

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 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 at the most generic level possible that relates to all complaints about programmes broadcast by the BBC over the last 5 years on a year by year basis. 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. He therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. The complainant wrote to the BBC on 5 April 2013 and asked for information of the following description:
 - *"How many complaints were made to the BBC over the last 5 years on a year by year basis"*
 - *How many complaints were upheld (i.e. the BBC makes a correction) on a year by year basis*
 - *How many complaints were rejected by the BBC (i.e. no corrective action taken)"*

4. The BBC responded on 24 April 2013. It stated 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 it believes that the information requested is excluded from the FOIA because it is held for the purposes of 'journalism, art or literature.' It clarified 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'. The BBC went on to say that in this case the requested information relates to editorial complaints and that information relating to editorial complaints is used to inform future content and improve the quality of journalistic output.
6. 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 1 July 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.
8. The Commissioner has therefore had to consider whether the BBC was correct to claim that the requested information is derogated.

Reasons for decision

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 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.
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 information that has been requested in this case is for information at the most generic level possible that relates to all complaints about programmes broadcast by the BBC over the last 5 years on a year by year basis. It also included a request for complaints which were upheld and complaints which were rejected by the BBC.
19. The Commissioner will adopt a similar position to the one taken in case reference FS50465338¹. This case considered a request relevant to the current case as it concerned information regarding an editorial complaint. The Commissioner's decision was that the information requested was derogated as it had a clear direct link with the BBC's output. The BBC argues that these are editorial complaints which form part of the on-going review of the standards and quality of programme making and is held to help inform future editorial discussions and decisions to improve the quality of journalistic output.
20. In two further decision notices, FS50404473, (covering the number and nature of complaints about the royal wedding on 29 April 2011) and FS50301304 (concerning the figures for complaints about political bias made to BBC Scotland) the refusal of the BBC to provide the information

¹ http://search.ico.org.uk/ico/search/decisionnotice#dn_searchTop

was also upheld by the Commissioner as he was satisfied that it was held for journalistic purposes and therefore fell under the derogation.

21. 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.
22. 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; and
 - 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.
23. When considering the purposes for which the information was held, the BBC has explained that it proactively publishes public responses to recent issues of audience concern which have caused a significant number of complaints, or to any significant issue raised by complaints received. The BBC also publishes quarterly archived reports covering the main themes in all complaints received.
24. Overall, the Commissioner considers that the BBC has provided evidence that it holds the information for the purposes of journalism. He is content that the information is held for the purposes outlined in the second and third points of the definition namely editorial purposes and for maintenance and enhancement of the standards and quality of journalism. He therefore considers that the information falls within the derogation.
25. For all of the reasons above, the Commissioner is satisfied that the information requested is derogated. Therefore, 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

26. 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

27. 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.
28. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF