

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 05 June 2019

Public Authority: The British Broadcasting Corporation ('the BBC')

Address: BC2 A4 Broadcast Centre
White City
201 Wood Lane
London
W12 7TP

Decision (including any steps ordered)

1. The complainant requested information on the ape trade in Africa. 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. She therefore upholds the BBC's position and requires no remedial steps to be taken in this case.

Request and response

3. The complainant made a first request on 27 January 2019 (reference RF120190156) for a letter relating to the illegal ape trade:

'[Redacted] This letter offered up for illegal sale and export from [Redacted] critically endangered great apes such as gorillas for US\$250,000 each. Will you now disclose or/and hand to international enforcement authorities this key piece of evidence that could greatly assist in the fight against the global illegal ape trade and, if not, why not? Further, as approximately 75% of your income comes from UK TV license payers', given that you spent thousands of pounds on the above investigation, resulting in a wide range of additional facts and evidence pinpointing key players in the illegal wildlife trade, after originally stating that the story would run in November last year, why was it shelved? Does it amount to covering up criminal and corrupt acts?'

4. The complainant made a second request on 6 February 2019 (reference RFI20190227) for further materials relating to the illegal ape trade:
'[Redacted] Interpol officers would stand by and assist in recovering the funds once the evidence of the payment would be provided. This did not happen [Redacted] filmed undercover evidence to log a case [Redacted] with the police [Redacted]. BBC never provided the corresponding evidence of the negotiations with the dealer and the handing over of the cash which would have allowed for presenting a solid case. [Redacted]
5. The BBC responded on 31 January and 7 February 2019 to each request respectively. The BBC explained that it did not believe that the information was caught by FOIA because it was held for the purposes of 'art, journalism 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 requests for information.
7. On 20 February 2019 the complainant contacted the Commissioner to complain about the way the requests for information had been handled. In particular, he challenged the operation of the derogation in this case *'as the BBC are not running with this story'*.
8. The Commissioner invited the complainant to withdraw his case on 4 March 2019 as it was her opinion that the requested information was held for the purposes of journalism, art and literature and that the BBC was correct in its refusal to disclose this information.
9. However, the complainant declined to withdraw his case and wrote to the Commissioner on 14 March 2019 to reiterate the fact that he did not believe that his requests were held for the purposes listed in Schedule 1.
10. He argued that he was *'not convinced that the journalistic exception applies in the context of the BBC having evidence of criminal and corrupt acts having and being committed and this evidence not being put into the public domain and not passed on to relevant enforcement authorities.'*

Scope of the case

11. The Commissioner considers the scope of the case is to determine if the requested information is excluded from FOIA because it would be held for the purposes of 'journalism, art or literature'.

Reasons for decision

12. 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."

13. 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'.

14. 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.

15. 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)

16. 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.

17. 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.
18. 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.
19. 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.”
20. 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'.”
21. 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.

22. 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.
23. In this case, the information requested concerns the correspondence and materials that the BBC may have received in the course of its investigations into potentially illegal trades in protected animal species in Africa and the editorial decisions taken about the selection of information for production.
24. Both the complainant and the BBC have provided the Commissioner with extensive supporting arguments but the Commissioner will not detail these arguments in this decision notice in case of inadvertent disclosure. For the same reason, the Commissioner redacted parts of the FOIA requests.
25. In light of submissions made by the BBC in this and previous cases the Commissioner considers that decisions concerning the collection of material and the editorial decisions on whether or not to use the material in a programme falls under the first and second elements explained above in paragraph 19 of this decision notice - the collecting or gathering, writing and verifying of materials for publication and editorial judgements.
26. In her recent decision notice FS50806010 (<https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614753/fs50806010.pdf>) the Commissioner considered the requested information for correspondence in relation to a robbery for a 'Crimewatch' programme.
27. In the decision notice FS50566640 (https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1431914/fs_50566640.pdf) the Commissioner considered the requested information for correspondence with the police and security services in relation to particular episodes of the BBC television programmes 'HARDtalk' and 'Notorious'.
28. In both cases the Commissioner concluded that the BBC holds the requested information for the purposes of 'journalism, art or literature' and it does not fall inside the FOIA. The Commissioner considers that similar arguments apply to the requested information in this case. Therefore, the requested information falls squarely within the definition of journalism and the Commissioner is satisfied that the information requested is derogated.
29. Having applied the approach to the derogation set out by the Supreme Court and the Court of Appeal, which is binding, the Commissioner is satisfied that the requested information falls under the definition of journalism and is therefore derogated. The Commissioner sees no basis for deviating from the approach as the complainant argues; the

information clearly falls within the derogation. The derogation is engaged as soon as the information is held by the BBC to any extent for journalistic purposes.

30. In conclusion, and for all of the reasons above, the Commissioner 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 requests.

Right of appeal

31. 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@justice.gov.uk

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

32. 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.

33. 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

Gemma Garvey
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Wycliffe House
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