

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 September 2015

Public Authority: British Broadcasting Corporation (BBC)

Address: White City
Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant has requested information about statistics broadcast on a particular BBC television programme. The BBC says that the information is excluded from the FOIA because it is held for the purpose of 'journalism, art or literature'.
2. The Commissioner's decision is that the requested information is derogated and the BBC is not obliged to comply with the request under the FOIA. He does not require the BBC to take any steps.

Request and response

3. On 11 May, the complainant wrote to BBC World Service and asked it to clarify some statistics he had seen broadcast on a World News program:
"The particulars of the statistics broadcast on the BBC World Programme on the 29th April 2015 between 7am – 8am."
4. The BBC World Service Audience Relations team responded on 16 June and explained to the complainant what the statistics had referred to, namely the economic effects of an earthquake in Nepal on its tourism sector.
5. The complainant wrote again to the BBC on 4 June and appears to have sought the same information. On 25 June, the BBC's Information Policy & Compliance team responded. It said that the information the complainant has requested is held for the purposes of 'journalism, art or

literature' and that it is therefore not obliged to comply with the request under the FOIA.

6. The complainant wrote again to both the Audience Relations and Information and Policy & Compliance teams. Both re-stated that because the requested information is derogated, the BBC is not obliged to comply with his request under the FOIA. The Audience Relations team also confirmed that the information it had provided on 16 June is accurate.

Scope of the case

7. The complainant contacted the Commissioner on 16 July to complain about the way his request for information had been handled. He is not satisfied that the BBC initially provided some information within the scope of this request, and then said it is not obliged to comply with the request because the information is derogated.
8. The Commissioner has considered the BBC's handling of the request and whether the information the complainant has requested is caught by the FOIA or is derogated.

Reasons for decision

9. Schedule One, Part VI of the 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 says: "The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature."
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 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 said 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 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.
12. 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 applied.
13. 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:

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

ii. 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.*

iii. 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. 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’.

15. 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. 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.
16. The Commissioner adopts a similar definition for the other elements of the derogation, in that the information must be used in the production, editorial management and maintenance of standards of those art forms.
17. In this case, the information requested concerns statistics broadcast in a BBC World Service news programme.
18. As mentioned at paragraph 15, the Supreme Court has defined 'journalism' as 'output on news and current affairs'. The Commissioner considers that there is a clear and direct link between the information being sought and the BBC's journalistic activities. Specifically, the editorial activities it undertakes to produce its journalistic output.
19. Consequently, he finds that the information falls within the derogation and that the BBC is not obliged to comply with Parts I to IV of the FOIA in respect of the complainant's request.
20. The Commissioner notes that the BBC did initially explain the statistics in question to the complainant. However, in previous decisions he has accepted the BBC's position that, although a request may fall outside the FOIA and the BBC is not *obliged* to comply with it, the BBC can nonetheless choose to *volunteer* information to an applicant outside of the Act. In the Commissioner's view, this was broadly the situation in this case: one BBC team volunteered some information; another team considered that the information - and any additional information if it is held - is derogated. He notes that the request may have been handled more consistently if it could have been handled centrally, by one team.

Right of appeal

21. 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@hmcts.gsi.gov.uk

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

22. 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.
23. 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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