 WLR 439, per Lord Brown, at 469 (§106).

⁸ Ibid, per Lord Walker, at 464 (§83).

- (i) The legislative objective of the exclusion, as emphasised by Lord Walker at §78 in *Sugar v BBC*:

*“... public service broadcasters, no less than the commercial media, should be free to gather, edit and publish news and comment on current affairs without the inhibition of an obligation to make public disclosure of or about their work in progress. They should also be free of inhibition in monitoring and reviewing their output in order to maintain standards and rectify lapses.”*⁹

- (ii) The tripartite analysis of the Information Tribunal, as it then was, about the meaning of ‘journalistic activity’ at §§107-109 of its decision in *Sugar* was endorsed by all three appellate courts:

“The first is the collecting or gathering, writing and verifying of materials for publication.

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.

*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.”*¹⁰

As Lord Walker went on to emphasise, the effect of the statutory construction is that *‘there are only two categories: one is information held for purposes that are in no way those of journalism, and the other is information held for the purposes of journalism, even if it is also held for other (possibly more important) purposes’*.¹¹

Therefore, should the BBC to hold the disputed information for editorial and also other purposes, for example, strategic purposes the derogation would still apply. In summary, the BBC is required to outline why we hold the requested information and how this information forms a sufficiently direct link with the BBC’s journalistic output.

Purpose for which the information is held and its connection to the BBC’s journalistic output

The requested information falls within the second limb of the Information Tribunal’s analysis in *Sugar* at §§107-109. Whether to provide the recording function on

⁹ Ibid, per Lord Walker, at 462 (§78).

¹⁰ *Sugar v The Information Commissioner* (EA/2005/0032), access at: <http://www.informationtribunal.gov.uk/DBFiles/Decision/i186/sugar%20derogation.pdf>

¹¹ *Sugar v BBC* [2012], at 461 (§75).

particular news programmes relates to the ‘analysis of, and review of individual programmes’.¹²

The requested information is directly related to ‘output’ as it relates to the way that the BBC produces content with a view to the public accessing and consuming BBC news and current affairs programmes. This is in turn related to the quality of BBC service provision as well as resourcing issues about the allocation of funds from a program or news division’s budget to such services. Budget decisions are taken by the producers of news programmes as part of the editorial decision-making process in the same way that they make budget-decisions regarding payments to talent, equipment or fees paid to guests.

Appeal Rights

If you are not satisfied with the outcome of your internal review, you can appeal to the Information Commissioner. The contact details are: Information Commissioner’s Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF; Telephone 01625 545 700 or www.ico.gov.uk

¹² This concept of the ‘analysis of, and review of individual programmes’ was raised in Decision Notice FS50672644, para 13.